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THE END OF LIBOR:
WHICH BENCHMARK RATE FOR PRE-AWARD INTEREST?

by Aaron Dolgoff, Tiago Duarte-Silva, and Julian DiPersio

LIBOR was discontinued for most currencies at the end of 2021, with only USD LIBOR set to be discontinued in 2023.[1] LIBOR has been widely accepted as a reference by tribunals in their decisions on pre-award interest rates.[2] The question now is what will replace it as the new benchmark lending rate. The Secured Overnight Financing Rate (SOFR) has emerged as a leading benchmark in financial markets.

SOFR shares considerable similarities with LIBOR. It is based on the rates that large financial institutions pay to one another for overnight loans.[3] Because LIBOR was an unsecured rate and SOFR is secured, SOFR is associated with lower risk than LIBOR. This fact is illustrated by, for example, SOFR rates being lower than LIBOR rates in both the overnight and 12-month tenors. Figure 1 below shows LIBOR's spread over SOFR for the 12-month tenor.[4] Since 2020, SOFR has been lower than LIBOR by an average of 26 basis points (i.e., 0.26 percentage points).[5]

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[1] Various forms of LIBOR across currencies, including GBP LIBOR, and tenors have already been discontinued, with the publication of USD LIBOR set to end in June 2023.

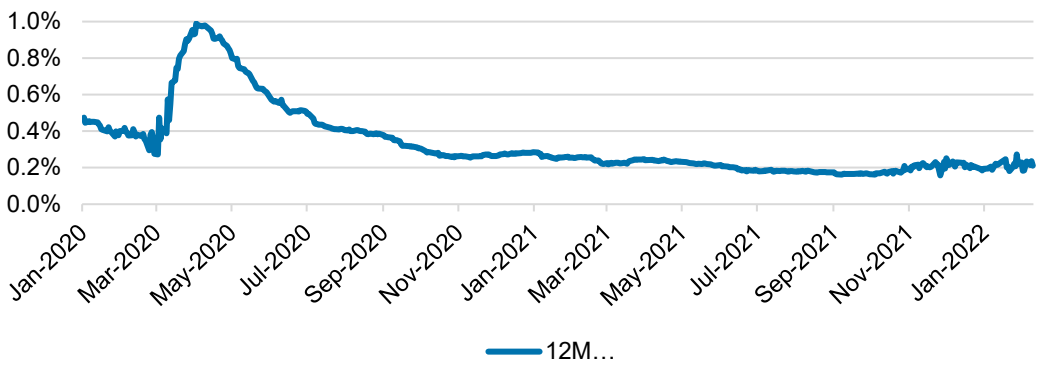
[2] Tiago Duarte-Silva and Swati Kanoria, IA *Insights: The importance of interest in arbitral awards*, CRA INSIGHTS, Feb. 9, 2022, https://www.crai.com/insights-events/publications/ia-insights-the-importance-of-interest-in-arbitral-awards/.

[3] *Secured Overnight Financing Rate Data*, FEDERAL RESERVE BANK OF NEW YORK, https://www.newyorkfed.org/ markets/ reference-rates/sofr.

[4] Note that SOFR is an overnight rate by definition; 12-month-term SOFR is based on swaps.

[5] Median LIBOR spread over SOFR, 12-month tenor, January 2020–February 2022. Data from Eikon and Intercontinental Exchange (ICE).

Figure 1: LIBOR spread to SOFR, 12M tenor[1]



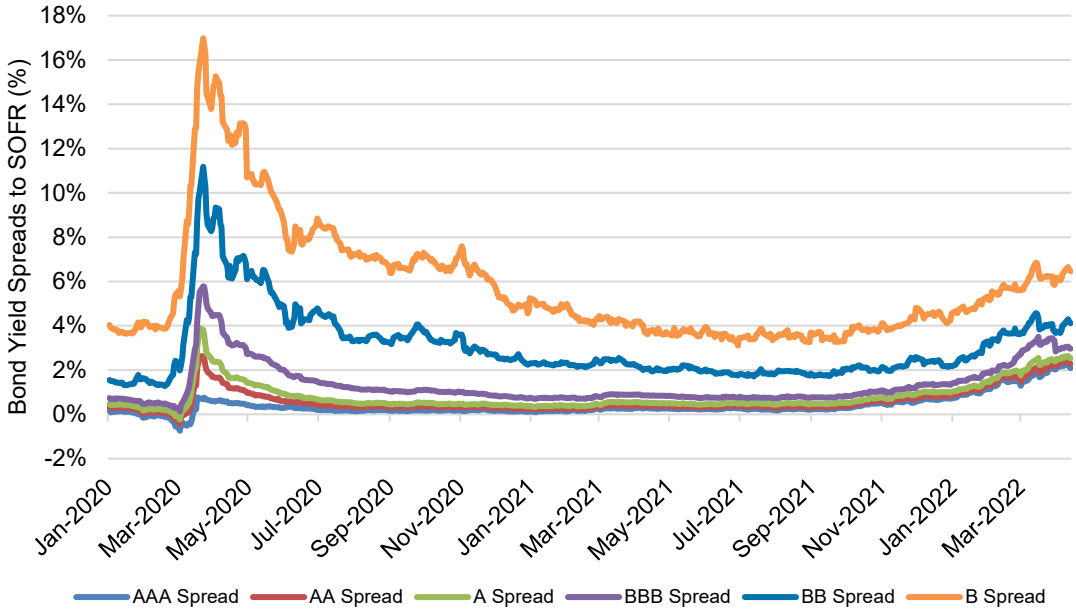
Although SOFR and LIBOR are similar, it is important that tribunals not simply move the goalposts by changing pre-award interest rates such as LIBOR+2.00% to SOFR+2.26%, for example. True borrowing costs vary with the borrower's risk and with market conditions.[2] The same principles apply to SOFR.

