Kluwer Arbitration Blog

Take-Aways from the 1st ICC Argentine Arbitration Day 2023 (Part II)

Martin Cammarata, Juan Jorge (Marval, O'Farrell & Mairal) · Thursday, March 30th, 2023

This post continues the coverage of the 1st ICC Argentine Arbitration Day 2023 that is available in **Part 1**.

Panel III – Debate on Economic Sanctions: A High Impact Phenomenon

The third panel involved an absorbing discussion with respect to economic sanctions and its impact on arbitrators and arbitral institutions. This panel was moderated by José Martínez de Hoz (h) (Partner of MHR Abogados, Buenos Aires).

Eduardo Zuleta (Partner of Zuleta & Asociados, Bogotá) and Christa Mueller (Partner of Mueller Abogados, Mexico City) began by recognizing that the situation in which a lawyer decides to abandon the representation of a State raises extremely complex questions, mainly because the arbitral tribunal cannot force a lawyer to stay on the case. In this sense, Mr. Zuleta and Ms. Mueller pointed out that tribunals do not have many means available to deal with this situation, other than being patient while the State effectively seeks a different legal representative. At the same time, they considered that suspending the arbitration proceedings is always a possibility. However, the ultimate question is "how long it should be suspended?"

Juan Pablo Argentato (Managing Counsel of the ICC International Court of Arbitration) and Valeria Galíndez (Partner of Galíndez Arb, Sao Paulo) addressed the issue of funds being withheld from a directly – or indirectly – sanctioned party and discussed its impact in the arbitration proceedings. Among other things, they recognized two main approaches to deal with this situation:

1. suspend the proceedings until some guarantee is provided; and
2. move forward the proceedings without delay, assuming a certain risk in order to preserve the celerity of the arbitration.

Finally, Diego Gosis (Partner of GST, Miami) and Laura Sinisterra (Partner of Debevoise & Plimpton, New York) debated if, within the framework of an investment arbitration, it is possible to consider a sanction issued against a State as a violation of an investment treaty. Putting on the hats of States and investors, within a series of hypothetical cases, both identified what would be relevant to analyze in each case:

1. who issued the sanctions;
2. the nationality of the investor; and
3. where the sanctioning measures were taken and where the assets are located.

Panel IV – Corruption Issues in Arbitration: Lessons Learnt

This panel discussed the problem of corruption in arbitration, focusing on cases where corruption occurred prior to the commencement of the proceeding, either to enter into the contract under dispute or as a purpose of the contract.

In a wide-ranging discussion moderated by Guido Barbarosch (Partner of Richards, Cardinal, Tützer, Zabala, Zaefferer, Buenos Aires), Ricardo Ostrower (Partner of Marval Mairal O'Farrell, Buenos Aires), Claudia Benavides (Partner of Baker McKenzie, Bogotá) and Sandra González noted that:

- A major preliminary question is to determine the applicable law when analyzing corruption. Should an arbitral tribunal apply the law chosen by the parties, the law of the seat of arbitration, or the law of the place(s) of possible enforcement of the award? The panel brought the well-known ICC case *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation S.A.* (1988), in which the arbitral tribunal first held the agency contract to be null and void for breaching the *lex loci solutionis* (Argelia), while also being contrary to the public policy of the seat of the arbitration (Switzerland). Later, the Swiss Supreme Court annulled the award on the grounds that Swiss law did not prohibit such contracts.
- Since parties to a corruption scheme are often at pains to hide any trace of their practice, the standard of proof to be used is "*more likely than not*". Thus, tribunals may rely on "red flags" (*e.g.*, whether one of the States involved has a high corruption rate or if the contract price is higher than it normally would be) to create presumptions that corruption may have taken place.
- Under the separability doctrine, arbitration agreements included in contracts procured by corruption are valid despite the invalidity of their underlying contract.
- While certain cases provide that tribunals have a duty to investigate corruption even *ex-officio*, this may result in the annulment or non-enforcement of the award on the grounds that the tribunal acted *ultra-petita*. However, the same consequence can occur if tribunals ignore any indication of corruption, since enforcement of such an award might be contrary to the public policy of many countries.

