Kluwer Arbitration Blog

ICCA 2014. Plenary Session of 8 April: Spotlight on International Arbitration in Miami and the United States

Frank Cruz-Alvarez (Shook, Hardy & Bacon LLP) · Saturday, April 12th, 2014

The April 8, Plenary Session, chaired by John Barkett (Miami) consisted of several presentations.

1. BG Group v. Argentina Mock Oral Argument

There was a mock argument of the *BG Group v. Argentina* case, where the participants assumed that they were arguing at the U.S. Supreme Court and assumed that the recently issued opinion from the U.S. Supreme Court was the Circuit Court decision. In the mock argument, Matthew Slater (Washington, D.C.) was counsel for the petitioner Argentina, and Nigel Blackaby (Washington, D.C.) as counsel for the respondent BG Group. The Court consisted of Judge Kathleen M. Williams (Southern District of Florida), Judge Vance E. Salter (Florida Third District Court of Appeal), and Judge Rosemary Barkett (Former 11th Circuit + Hague).

Counsel for Argentina made several arguments in asking the court to overturn the lower court decision in favor of BG Group:

• The lower court mistakenly assumed that the investment treaty at issue contained an agreement to arbitrate. He argued that the proper interpretation of the treaty is that the dispute resolution clause contained an “offer” to arbitrate that an investor could accept “if” the investor first sought relief in the local courts of Argentina. Until that condition as satisfied, Argentina could not be deemed to “consent” to arbitration. In short, his argument was that the issue before the court was whether there was an agreement to arbitrate, and that such a question in typically decided by courts and not arbitrators under U.S. precedent.

Counsel for BG Group asked the court to affirm the lower court’s decision arguing that:

• There was an agreement to arbitrate because the local litigation clause was a “condition precedent” and not a condition of consent. Indeed, counsel argued that a reading of the dispute resolution clause of the treaty supports this interpretation because despite the local litigation requirement either party is always free to institute arbitration if they are unhappy with the result in the local court, or if after 18 months there is no resolution in the local court. As such, all avenues lead to arbitration which supports the idea that there was an agreement to arbitrate. Furthermore, counsel argued that because the issue is one of whether a condition precedent to arbitration was fulfilled and that issue is generally resolved by the arbitrators, the court should affirm the lower court enforcing the award and affirming the arbitrators’ interpretation and application of the local

litigation clause.

Following the argument of the lawyers, there was a lively discussion between the advocates and the mock judges, as well as questions from the audience that raised interesting issues regarding the impact of this decision on future investment treaty arbitrations, and whether the decision makes the U.S. an attractive or unattractive forum for enforcement of investment treaty arbitration awards.

2. Miami Spotlight

The second presentation was made by Eduardo Palmer (Miami). The focus of his presentation was to catalogue and discuss the reasons why Miami is a location that should be considered for future arbitrations. He listed a number of advantages that Miami benefits from, including:

• Miami is the gateway to Latin America and everything that goes with it makes this a great location.
• More non-stops to cities in Latin America
• Through waves of immigration over the last 30 to 40 years, Miami has been the center of Latin professional migration.
• Spanish is spoken as part of the business language of Miami
• On a cost basis Miami compares better to other arbitral sites because Miami is substantially cheaper in all categories – it is cheaper to arbitrate here.
• Miami is a beautiful city with a lot to do and great weather.
• Tax considerations – e.g., if you are in NY for a long arbitration tax issues may be implicated.
• Fla. Bar Rules 1-311 – the bar rule that allows foreign lawyers to work in international arbitrations.
• Enactment of UNCITRAL model law in Florida without modification from the original text. Includes arbitrator immunity. Personal jurisdiction
• Hearing centers – ICDR and JAMS (open to all)
• Special court on arbitration in Miami
• University of Miami Law School Institute for International Arbitration

3. Class Actions in Arbitration / New York and Other U.S. Arbitration Venues

The third presentation was given by Rachel Kent (Washington, D.C.), and the focus of the presentation was to highlight other U.S. Arbitration venues and to discuss the current status of class action arbitrations in the U.S.

With respect to other arbitral venues, here are the takeaways from the presentation:

• NY remains the most popular seat for international arbitrations.
• ICC recently opened an office in NY.
• NY courts honor strong pro-arbitration policies
• NY law is widely selected as the governing law in many contracts because it is regarded as well developed.
• NY has a great track record on these types of cases; and a lot of experience applying foreign law.
• Large pool of lawyers
• Significant infrastructure (e.g., NY International Arbitration Center (Midtown in Manhattan)
• Other popular arbitration venues in the U.S. are:
o (1) Houston – in oil and gas disputes;
o (2) Washington, D.C., for investor disputes; and (3) Chicago and Atlanta – particularly in

international commercial arbitrations;

With respect to the status of class actions in arbitrations, here are the key takeaways:

• Primarily used in consumer litigation.
• If the agreement expressly permits class arbitration then it is allowed; if it is expressly excluded then class arbitration will not be allowed.
• If the agreement is silent, class arbitration should not be allowed. If the parties do not agree that the agreement is silent, then this requires interpretation – if the parties agree to have the arbitrator decide then the decision will not be reviewed by the court. If the issue is left open, then it is unsettled whether it is a question for arbitrators or the court to decide.
• The future of these types of claims is uncertain until we receive more guidance from the U.S. Supreme Court.

4. Restatement (Third), The U.S. Law of International Commercial Arbitration (Prof. George Bermann / replaced by Jack Coe)

The fourth presentation was given by Professor Jack Coe (Pepperdine University) regarding the status of the American Law Institute's Restatement (Third), The U.S. Law of International Commercial Arbitration. Professor Coe gave a short presentation where he explained that the complete Restatement will be five chapters, two of which have been completed and in some instances cited by courts. He walked through some of the positions expressed in the Restatement – e.g., under the Restatement *forum non conveniens* is not a basis to reject enforcement of an arbitral award.

5. Enforcement of International Arbitral Awards In Florida and the United States: Judicial Consistency?

The fifth and final presentation was given by Daniel Gonzalez (Miami). Mr. Gonzalez discussed the need for consistency in Florida and the United States in the realm of international arbitration. He highlighted specific areas where consistency is needed:

• Service of Process – e.g., in the United States and Florida the mechanism for securing proper service are varied;
• There is disagreement among the federal courts as to the availability of defenses to enforcement beyond those articulated in Article V of the New York Convention;
• There is disagreement among the federal courts on the issue of personal jurisdiction – in some circuits the existence of assets within the circuit is enough, in others, the assets within the circuit have to be the assets that were the basis of the arbitration; and
• Finally, he noted the inconsistency in the rulings of certain court when deciding whether to enforce an annulled award.

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