Figure 2 below shows bond yield spreads to SOFR since 2020, (i.e., how much higher than SOFR were the rates on debts of different risks/ratings). For example, the green line shows rates on debts rated B (within the junk debt category), whereas the orange line shows rates on debts rated AA.

[1] Data from Eikon and Intercontinental Exchange (ICE).

[2] Aaron Dolgoff and Tiago Duarte-Silva, *Pre-Award Interest: Is LIBOR+2% a Reasonable Commercial Rate*?, CRA INSIGHTS, June 14, 2022, https://www.crai.com/insights-events/publications/pre-award-interest-is-libor2-a-reasonable-commercial-rate/.

Figure 2: Bond yield spreads to overnight SOFR across credit ratings[3]



It is too early to observe a full business or credit cycle of how these spreads vary over time; nevertheless, it is clear that SOFR plus a standardized spread (e.g., 2.00% or even 2.26%) does not capture the variety of commercially reasonable rates. For example, AA-rated debts have had spreads between 42 basis points below and 263 basis points above SOFR (i.e., -0.42 to 2.63 percentage points), and B-rated debts' spreads over SOFR have always been at least 300 basis points (i.e., 3.0 percentage points).

It is also clear that SOFR plus a standardized spread does not capture changing market conditions. For example, the spread on B-rated debts has varied more than 1,387 basis points since 2020, (i.e., 13.87 percentage points).

The discontinuation of LIBOR has implications for lending rates in foreign currencies as well. The Euro Short-Term Rate (ESTR) has replaced EUR LIBOR, while the Sterling Overnight Index Average (SONIA) has replaced GBP LIBOR.4 Like LIBOR,

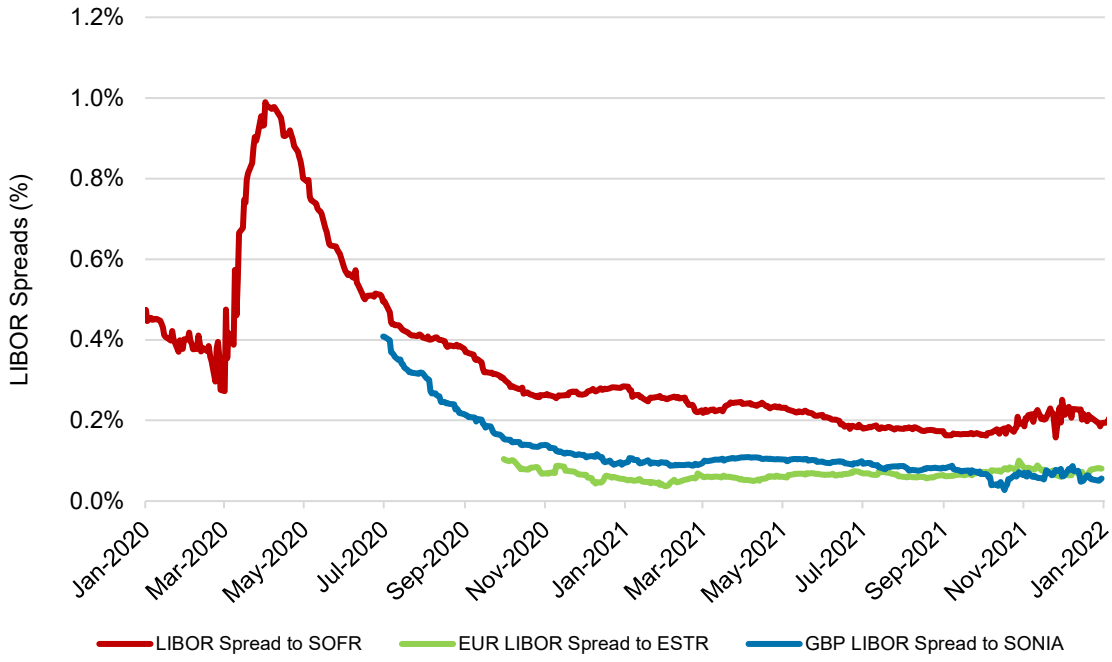
[3] Bond yield ratings based on indices of one-to-three-year corporate bond yields at each credit rating. Data from Eikon.

[4] *LIBOR Reforms*, HSBC, https://www.gbm.hsbc.com/financial-regulation/ibor.

they do little to capture risk profiles and market conditions, two essential components of interest rates.

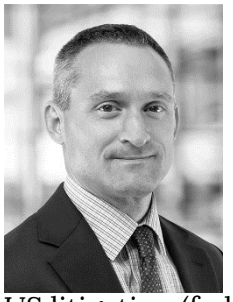
Figure 3 below shows LIBOR spreads to its replacements across currencies. It shows that LIBOR rates are higher than their currency equivalent replacement benchmarks, indicating that these new benchmarks represent lower-risk lending rates–they are not the same as LIBOR.

Figure 3: LIBOR spreads to SOFR, SONIA, and ESTR, 12-month tenor[5]



As these transitions take place, it will be important to consider that the LIBOR replacements should not be accepted as perfect substitutes for LIBOR when it comes to selecting rates for pre-award interest. It will be just as important to realize that, like LIBOR, these replacements will do little to account for changing market conditions and risk profiles.

[5] Data from www.global-rates.com, Eikon, European Central Bank (ECB), and Intercontinental Exchange (ICE). ECB began publishing 12-month ESTR in October of 2020. 12-month SONIA not available on Eikon prior to July of 2020.