Panel V – Argentina As a Seat of International Arbitration

Moderated by Joaquín Vallebella (Partner of Brons & Salas, Buenos Aires), Panel V addressed the new legal context for arbitration in Argentina, since the enactment of the International Commercial Arbitration Law ("ICAL") in 2018, as well as the review of arbitral awards in the country.

Federico Campolieti (Alternate Member of the ICC Court and Partner of Bomchil, Buenos Aires), Maria Inés Sola (Senior Legal Counsel of Pan American Energy, Buenos Aires), Roque J. Caivano (Professor and International Arbitrator, Buenos Aires), and Mariana Lozza (Director of International Affairs and Disputes of the *Procuración del Tesoro de la Nación*, Buenos Aires) analyzed the relevant factors for choosing an arbitral seat. In general, they agreed that factors such

as neutrality, applicable law, language, and costs involved in terms of accessibility and logistics (especially regarding evidentiary hearing) are usually considered.

Then, Prof. Caivano referred to the regulation of arbitration in Argentina, presenting an overview from 1820 to the current dual system that the country has implemented since the enactment of the ICAL. This dual system includes international arbitration, mainly governed by the ICAL, and domestic arbitration, governed by the Civil and Commercial Code and the provincial procedural codes, depending on the seat of the arbitration. Despite certain particularities, Prof. Caivano pointed out that both regulations recognize the fundamental principles of arbitration (separability of the arbitration agreement, *competence-competence*, etc.).

Mr. Campolieti addressed the jurisprudential approach to arbitrating in Argentina as the "acid test" considered to find out if a legislation *works or not*. In this sense, he referred to a long list of positive cases involving the development of arbitration in Argentina concerning objective arbitrability (including references to *Vanger S.R.L. v. Minera Don Nicolas S.A.*, discussed here), as well as the review of arbitral awards. Regarding the latter, Mr. Campolieti went through several jurisprudence (such as the 2017 Supreme Court's *Ricardo Agustín López et al. v. Gemabiotech S.A.*, available here) that completely reversed the Cartellone doctrine – or "Cartellone monster" – in which the Supreme Court embarked on an overly broad review of an arbitral award (*see José Cartellone Construcciones Civiles S.A. v. Hidroeléctrica Norpatagónica S.A.*, available here).

Finally, Ms. Lozza referred to the latest arbitration developments in Argentina, highlighting the existing regulations in the hydrocarbons sector (which allow related disputes to be referred to arbitration under certain circumstances), and especially considering the great opportunity that it offers for the Argentinian continental shelf to be explored and, eventually, exploited in benefit of the country.

Closing Keynote Speech of Carlos F. Rosenkrantz: "The Role of Judges in Arbitration: Nullity, Recognition and Enforcement of Awards"

The keynote speaker of the event was Carlos F. Rosenkrantz (Vice-President of the Supreme Court of Justice, Argentina).

Using as a starting point the premise that judicial authorities must increase the confidence in arbitration, Dr. Rosenkrantz reviewed the Argentine Supreme Court's latest case law on the matter and listed the five "musts" that should guide the judicial review of arbitral proceedings:

1. courts *must* not make or alter substantive decisions adopted in arbitration proceedings;
2. courts *must* require evidence from the party alleging a breach of public policy;
3. courts *must* not endorse an "expansive" notion of public policy;
4. courts *must* not reintroduce *ex officio* defenses that had been raised and rejected in previous instances as *res judicata*; and
5. courts *must* interpret in accordance with the object and purpose of arbitration, which is precisely to promote international trade.

In conclusion, Dr. Rosenkrantz stressed that these five guidelines would reinforce the predictability of judicial control on arbitration proceedings, providing ample benefits for their users.

Conclusion

Finally, Máximo L. Bomchil (Former Member of the ICC Court of Arbitration and Honorary President of Bomchil, Buenos Aires) closed the event. The closing was followed by a cocktail at the Great Hall of Honor of the Peace Palace, which nourished the arbitration atmosphere with a great tango show to end this 1st – but (hopefully) not last – ICC Argentine Arbitration Day.

This post does not necessarily reflect the position of the institutions, law firms and/or clients to which the authors and speakers referred to herein belong and/or represent.

This entry was posted on Thursday, March 30th, 2023 at 9:13 am and is filed under ICC Arbitration

Day
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.