Kluwer Arbitration Blog

Better Late Than Never? Costa Rican Supreme Court Recognizes ICC Award

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Approximately a year ago, on 19 December 2019, the First Chamber of the Supreme Court of Costa Rica recognized an ICC arbitration award rendered on 10 June 2016 by a tribunal seated in Miami. This case, one of the very few where the New York Convention ("NY Convention") has been applied by a State court in Costa Rica, provides a useful basis to discuss some of the remaining challenges of this instrument, as well as the practical circumstances concerning the recognition and enforcement of an international award in developing jurisdictions.

The underlying dispute

The dispute arose out of an exclusive pineapple sales agreement entered between Del Monte International GmbH (Swiss) and INPROTSA (Costa Rican) in May 2001.

Under the *Pineapple Sales Agreement* ("Agreement"), Del Monte provided INPROTSA with "MD-2" pineapple seeds free of cost.[1)] Del Monte also offered its technical expertise and assistance, while retaining the ownership of all MD-2 seeds. In exchange, INPROTSA agreed to grow, sell, package, and deliver the MD-2 variety pineapples exclusively to Del Monte. The parties further agreed that, upon termination of the Agreement, INPROTSA would destroy or return the plant stock to Del Monte.

After the Agreement came to an end in 2013, INPROTSA failed to comply with its obligation to destroy or return. Instead, it sold the plant stock to third parties. This prompted Del Monte to pursue arbitration before the International Court of Arbitration of the ICC in Miami, requesting damages, specific performance, and injunctive relief on the basis of breach of the Agreement.

One of the main arguments of defense raised by INPROTSA was that it had been induced to enter the Agreement by fraud, alleging that Del Monte made a false representation that it owned a patent over the MD-2 pineapple variety. Ultimately, the single arbitrator ruled in favor of Del Monte, issuing a 48-page final award dated 10 June 2016.

Recognition of the award in Costa Rica

On 18 July 2016, Del Monte requested the recognition of the award in Costa Rica before the First Chamber of the Supreme Court. INPROTSA intervened and requested the Court to refuse recognition of the award, arguing that the award relied on a misrepresentation of the facts, resulting in a breach of due process. Consequently, INPROTSA argued that recognition had to be refused, in accordance with article V(1)(b)[2] of the NY Convention, article 5(1)(b) of the Inter-American Convention on International Commercial Arbitration ("Panama Convention"), and article 36(1)(a)(ii) of the Law on International Commercial Arbitration (the domestic law governing international arbitration, which is based on the UNCITRAL Model Law).[3] The Court found that the challenge based on due process actually referred to the merits of the case and – in turn – dismissed it.[4]

The Costa Rican company further alleged that the arbitration tribunal went beyond the scope of its authority, by granting damages not requested by the claimant. To support its claim, INPROTSA invoked article V(1)(c)[5] of the NY Convention, article 5(1)(c) of the Panama Convention, and articles 36(1)(a)(iii) of the Law on International Commercial Arbitration. The strength of this argument under the NY Convention is, in any case, questionable. In the past, tribunals applying this article have discussed whether it provides a ground for refusal of an award rendered *ultra petita*. The general conclusion has been that the interpretation of article V(1)(c) of the treaty must be restrictive, distinguishing the parties' pleadings and prayers for relief, from the parties' broader submission to arbitration (see here and here).

Finally, INPROTSA raised a public policy exception,[6] attempting to demonstrate that, by ordering the destruction of the plant stock, the award was contrary to Costa Rican constitutional and agrarian law. The legal bases for this claim were article V(2)(b)[7] of the NY Convention, article V(2)(b) of the Panama Convention, and article 36(b)(ii) the Law on International Commercial Arbitration. The Court disregarded the argument, by stating that the Costa Rican company did not provide any evidence to support its claim, and that the remedy of destruction of the goods stemmed from the Agreement. Additionally, the Court also found —once again— that the argument referred to the merits of the case.

Enforcement pending

While the First Chamber of the Supreme Court oversees the recognition of foreign awards in Costa Rica, the enforcement action is outside its jurisdiction, and must be sought before a lower court. One year after the recognition of the award, the enforcement of the award is still pending, and currently being litigated before the competent domestic court.