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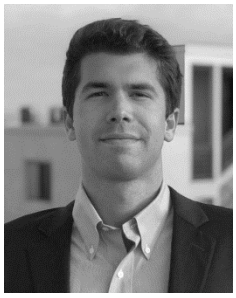

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A RISKY TREATY INTERPRETATION LOOPHOLE? THE CASE OF INVESTMENT-STATE ARBITRATION CASES WITH ENVIRONMENTAL ISSUES

by Juliana Carvajal Yepes

I. INTRODUCTION

In September 2022, the Institute for Transnational Arbitration (ITA) and the Latin American Association of Arbitration (ALARB) held a workshop titled *Environmental vs. Investment Protection: Are They Mutually Exclusive*? One panel—"*What have we learned from recent investment cases in which environmental issues were at the center stage*?"—focused on Latin American investment arbitration cases in the environmental field and highlighted how tribunals have balanced the protections granted to investors under investment treaties against environmental policies of states.

[1] The conversation was moderated by Sebastian Wuschka (Of Counsel at Luther in Hamburg, Germany) and the panelists were John A. Terry (Partner at Tory's in Toronto, Canada), Ana Maria Ordoñez (Head of International Investment Disputes at the National Legal Defense Agency of the State in Bogotá, Colombia), and Abby Cohen Smutny (Partner at White & Case in Washington D.C., USA). The panel considered various cases, including *Eco Oro Minerals Corp v. Colombia*[2] and *Infinito Gold Ltd v. Costa Rica*,[3] as examples of recent tribunal decisions showing a consistent trend in the analysis of issues related to environmental and investment protections.

This article considers the arguments made by the panelists and analyses the trends on treaty interpretation when environmental issues are at the center stage. First, the article begins by discussing *Eco Oro* as a trend against environmental carve-

[1] *See* Sarah Rouach, *Are Environmental and Investment Protection Mutually Exclusive? Report of the ITA-ALARB Americas Workshop*, KLUWER ARB. BLOG (Oct. 31, 2022), https://arbitrationblog.kluwerarbitration.com/2022/10/31/are-environmental-and-investment-protection-mutually-exclusive-report-of-the-ita-alarb-americas-workshop/ (covering the ITA-ALARB Americas Workshop).

[2] Eco Oro Minerals Corp. v. Republic of Colom., ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (Sept. 9, 2021).

[3] Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Decision on Jurisdiction (Dec. 4, 2017).

outs. Then, the article explores the concept of just compensation and tribunals' interpretation in the environmental context. Next, the article explores the general criticisms of environmental protections through the *Eco Oro* case. Finally, the author offers suggestions and questions for further research.

II. ECO ORO AS A TREND AGAINST CARVE-OUTS

When dealing with the interpretation of investment treaties and environmental exceptions, the question is often whether the language regarding environmental measures is a treaty "carve out," and if so, are the contested environmental measures still subject to investment-treaty protections? A carve-out would allow a state to "exempt an entire policy area or sector from the scope of a treaty," thereby precluding an investor from invoking treaty protections.[4]

In at least two cases, tribunals have determined that these environmental clauses do not constitute a carve-out. In *Infinito Gold Ltd v. Costa Rica*,[5] the tribunal considered the following clause in the Canada-Costa Rica bilateral investment treaty (BIT):

> Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

The tribunal concluded that according to "the ordinary meaning of the text and context in light of the treaty's object and purpose,"[6] the provision was not a carve-out from the BIT's protections, but rather a reaffirmation of the State's right to regulate.[7] The tribunal reasoned that the mere inclusion of an environmental protection provision did not provide exemption for just compensation.

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[4] Caroline Henckels, *Should Investment Treaties Contain Public Policy Exceptions?*, 59 B.C. L REV. 2825, 2828 (2018).

[5] *Infinito Gold*, ¶¶ 349-52.

[6] *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331.

[7] *Infinito Gold*, ¶¶ 350-52.

Similarly, in *Eco Oro Minerals Corp. v. Colombia*,[8] the tribunal interpreted the environmental provision[9] as not being a carve-out and further stated that "there is no provision in Article 2201(3) permitting such action to be taken without just compensation."[10] The *Eco Oro* tribunal highlighted the importance of express stipulations, stating that if the intention of the parties was to exempt the State from liability, the "Contracting Parties would have not left such an important provision of non-liability to be implied."[11] The *Eco Oro* tribunal pointed to Annex 811(2)(b)[12]—which lists some instances where environmental measures could be considered direct expropriation, thereby entitling an investor to compensation—as justification for its reasoning that Article 2201(3) could not be interpreted as a stand-alone environmental exception that would relieve the State from liability.[13]

Thus, as made clear in *Eco Oro*, unless states carefully draft their environmental clauses to have strong wording or include express stipulations, tribunals will likely

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[8] *Eco Oro*, Decision on Jurisdiction, Liability and Directions on Quantum, (Sept. 9, 2021).

[9] Canada-Colombia FTA Article 2201(3):

> (3) For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:
>
> (a) To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health.
>
> (b) To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
>
> (c) For the conservation of living or non-living exhaustible natural resources.

[10] *Eco Oro*, ¶ 829.

[11] *Id.*

[12] Canada-Colombia Free Trade Agreement, Annex 811(2)(b), *in force* Nov. 21, 2008, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/background-contexte.aspx?lang=eng.

