Kluwer Arbitration Blog

New York Arbitration Week 2021 Redux: Dispelling Cross-Cultural Enforcement Myths: The Arbitral Award in Seats of the Americas

Alexander Haden, Jesse Peters (Skadden, Arps, Slate, Meagher & Flom LLP) · Wednesday, December 8th, 2021

On November 16, 2021, during New York Arbitration Week 2021, several committees of the New York City Bar Association hosted a panel discussion entitled "Dispelling Myths: Enforcement of Latin American Arbitration Awards in the United States and U.S. Arbitration Awards in Latin America," which focused on enforcement of foreign arbitral awards in the United States, Argentina, Brazil, Colombia, and Mexico. Professor Alejandro Garro (Columbia Law School) moderated the panel featuring María Inés Corrá (Partner, Bomchil), Marcela Levy (Partner, Mannheimer, Perez e Lyra Advogados), Elsa Ortega (Partner, Ortega & Gomez Ruano Lawyers), Jennifer Permesly (Partner, Skadden, Arps, Slate, Meagher & Flom LLP), and Eduardo Zuleta (Partner, Zuleta Abogados).

United States

Ms. Permesly acknowledged that, while U.S. law on the enforcement of arbitral awards has been "fairly stable," there is still "room for mischief" because of the U.S.'s common law tradition and decentralized court system.

Ms. Permesly first addressed the commonly held view that U.S. courts do not honor competence-competence and will set aside awards for lack of arbitral jurisdiction. She noted that this myth is rooted in some truth, because in the United States the final determination of whether an arbitrator has jurisdiction generally is for a court rather than the arbitrator. At the same time, she explained that an exception nearly swallows the rule: if there is clear and unmistakable evidence that the parties intended to refer the question to the arbitrators, then courts will not review arbitral jurisdiction *de novo* at the enforcement stage. Most U.S. federal courts have now held that the incorporation of arbitral institution rules that delegate questions of arbitrability to the arbitrators is itself such clear and unmistakable evidence. This becomes increasingly complex, however, where, for example, parties carve certain types of disputes out of their arbitration agreement's scope (as was the case in the recent case that went up to the U.S. Supreme Court, *Henry Schein Inc. v. Archer & White Sales, Inc.*, 592 U.S.___ (2021)) or where non-signatories are involved.

Ms. Permesly also discussed the commonly-held view that U.S. courts will vacate awards based on

an arbitrator's "manifest disregard of the law," a ground for vacatur not found expressly within the Federal Arbitration Act. She clarified that federal circuit courts of appeals have diverging views on whether the Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), invalidated that doctrine, with some courts holding that the doctrine can no longer be applied to vacate an arbitral award and others maintaining it as a limited basis for review. For example, courts in the Second Circuit continue to apply the manifest disregard doctrine, but, in Ms. Permesly's view, in very limited circumstances, typically when an arbitrator has blatantly disregarded a clearly applicable law that it was made aware of but chose not to apply.

Argentina

Argentina ratified the New York Convention in 1989, and enacted its International Commercial Arbitration Law in 2018, which adopted the UNCITRAL Model Law with minor changes. Ms. Inés Corrá discussed three Argentinian Supreme Court decisions that, in her view, demonstrate the courts' support for enforcing foreign awards by honoring the New York Convention's spirit and its limited scope of grounds for denial of enforcement.

In *Armada Holland BV Schiedam Denmark v. Inter Fruit S.A.*, A. 1159 XLIII (Supreme Court of Justice of the Nation, May 24, 2011), a sole arbitrator found that an arbitration agreement existed where the parties' charter party agreement referred to a standard form containing an arbitration agreement. The Supreme Court subsequently rejected one party's argument that there was no arbitration agreement in writing (as required under the New York Convention), holding that verification of the Convention's requirements for enforcement did not permit review of the arbitrator's decision.

In *Deutsche Rückversicherung AG v. Caja Nacional de Ahorro y Seguro*, 6461/2009/CS1 (Supreme Court of Justice of the Nation, September 24, 2019), the defendant in recognition and enforcement proceedings alleged that the award did not apply the debt consolidation regime applicable to credits against Argentinian State entities. The Supreme Court confirmed that the enforcing court could grant partial enforcement by modifying the award to adapt it to the proper regime permitted by domestic law, under Articles 3 and 7 of the New York Convention.

Finally, in *Milantic Trans S.A. v. Ministry of Production*, CSJ 1460/2016/CS1 (Supreme Court of Justice of the Nation, August 5, 2021), the Supreme Court overturned a lower court decision, rejecting enforcement based on the absence of a valid arbitration agreement duly approved by law. The Supreme Court noted that the power to verify *ex officio* the New York Convention's grounds for denial of recognition and enforcement cannot be exercised against other essential principles of law (such as *res judicata*). This decision was met with approval by scholars and practitioners alike.

Brazil

Ms. Levy noted that Brazilian courts are very arbitration-friendly, which perhaps contributes to Brazil having the second-largest number of parties involved in ICC arbitrations.

Ms. Levy discussed *EDF International S.A. v. Endesa Latinoamérica S.A. and YPF S.A.*,

2011/0129084-7 (2011), where a court at the seat of arbitration (Argentina) had annulled the award. In enforcement proceedings in Brazil, the court held that a foreign award, whether arbitral or not, must have *res judicata* effect to be recognized. Because the award was null in Argentina, it was similarly null in Brazil. She noted that this was one of the few decisions where the court referred to the New York Convention and other treaties, rather than solely relying on the Brazilian Arbitration Act (which has bases for denying recognition similar to those in the Convention).

