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Is a Uniform Arbitrability Rule Needed at an International Level?

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A July 2015 decision of the Superior Court of Justice of Madrid (*Tribunal Superior de Justicia*), the competent court to decide on the setting aside of an award when the seat of the arbitration is Madrid, declared non-arbitrable a controversy between two multinational Spanish operators in the natural gas sector. The dispute arose over the system operator and carrier's refusal to renounce the capacity reserved in its contract to transport gas to France-Larrau. The Court considered this issue non-arbitrable and cancelled the Partial Award on arbitrability and jurisdiction, due to the need to preserve the public interest in a strategic and regulated sector. The result could have been different on an international level. The 2003 Spanish Arbitration Act considers the applicable law to arbitrability under a pro arbitration rule for international arbitrations: the matter is subject to arbitration if allowed under either the rules of law chosen by the parties to deal with the arbitration agreement, the law applicable to the contract or under Spanish law (art.9.6 Spanish Arbitration Act).

Domestic pronouncements of arbitrability are seen from time to time in different jurisdictions. Even if we consider typical commercial areas—intra-corporate disputes, securities, intellectual property, fair and unfair competition, distribution contracts, financial contracts, insurance, transport, insolvency, or regulated economic sectors (including energy)—the different approaches to arbitrable subject matter taken by domestic laws, scholars and case law has created uncertainty.

Neither the 1985 UNCITRAL Model Law on International Commercial Arbitration (MAL) nor its 2006 revision contains a provision dealing with arbitrability. The legislative history is clear on this point: "The prevailing view was that the Model Law should not contain a provision delimiting non-arbitrable issues" (A/CN.9/216, 23 March 1982, nº30). Despite that conclusion, arbitrability was repeatedly included in the agenda for the MAL's revision.[1)] The UNCITRAL Working Group II considered problematic for international arbitration the differences in domestic laws and the uncertainties derived from distinct legal solutions towards arbitrability (A/CN.9/610, 5 April 2006, nº8).

Although the general trend in domestic laws is towards a broader approach of submitting to arbitration matters that have been traditionally outside of its scope, incorporation of an arbitrability rule within the MAL could be deemed both necessary and possible.

First, consideration should be given to the lack of uniform solutions in the law. Due to the MAL's

silence on the issue, it is clear that there is no uniform approach towards arbitrability. Second, arbitrability is an important issue to be analyzed both by the arbitrators during the arbitration procedure (*ex officio*) and by the courts thereafter (also *ex officio* as arbitrability is a ground for setting aside an award (art. 34 MAL) and for denying its enforcement (art. 36 MAL and New York Convention art. V.2(a)). Additionally, the fact that general and broad definitions are present in many arbitration laws does not help to build a uniform solution, since arbitrability in specific areas is subject to scholarly interpretation and judicial decisions that may be based on national conceptions limiting arbitrability of the subject matter of the dispute. Furthermore, legal certainty is rarely achieved due to the fact that many states deal with arbitrability in specific areas of regulation.

In terms of finding a uniform solution towards an arbitrability rule, the Working Group II foresaw the possible design of a rule on arbitrability: a general formula and a uniform list of exceptions (A/CN.9/610, 5 April 2006, nº8). This kind of solution would be easy to implement and would contribute enormously to uniformity in this area. UNCITRAL could take a leading role towards a uniform and international solution, calling attention to the need to amplify the borders of arbitrability to states that are reluctant to do so. Although it is true that arbitrability will vary from country to country, and even within a given country, a general formulation would not be difficult to implement and would not encounter the problem of specific regulation mentioned above. In fact, generally speaking, domestic laws consider arbitrability under general rather than exhaustive provisions. Generally, national laws provide that all rights or matters of which the parties "may freely dispose" (like in Art.2.1 Spanish Arbitration Act) or "property issues" are arbitrable. Many other statutes link arbitrability with the transaction, and thus the matters that are the object of a transaction might be also subject to arbitration.