[13] *But see* Roopa Mathews & Dilbert Devitre, *New Generation Investment Treaties and Environmental Exceptions: A Case Study of Treaty Interpretation in Eco Oro Minerals Corp. v. Colombia*, KLUWER ARB. BLOG (Apr. 11, 2022), https://arbitrationblog.kluwerarbitration.com/2022/04/11/new-generation-investment-treaties-and-environmental-exceptions-a-case-study-of-treaty-interpretation-in-eco-oro-minerals-corp-v-colombia/ (stating that this interpretation is at odds with the generally accepted interpretation of Article XX of GATT).

have sufficient justification to interpret environmental clauses outside of the context of a carve-out.[14]

III. INTERPRETING JUST COMPENSATION

There is a general belief that states facing an investment-treaty arbitration tribunal will lose most of their environmental claims and be forced to compensate investors for expropriating their investments.[15] While both tribunals in *Eco Oro* and *Infinito Gold* decided that the State was not exempt from liability, their analyses extended beyond expropriation and into the realm of Fair and Equitable Treatment ("FET")[16] and Minimum Standard of Treatment ("MST")[17] obligations, indicating that the environmental clauses are not themselves the harbingers of compensation.

For instance, the *Eco Oro* tribunal concluded that the legitimate expectations under the BIT were frustrated,[18] that Colombia delayed the regulatory licenses[19] and the delimitation of El Paramo of San Turban,[20] and that the process was not transparent or predictable.[21] In other words, the *Eco Oro* tribunal concluded that

[14] HENCKELS, *supra* note 4, at 2843-2844 (explaining that not including strong language of exceptions gives the impression that those provisions are "simply copy-pasting exceptions from previous investment agreements" and that is why the terminology is general and tribunals end up having divergent interpretations); *see also id.* at 2843 (stating that "exceptions may be the preferrable way to frame the substantive obligations in such a way as to provide greater clarity about the types of government action that are permitted and proscribed").

[15] Jimena Sierra, *Is the Arbitral Award in the Eco Oro v. Colombia Dispute "Bad Law"?*, AFRONOMICS LAW (Nov. 11, 2021), https://www.afronomicslaw.org/category/analysis/arbitral-award-eco-oro-v-colombia-dispute-bad-law; CEO, FOE & TNI, *Golden Profits Undermine People's Right to Clean Water: Eco Oro vs. Colombia*, BILATERALS.ORG (Apr. 2021), https://www.bilaterals.org/?eco-oro-vs-colombia-goldenprofits#:~:text=Eco%20Oro%20vs.%20Colombia%3A%20Golden%20profits%20undermine%20people%E2%80%99s,mining%20Issue%3A%20environment%20by%20CEO%2C%20FOE%20%26%20TNI.

[16] *Eco Oro*, ¶¶ 699-700.

[17] *Id.* ¶¶ 700, 701.

[18] *Eco Oro*, ¶¶ 543-46.

[19] *Id.* ¶¶ 546-51.

[20] *Id.* ¶¶ 555-56.

[21] *Id.* ¶¶ 576-77.

Colombia's measures were not implemented in good faith and those actions violated the MST obligations under the treaty.[22]

With regards to just compensation, the *Eco Oro* tribunal discussed the police powers doctrine. Citing *Saluka v. Czech Republic*, the tribunal stated:

> It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.[23]

The *Eco Oro* tribunal described three approaches that tribunals use to analyze whether a state's expropriation constitutes a proper exercise of their police powers or whether it requires just compensation. The first approach is two-fold: the tribunal 1) determines whether there was an indirect or direct expropriation, and 2) asks whether the exception applies.[24] The second approach considers 1) whether there has been a substantial deprivation, and 2) whether the measures at issue were an exercise of the state police power.[25] Finally, the third approach asks the tribunal to evaluate all the relevant facts and then reach a decision on whether the relevant measures constitute expropriation or a proper exercise of the state's police power.[26]

However, some commentators believe that a state's right to regulate and properly utilize their police powers, in the context of environmental issues, should not be on equal footing as investors' rights but that it should be subordinate. The commentators find that the *Eco Oro* tribunal's decision to interpret state and investor rights on equal footing "show[s] their lack of sensitivity"[27] to the importance of

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[22] *Id.*

[23] *See id.* ¶ 627; *see also* Saluka Inv. v. Czech., PCA Case No. 2001-04, Partial Award, ¶¶ 255-275 (Mar. 17, 2006); Técnicas Medioambientales Tecmed S.A v. Mex., ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003).

[24] *See Eco Oro*, ¶ 627 (citing Methanex Corp. v. U.S., NAFTA CH. 11 ARB. TRIB., Final Award of the Tribunal on Jurisdiction and Merits, ¶ 653 (Aug. 3, 2005); *see also Saluka Inv.*, Partial Award, ¶ 654; WNC Factoring Ltd. v. Czech., PCA Case No. 2014-34, Award, ¶ 656 (Feb. 22, 2017), as taking this approach).

[25] *Eco Oro*, ¶ 627 (explaining that this approach was followed in *Tecmed*, Award, ¶ 658).

[26] *See* Marfin Inv. Group. V. Republic of Cyprus, ICSID Case No. ARB/13/27, Award, ¶¶ 1031-1126 (July 26, 2018).

[27] SIERRA, *supra* note 15.

environmental issues.[28] In *David Aven v. Costa Rica* the tribunal held the rights of investor subordinate to the state's right to utilize their police powers in the context of environmental concerns. The tribunal stated that "this subordination is not absolute . . . it requires that the action by the States Parties . . . to act in line with principles of international law, which require acting in good faith."[29]

Further, there is no question that the tribunals recognize the right of a state to regulate and expropriate if they deem it necessary.[30] In fact, the *Eco Oro* tribunal stated that "Colombia's contention that the State parties agreed to *subordinate* investment protection to environmental preservation in the FTA is wrong. Both ideals are mutually supportive, neither is subordinate to the other. They must be applied consistently." [31] The tribunal in *Eco Oro* highlighted that Colombia applied their measures in a non-discriminatory way because the measures were applied to all of the interested parties equally. [32] However, the Colombian government, when balancing the competing interest of the environment and economic rights of private persons, did decide to either relocate or compensate the artisanal miners and local populations affected by the measures,[33] but no offer of compensation or relocation was made to Eco Oro, making clear that Colombia's treatment was not a *bona fide* use of police power.[34]

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[28] *Id.*

[29] *See* David Aven et al. v. Republic of Costa Rica, Case No. UNCT/15/3, Final Award, ¶ 412 (Sept. 18, 2018).