Another case, *ASA Bioenergy Holding A.G. v. Adriano Ometto Agricola Ltd.*, 2013/0278872-5 (2015), sparked significant commentary from the arbitration community. The court denied enforcement of two ICC awards issued in New York because the arbitrator would not have been considered impartial under the Brazilian Civil Procedure Code. Because impartiality is part of the guarantee of due process, the award violated Brazilian public policy, and could not be enforced in Brazil. Interestingly, a New York court had already determined that there was no issue with the arbitrator's impartiality. *See Ometto v. ASA Bioenergy Holding A.G.*, 549 F. App'x 41 (2d Cir. 2014).

Ms. Levy also noted two cases, *Banco de Crédito e Inversiones S.A. v. Aloés Indústria e Comércio Ltd.*, 2014/0207257-5 (2017) and *Subway Partners C.V. v. HTP High Technology Foods Corporation S.A.*, 2005/0032212-5 (2006), addressing enforcement challenges alleging the lack of proper summons. In *Inversiones*, the court held that there is proper notice when there is evidence of indisputable knowledge of the arbitration proceeding; proof of service under Brazilian law is not required. Yet, in *Subway*, the court denied recognition because, before the party sought recognition of the award in Brazil, there was improper service in a U.S. court where the party had chosen to validate the award – even though there was no issue with the arbitration itself.

Colombia

Mr. Zuleta described Colombia (a signatory to the New York Convention) as a country that "exports arbitrators and imports awards" because its jurisprudence clearly favors enforcement of awards.

Colombia's arbitration statute, based on the UNCITRAL Model Law, essentially reproduces the Convention's exclusive grounds for refusal of recognition and enforcement. Article 114 of the statute contains an additional provision not in the Model Law; it states that the Code of Civil Procedure's provisions on grounds to deny recognition shall not apply, and may only be applied for the enforcement of *judicial* decisions. This came about because, previously, a pair of Supreme Court decisions in January and March 1999 in *Merck & Co. Inc. et al. v. Tecnoquimicas S.A.*, No. E-7474 (Corte Suprema de Justicia) had considered that recognition and enforcement was subject to that code. Later Supreme Court decisions changed this trend, reaffirming that the only grounds for refusal of recognition and enforcement are those in the arbitration statute and the New York Convention.

Mr. Zuleta presaged two issues on the horizon. First, though Colombia's arbitration statute provides for only one round of pleadings for recognition and enforcement, some courts may permit further submissions based on due process considerations. Second, because the Council of State, which has jurisdiction over recognition and enforcement proceedings against states or state entities, has issued only one decision on recognition, its position on what international public policy is in

certain circumstances involving state or state entity action remains uncertain.

Mexico

Ms. Ortega explained that, in Mexico, arbitral awards generally are presumed valid and binding, with limited grounds available for opposing enforcement. Mexico has incorporated the UNCITRAL Model Law into the Mexican Commerce Code, and is also a signatory of both the New York Convention and the Panama Convention.

In Mexico, enforcement of an arbitral award is not an appeal, as the judge may not examine the merits of the underlying dispute, which were decided by the arbitral tribunal. This distinction is important because, in Mexico, there is a special proceeding—called an *amparo*—against actions by the government or authorities violating an individual's human rights or constitutional protections. While courts have held that arbitral tribunals are not governmental actors for the purposes of an *amparo*, when a judge makes a decision in an enforcement or annulment proceeding, that judge becomes an authority for the purpose of an *amparo*. There has been a debate in Mexico as to whether the *direct amparo* (against final decisions in a trial or rulings that terminate a trial) or the *indirect amparo* (against acts that are not final decisions) was the appropriate vehicle to challenge these enforcement or annulment decisions. Despite a 2011 amendment to the applicable law indicating otherwise, the Mexican Supreme Court of Justice ruled in December 2019 that the indirect *amparo* applies because, in an annulment or enforcement proceeding, the judge does not resolve the merits of the dispute.

Ms. Ortega also discussed the constitutionality of the Mexican Commerce Code's authentication requirement for arbitral awards. While the Model Law eventually removed the requirement that the party seeking enforcement had to provide the original award, duly authenticated, Mexico did not. However, in October 2020, in the *amparo* with docket number 7856/2019, the Supreme Court of Justice found the requirement was disproportionate and unnecessary, and therefore unconstitutional, because arbitral awards in Mexico are inherently valid and of binding force.

Conclusion

The panelists dispelled the myth that it is a "herculean" task to recognize and enforce foreign arbitral awards throughout the Americas. While each jurisdiction's particular and sometimes complex requirements must be accounted for, the panelists agreed that there is a clear trend favoring enforcement of awards in the Americas.

The views expressed in this article reflect those of the authors and not necessarily those of Skadden, Arps, Slate, Meagher & Flom LLP or any of its clients.

A recording of the program is available here and Kluwer Arbitration Blog's full coverage of New York Arbitration Week is available here.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Wednesday, December 8th, 2021 at 8:00 am and is filed under Awards, Enforcement, Latin America, New York Arbitration Week, United States Courts, USA
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.