A general formula allowing arbitrability and a uniform list of exceptions would be rather easy to implement. However, in terms of uniformity this would not be enough. Further consideration ought to be given to the design of more complex rules for specific subject matters that are very controversial under domestic laws. To provide one example, intra-corporate disputes are quite a complex area where one encounters the traditional misconceptions, arguments and limitations against arbitration: imperative rules, public order, the impact of third party rights, and the exclusive competence of state courts. The problems, however, are not limited to arbitrability; procedural aspects also need to be studied, including the impact of arbitration of intra-corporate disputes on third parties, the effect of the award on commercial registries, confidentiality versus transparency, and the permissibility of arbitrations in equity.

Very few statutes refer to arbitrability in regard to corporations. Some link arbitrability with the general standards provided in arbitration laws. Others, however, consider a wider scope of issues, sometimes limiting the scope of arbitrability to certain intra-corporate disputes or limiting the persons subject to arbitration. Since the 2011 reform of the Spanish Arbitration Act, Spain expressly allows arbitration for publicly held corporations. In contrast, Italian law forbids it (Legislative Decree of 17 January 2003, no. 5). The Spanish Arbitration Act (arts.11 bis and ter) requires a supermajority vote of shareholders for the introduction into the bylaws of the corporation of an arbitration clause and does not recognize appraisal rights for dissenters. In Italy, dissenters have appraisal rights, and under the Mauritius International Arbitration Act, a unanimous vote of current shareholders is required (Section 3(6)). Under Spanish Law, arbitration is allowed both in equity and in law, as opposed to Italian law, which forbids arbitration in equity.

These statutes impose limitations and special procedural rules. Spanish law forbids *ad hoc*

arbitration of challenges to corporate resolutions and requires that all arbitrators be appointed by the institution. The Spanish Arbitration Act (art. 11 ter) similarly provides special registration and publication procedures when an arbitration award annuls corporate resolutions subject to registration. Mauritius requires the juridical seat of any arbitration under the Act to be Mauritius. Italian law requires all arbitrators to be appointed by a third person unrelated to the company, and requires the request for arbitration to be publicly registered and available for inspection. Italian law also allows a third party intervention, in which the award is binding on the company even if the company was not a party to the arbitration. Finally, in contrast with to Italy's general arbitration act, which does not give arbitrators the power to issue interim measures of protection, arbitrators do have this power in regard to intra-corporate disputes.

As this brief comparative survey demonstrates, a general formula on arbitrability would not be sufficient to tackle all of the issues that arise from the possibility of submitting intra-corporate disputes to arbitration. Specially-tailored provisions would be needed to provide uniformity and certainty in this area. Furthermore, the special rules would need to address not only arbitrability but also other aspects of arbitration, such as the persons to be subject to arbitration (shareholders, board of directors, etc), whether confidentiality should be the rule or the exception, arbitration in equity versus in law, impact on third party rights, and the shareholder vote required to introduce an arbitration clause.

Furthermore, UNCITRAL might assist in the design of a model arbitration clause or special procedural rules to be incorporated into corporate bylaws or articles of incorporation, or a model clause or procedural rules for arbitral institutions. In fact, such model clauses and special procedural rules are increasingly common. Examples include the Mauritius International Arbitration Act (model clause), the Report on Corporate Arbitration and Model Arbitration clause offered by the Spanish Club of Arbitration, the new rules for corporate arbitration included in the Rules of Arbitration of the Court of Arbitration of Madrid (in force from 1st March 2015, art.52), and the model arbitration clause and supplementary rules offered by the DIS (German Institution for Arbitration).

Although finding a uniform solution for the arbitrability of intra-corporate disputes would be more difficult than designing a general uniform rule on arbitrability, the recommendation would be for UNCITRAL to deal separately with specific commercial matters that are problematic. A work by UNCITRAL in the area of arbitrability of commercial disputes would help to fill an important gap in the MAL and to achieve desired uniformity, international consensus, and legal certainty in the arbitration world.

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References

?1 A/CN.9/216, 23 March 1982, nº30-31. It was also considered by the Commission it its thirty-sixth (Vienna, 30 June-11 July 2003), thirty-seventh (New York, 14-25 June 2004) and thirty-eighth (Vienna, 4-15 July 2005) sessions. In particular, the Commission noted that priority consideration might be given to the issue of arbitrability of intra-corporate disputes as well as arbitrability in the fields of immovable property, insolvency or unfair competition (see A/CN.9/610, 5 April 2006, nº6; and A/61/17, nº183).

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