[30] *See Eco Oro*, ¶ 640 (discussing the generally accepted police power and the right to regulate in regard to environmental protections. Here, the tribunal did recognize that the environmental regulations was non-discriminatory because it was applied all across in the same way); *see also id.* (partially dissenting, Dr. Grigera Naón) (alluding to the principle of *pacta sunt servanda*, the weighing and balancing of interest, and explaining international concepts of expropriation including *mutatis mutandis*).

[31] *Id.* ¶¶ 547-550 (emphasis added).

[32] *Id.* ¶¶ 641-642

[33] *See id.* ¶ 641 (indicating that the Colombian government understood that they had to compensate the affected parties for stripping away their rights).

[34] *Eco Oro*, ¶¶ 641-643 (referencing some of the legal comments and decisions from local courts). For example, the *Eco Oro* tribunal refers to a decision of the Constitutional Court of Colombia to demonstrate that the highest court in Colombia concluded that an affected holder of a mining title, such as Eco Oro, had a right to seek compensation from the State. *Id.* Similarly, the *Eco Oro* tribunal

As a final remark, the tribunal ordered Colombia to pay the investor just compensation because Colombia frustrated the legitimate expectations of the investor under the treaty and under international law by making assurances that the project would be supported.[35] Thus, while the tribunal recognized the environmental impact of exploiting the Páramo Santurbán, it reasoned that just compensation was a "fair outcome that preserves a broad discretion for Colombia to regulate the environment whilst affording reparation in connection with the destruction of the acquired rights of Eco Oro."[36]

IV. GENERAL CRITICISMS OF ENVIRONMENTAL PROTECTIONS THROUGH ECO ORO

As noted above, environmental clauses are generally not considered "carve-outs." In fact, tribunals often analyze them in tandem with expropriation provisions in consideration of just compensation. In *Eco Oro*, Colombia was still liable for compensation because, while Article 2201(3) of the Canada-Colombia Free Trade Agreement (FTA) allowed the regulation and effectuation of measures to protect the "human, animal, or plant life and health, provided that such measures are not arbitrary or unjustifiably discriminatory between investment," [37] there was no mention of exempting the State from paying just compensation.

refers to Advisory Opinion 2233 of the Council of State of Colombia to show that it was the Council's belief that an investor could bring an action against the government before the administrative courts claiming a violation of private contractual rights. However, by submitting the dispute to arbitration, Eco Oro waived its right to litigate in local courts so these local court decisions were just persuasive for the arbitral tribunal.

[35] *See id.* ¶ 689 ("For example, *Eco Oro* says that President Santos expressed his support at a meeting Eco Oro attended with him and his Chief of Staff in February 2016 during which he encouraged Eco Oro to apply for its environmental license as soon as possible so that the Project could be showcased as a post Páramo delimitation success story. Whilst the only evidence of what was apparently said by President Santos was given by Mr. Moseley Williams, it was not denied that this meeting took place. Indeed, two years before Concession 3452 was executed, the Vetas-California Mining District was created to attract foreign mining investment"); *see also id.* ¶ 690 ("The Project was designated both a PIN and a PINE at various times to enable Eco Oro to receive special support to move the Project forward, as publicly confirmed by the then Minister of Mines, Mr. Gonzalez . . . in the context of Colombia's efforts to attract foreign mining investment").

[36] *See Eco Oro*, ¶ 527 (observing that a state can rely on rules of customary international law, *opinio juris*, and decisions of international tribunals to prove an MST violation).

[37] Canada-Colombia FTA, *supra* note 12, at art. 2201(3).

Some critics of the *Eco Oro* decision mention that the tribunal did not consider the joint interpretation submission made by Canada.[38] In its submission, Canada agreed with Colombia's interpretation, arguing that when a State seeks to apply an environmental protection, it does not have to pay just compensation.[39]

Another notable criticism resulting from the *Eco Oro* decision concerns inconsistent interpretations when it comes to environmental clauses. Indeed, the working sessions of United Nations Commission on International Trade Law (UNCITRAL) Working Group III has also addressed the issue of treaty interpretation inconsistency, as discussed further below.[40]

Further, some commentators argue that the *Eco Oro* tribunal erred in its interpretation by not following the "generally accepted interpretation of Article XX of the [General Agreements on Tariffs and Trade (GATT)]."[41] However, while the GATT provisions, namely Article XX,[42] was utilized as guidance to draft the environmental exception in the Canada-Colombia FTA, the GATT article is guidance and meant to apply only in non-investment, state-v.-state cases. Thus, while the GATT articles can be persuasive when drafting environmental exceptions, the *Eco Oro* tribunal was not bound to this interpretation.

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[38] *See* MATHEWS & DEVITRE, *supra* note 13. Panelist Ordoñez opined that joint interpretations should be binding or given a degree of weight on the International Investor-State Dispute Settlement ("ISDS") tribunals, and in this case, the tribunal did not give any weight to Canada's statement.

[39] *Id.*

[40] U.N.G.A, 39TH Sess., 3rd plen. mtg. at 2-5, U.N. Doc. A/CN.9/WG.111.WP.191 (Jan. 17, 2020).