Commentary

Arbitration is increasingly recognized as the go-to forum for cross-border commercial disputes, as companies have a generally positive perception of this mechanism (see here and here). Arbitration

is unique in offering a speedy, expert-relying, and internationally enforceable process. However, even if arbitration proceedings usually live up to their users' expectations by providing a final and binding award quickly, a risk still remains: running into a longer than expected delay, when the need to turn to State courts for recognition/enforcement of the award arises. The case at hand is a perfect example of that.

Some Latin American jurisdictions have faced criticism that judicial delay has become the norm within their court systems. This problem could be attributed to multiple motives and, although resources have been destined to tackle the issue, there still seems to be limited effective change. However, one of the causes, particularly in arbitration-related cases, can be easily identified: the competent courts having a very ample subject-matter jurisdiction.

For instance, in Costa Rica, the First Chamber of the Supreme Court is the highest forum in matters relating to civil law, commercial law, administrative law, agrarian law, tax law, and the recognition of foreign civil/commercial judgements and awards (Article 54, Judiciary Act). The recognition of foreign awards is just one of the many issues falling under its jurisdiction. An overloaded docket sets the perfect stage for the aforementioned delay situation: it took Del Monte three-and-a-half years before obtaining a resolution from the First Chamber, and this resolution only concerned the recognition of the award. Now, Del Monte is waiting —once again— for the enforcement action.

Of course, judicial delay is not an issue faced exclusively by the Costa Rican court system. In 2020, the COVID-19-related restrictions impacted even some of the top-ranked judicial systems, likely resulting in setbacks for their users. Under this premise, a broader question must be asked: does judicial delay affect the efficiency of international arbitration? If so, which solutions could be offered?

The latter question must be solved according to the reality posed by each State facing this issue. Several proposals could be considered, including the possibility of creating a State court devoted exclusively to arbitration matters, as discussed in previous posts of the Kluwer Arbitration Blog (see here and here). However, in States where the practice of arbitration is still developing, such as Costa Rica, it is likely that the arbitration-related caseload is not large enough to justify such a policy.

Another proposal is to effectively channel any arbitration matter to a single judicial authority, different from the Supreme Court, which already has a heavy workload. In the case of Costa Rica, such a court could oversee matters such as: (1) the recognition of foreign awards, (2) the enforcement of domestic and international awards, (3) requests to compel or stay arbitration, and (4) requests for setting aside awards rendered in Costa Rica. Currently, all of these matters are handled by the First Chamber of the Supreme Court, except for enforcement proceedings, which are referred to the competent lower court, according to the internal jurisdictional rules (Article 99, Code of Civil Procedure). In the case of foreign awards, the system requires two distinct judicial proceedings: one for recognition and another one for enforcement.

The authors propose that the relevant laws (*e.g.* the Code of Civil Procedure, the Law on International Commercial Arbitration, and the Judiciary Act) are amended, empowering the competent lower courts to both recognize and enforce foreign awards under a single proceeding. Far from requiring the creation of a new type of legal procedure, the recognition of the award could be treated as a preliminary question during the enforcement action. All of this would save time, in

turn contributing to the better fulfilment of the goals of the NY Convention.

Conclusion

Facilitating cross-border trade and business transactions is in the best interest of developing States, and the availability of effective dispute settlement mechanisms is a core component of achieving that goal. The NY Convention, and to a lesser extent, the Panama Convention, are at the forefront of this, as they provide companies with reliable bases for pursuing transnational claims.

For these reasons, the Contracting States of these instruments should constantly strive to find ways to enhance their efficiency. The "dependency" that arbitration has on States and their courts should not be a crutch. Instead, the relationship between the two should be mutually beneficial, with both sides understanding that they contribute to each other.

References

?1 This variety is widely known as the “Del Monte Gold” pineapple and has been credited for the increase in per capita consumption of fresh pineapples throughout the world.

?2 “The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”

?3 The text of the remaining two articles is nearly identical to the cited section of the NY Convention.

?4 The authors did not have access to the documentation preceding the judgement of the Supreme Court. The latter is brief on its exposition of the substantive arguments raised by INPROTSA and its dismissals, so further elaboration is currently unattainable.

?5 “The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.”

?6 Under this exception a court may refuse to enforce a foreign judgement or award because it would violate the public policy of the country where those actions are being sought.

?7 “The recognition or enforcement of the award would be contrary to the public policy of that country.”

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