[41] *See* MATHEWS & DEVITRE, *supra* note 13 (noting that the general interpretation in other cases have been that the rights of investors are subordinate to the right of the States to ensure that investment are carried out in a manner sensitive to environmental concerns).

[42] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art XX ("General Exceptions: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health; . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; . . .").

V. CONCLUSION

While there are still challenges in balancing the interests of the state and foreign investors when it comes to environmental exceptions, there have been suggestions for better treaty drafting to avoid inconsistent interpretation.

For instance, UNCITRAL Working Group III[43] suggested that parties and tribunals should create methods to ensure that treaties are interpreted following the party's intention. In particular, Working Group III suggested "the development and use of treaty provisions on unilateral, joint or multilateral interpretative declarations, guidance to arbitral tribunals on the meaning of certain terms and standards, binding interpretations of the underlying investment treaty obligation and the establishment of joint committees or commissions on treaty interpretation."[44]

Further, there has been some discussion of the "new generation BITs" that refers to treaties that have been drafted to address interpretation issues. Those "Model Treaties" are focusing on corporate responsibility issues, limiting compensation, and including clear express provisions for exceptions. The Morocco Model Investment Treaty,[45] for example, includes a clause expressly indicating the right of the State to expropriate for the public interest but also includes, in the same article, factors to consider in determining whether a measure amounts to indirect expropriation.

Finally, the possibility of allowing counterclaims and or utilizing the ICSID Rule 48 (Ancillary Claims) [46] requires further inquiry. An ancillary claim can be appropriate for a party to raise if there is a claim that arises directly out of the same subject matter as the main dispute, covered by the parties' consent to arbitration and falls within the

[43] U.N.G.A, *supra* note 40, at 2.

[44] *Id.*

[45] Morocco Model Bilateral Inv. Treaty, INVEST. POL'Y (June 2019), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5895/download.

[46] ICSID Rules of Procedure for Arbitration Proceedings, Rule 48 (July 28, 2022) ("Rule 48 Ancillary Claims (1) Unless the parties agree otherwise, a party may file an incidental or additional claim or a counterclaim ("ancillary claim") arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and the jurisdiction of the Centre. (2) An incidental or additional claim shall be presented no later than in the reply, and a counterclaim shall be presented no later than in the counter-memorial, unless the Tribunal decides otherwise. (3) The Tribunal shall fix time limits for submissions on the ancillary claim").

jurisdiction of the Centre of the ICSID Convention.[47] The possibility to raise such counterclaims would allow states to reclaim their procedural rights to a fair defense and compensation from investors. For instance, in the *Eco Oro* case, Colombia, under this article, could have been able to demand compensation from Eco Oro if it had been established that there was a violation of national or international norms regarding human rights and environmental protections. However, the scope of consent and jurisdiction of ICSID would have to be interpreted broadly.[48] Thus, while this approach merits consideration, the effectiveness of the ancillary claims are yet to be determined and analyzed in practice.

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[47] *Id.*

[48] Maria Jose Alarcon, *ICSID Reform: Balancing the Scales?*, KLUWER ARB. BLOG (Jan. 28, 2022), http://arbitrationblog.kluwerarbitration.com/2022/01/28/icsid-reform-balancing-the-scales/

PRESERVING PERSPECTIVES: INTERNATIONAL ARBITRATORS IN THEIR OWN WORDS GEORGE A. BERMANN

by Anna Isernia Dahlgren

I. INTRODUCTION

On June 16, 2022 at the 34th Annual ITA Workshop and Annual Meeting in Austin, Texas, Andrea K. Bjorklund (Associate Dean of Graduate Studies, Full Professor, and the L. Yves Fortier Chair in International Arbitration and International Commercial Law at McGill University Faculty of Law, Montreal),[1] interviewed Professor George A. Bermann (Jean Monnet Professor of EU Law and Walter Gellhorn Professor, Columbia Law School, New York) for a continuing series of oral history interviews by the ITA Academic Council – the Preserving Perspectives Project: International Arbitrators in Their Own Words. The recording of the interview can be found at https://vimeopro.com/user34174610/ita-oral-history-interviews/video/771638892.

The Preserving Perspectives Project conducted its inaugural interview in February 2012, between the late David Caron[2] and Prof. Bermann. It is fitting, then, that the reprisal of Prof. Bermann's interview take place ten years later in honor of Prof. Caron. It is similarly fitting that Prof. Bjorklund conducted the interview, as she was the first academic council member and chair to carry forward Prof. Caron's vision of the Preserving Perspectives Project.

This article preserves the interview and contemplates Prof. Bermann's impact on the field of international arbitration. First, it briefly introduces Prof. Bermann, before delving into the "manifest destiny" that led him towards arbitration. Next, it turns to one of Prof. Bermann's most well-known accomplishments, the Restatement Project. It concludes with Prof. Bermann's reflections on his career and on the field of arbitration. While this article does its best to convey the substance of the interview,

[1] To learn more about Prof. Bjorklund, *see* https://www.mcgill.ca/law/profs/bjorklund-andrea.

[2] David D. Caron was an international judge, arbitrator, and professor of law; he passed away in 2018. *See* http://davidcaron.life/ for more.

Prof. Bermann's charm and wit—and many additional stories—do not translate well to text. It is highly recommended that readers take the time to watch the interview, too.

II. PROFESSOR BERMANN

George A. Bermann is professor of law and director of the Center for International Commercial and Investment Arbitration at Columbia Law School, as well as member of the faculty of the Ecole de droit, Sciences Po (Paris) and the Geneva LL.M. in International Dispute Settlement (MIDS). He has been an arbitrator in scores of international commercial and investment cases since 1985 under the aegis of most leading international arbitral institutions. He is head of the global advisory board of the New York International Arbitration Center (NYIAC), fellow of Chartered Institute of Arbitrators, founding member of the Governing Board of the ICC International Court of Arbitration (Paris), and head of the advisory board of the Thai Arbitration Center (Bangkok) and Center for International Investment and Commercial Arbitration (Lahore, Pakistan). Prof. Bermann is Chief Reporter of the ALI Restatement of the US Law of International Commercial Arbitration, co-editor-in-chief American Review of International Arbitration, and member of board of editors of Revue de l'Arbitrage. He co-authored (with the late Emmanuel Gaillard) the UNCITRAL Guide to the New York Convention and author of many books, book chapters, and articles on international dispute resolution – notably international arbitration.

III. "MANIFEST DESTINY"

Like many other giants in the field of international arbitration, Prof. Bermann did not plan on becoming a world-renowned arbitration practitioner. Even though his father was a small-town lawyer, he was torn between law, journalism, and architecture. Having strong programs in both law and architecture, Yale College was a natural choice. But eventually—once he became familiar with was law was and knowing his strengths and weaknesses to the point where he felt weaker in having what it takes to be a good architect—law won out.

Admitted to Yale Law School, Prof. Bermann became hooked on international law after taking the only available international law class, "Public Order in the World

Community," taught by Myres McDougal[3] and Michael Reisman.[4] He also credits his "Conflict of Laws" course, taught by Louis Pollak,[5] as putting him on the path to international arbitration.

After graduating from Yale Law School in 1971, Prof. Bermann took an associate position at Davis Polk & Wardwell in their litigation department, working on the case *Compagnie Financiere de Suez et de l'Union Parisienne v. U.S.*, 492 F.2d 798 (Ct. Cl. 1974). After four years at Davis Polk representing "world class corporate culprits," Prof. Bermann decided to pursue his academic career. In explaining to Prof. Bjorklund why he left, he recounted a conversation he had with his wife, saying "this cannot be my manifest destiny. What if my whole career is like this and this is what I've built it up all for?" Doing the unthinkable, Prof. Bermann quit Davis Polk and obtained a two-year fellowship from Columbia Law School, in which the first year was spent studying either French or German law and teaching at Columbia, and the second year was spent in the chosen country.

However, in his first year of the fellowship, he was invited to join the faculty at Columbia, with the understanding that he would have to go to Germany after his year in France. So, in 1975, he worked at the Conseil d'État (French Supreme Administrative Court) in France, with the University of Paris, where he actively participated in deliberations as an intern. Then, he spent one semester learning German at the University of Munich and the next at the Max Planck Institut für ausländishes öffentliches Recht und Völkerrecht in Heidelberg.

After two years spent "swanning around Europe," Prof. Bermann was faced with teaching at Columbia Law School. Although anxiety plagued him at first, he soon became comfortable, and now finds teaching exhilarating. He noted that he has yet

[3] Myres McDougal was a Sterling Professor Emeritus of Law at Yale Law School and a renowned authority on international law; he passed away in 1998. *See* https://news.yale.edu/1998/05/08/obituary-myres-smith-mcdougal-sterling-professor-emeritus-law for more.

[4] W. Michael Reisman is Myres S. McDougal Professor of International Law at the Yale Law School. *See* https://law.yale.edu/w-michael-reisman for more.

[5] Louis Pollak was a dean at Yale Law School and a U.S. District Court judge. *See* https://law.yale.edu/yls-today/news/judge-louis-h-pollak-48-former-yls-dean-dies-89 for more.

to find a field with students more passionate than those in arbitration and that the field is growing immensely.

Prof. Bermann was then invited to co-teach an International Litigation seminar with Henry deVries,[6] who Bermann credits with introducing international arbitration to Columbia Law School along with Hans Smit.[7] This led directly to his first arbitrator appointment. One of deVries' colleagues at Baker Mackenzie, Robert Davidson, nominated Prof. Bermann as a party-appointed arbitrator, in what Prof. Bermann now describes as a potential disclosure error due to deVreis' proximity to the case. That case received the one of the first anti-arbitration injunctions addressed to the Tribunal from a Mexican court, leading Prof. Bermann to call it "unforgettable."

IV. THE RESTATEMENT PROJECT

Perhaps one of Prof. Bermann's more well-known accomplishments, the conversation turned to the American Law Institute's Restatement Project.[8] He had gotten to know Carolyn Lamm,[9] who was a member of the Council of the American Law Institute (ALI) and prevailed in her fight to get an international arbitration restatement. She approached him to be the Chief Reporter for the new International Commercial and Investor-State Arbitration Restatement, at which point he selected his co-Reporters: Catherine Rogers, Christopher Drahozal, and Jack Coe. Together, they spent twelve years on the project, identifying the role of courts over the life-cycle of an arbitration.[10] Of course, Prof. Bermann, commented, the recent United

[6] Henry deVries was a lawyer and Professor Emeritus at Columbia Law School; he passed away in 1986. *See* https://www.nytimes.com/1986/09/25/obituaries/henry-p-devries-a-lawyer-and-professor-at-columbia.html for more.

[7] Hans Smit was a distinguished Columbia Law School professor and practitioner in international arbitration and procedure; he passed away in 2012. *See* https://www.law.columbia.edu/news/archive/hans-smit-58-towering-figure-international-arbitration-dies-84 for more.

[8] RESTATEMENT OF THE US LAW OF INT'L COMMERCIAL AND INVESTOR-STATE ARB (AM. L. INST. 2019), https://www.thealiadviser.org/international-commercial-arbitration/.

[9] Carolyn Lamm is a Partner at White & Case (Washington, D.C.) and a renowned leader in the field of international arbitration. *See* https://www.whitecase.com/people/carolyn-lamm for more.

[10] *See* George A. Bermann et al., *Restating the U.S. Law of International Commercial Arbitration*, 113 PENN. STATE L. REV. 1333 (2009) (reflecting on the process of producing and presenting the Preliminary Draft of a chapter addressing Recognition and Enforcement of Arbitral Awards).

States Supreme Court ruling in *ZF Automotive US, Inc. v. Luxshare*, Ltd., 142 S. Ct. 2078 (2022),[11] brought the project back to the drawing board as the Court took the opposite view on the applicability of 28 U.S.C. § 1782 in international arbitration as the Restatement authors.[12] Luckily, the Restatement collects both view points on the issue, so it was mainly a matter of redrafting the black letter law and comments, and reversing the reporter's notes to support the Court's opinion.

On the open question of whether ICSID arbitration will be considered differently than commercial arbitration under § 1782, Prof. Bermann opined that functionally speaking, while ICSID tribunals pass judgment on government actions, they will likely not be considered to be exercising governmental authority.

V. REFLECTIONS

After guiding Prof. Bermann through the various twists and turns of his career, Prof. Bjorklund changed gears, asking Prof. Bermann to reflect on his career: "Which arbitral award, that a tribunal on which you were sitting, has had the broadest influence?" Prof. Bermann turned to *P.L. Holdings v. Poland*,[13] in which the Tribunal, of which he was President, denied Poland's intra-EU objection to jurisdiction. On appeal, the *Svea* Court of Appeals again denied the intra-EU objection, finding that unlike in *Achmea v. Slovakia* (I) – which was pending before the European Court of Justice at the time – Poland did not raise an intra-EU objection, which the lower Swedish court deemed waived.[14] The case was referred to the European Court of Justice, which, in Prof. Bermann's view, essentially extended the *Achmea* holding to commercial arbitration.[15]

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[11] George A. Bermann, *ZF Automotive: Predictable Outcome, Lackluster Reasoning*, TRANSNAT'L LIT. BLOG (June 14, 2022), https://tlblog.org/zf-automotive-predictable-outcome-lackluster-reasoning/ (discussing and criticizing the Supreme Court's analysis and outcome in *ZF Automotive*).

[12] Brief Amici Curiae of George A. Bermann et al., *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022), https://www.scotusblog.com/case-files/cases/zf-automotive-us-inc-v-luxshare-ltd/.

[13] PL Holdings S.à.r.l. v. Republic of Poland, SCC Case No. V 2014/163, Partial Award, ¶ 316 (June 28, 2017).

[14] PL Holdings S.à.r.l. v. Republic of Poland, SCC Case No. V 2014/163, Judgment of Svea Court of Appeal on Set-aside Application (English), pg. 34-35, 38-42 (Feb. 22, 2019).

[15] PL Holdings S.a.r.l. v. Poland, SCC Case No. V 2014/163, Judgment of the Grand Chamber of the European Court of Justice, ¶¶ 47-56 (Oct. 26, 2021).

When asked to reflect on the changes in the field since he began his career, Prof. Bermann mentioned demographics and technology, but alighted on a particular change in advocacy, related to the political polarization seen across the globe: demonization of the other. His solution to this negative advocacy was to emphasize that it doesn't work. "Lawyers are pragmatic," he mused, "if you tell them, 'you have an interest in doing things differently,' there might be a response."

In closing, Prof. Bermann advised new practitioners to attempt to make it seem like they sincerely believe the position of their client, to concede ground, when possible, in order to garner credibility, and to overall demonstrate good judgment and reasonableness.

VI. CONCLUSION

Prof. Bermann is undoubtedly one of the most influential practitioners in the field of international arbitration. His career boasts a star-studded cast of similarly impressive colleagues and a commitment to crafting the next generation of giants. One can only hope that he continues to chair tribunals and classroom podia alike.

ANNA ISERNIA DAHLGREN, ESQ. is an appellate law clerk at the Colorado Court of Appeals and a recent graduate from American University Washington College of Law ("AUWCL"), where she graduated cum laude, was selected to be a Special Legal Assistant to the United Nations International Law Commission's Draft Commissioner in 2019 and served as captain of AUWCL's 2021 Frankfurt Investment Moot Court Competition Team. She led her team to the Advanced Round of 16 and now coaches the AUWCL team, which won the Moscow Pre-Moot in 2022. She is passionate for all methods of dispute resolution and is particularly interested in the intersection of the global energy transition and international arbitration. She also holds a B.A. in International Relations (2015), speaks German and Italian, and studied Mandarin at East China Normal University in Shanghai.

20 YEARS OF THE PARAGUAYAN ARBITRATION ACT: EIGHT CASES THAT HELPED SHAPE AN EVER-EVOLVING FIELD IN PARAGUAY

by Raul Pereira

I. INTRODUCTION

The regulation of arbitration in Paraguay can be traced back to the 19th century. It was recognized by the 1883 Code of Civil Procedure.[1] Later, with the enactment of a new code of civil procedure in 1988, a complete chapter was dedicated to arbitration, regulating all aspects of the field, from the purpose of arbitration all the way to the issuance of the final award, including the constitution of the tribunal, arbitration costs, and annulment proceedings.[2] The Code for Judicial Organization of 1981 (still in force), also recognized arbitration as equivalent to a judicial process.[3] Then, in 1992, the current Paraguayan Constitution recognized the institution of arbitration as part of the legal system.[4]

In the international aspect, Paraguay incorporates into its legislative framework the main international arbitration conventions and treaties, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[5] ("New York Convention"), the Inter-American Convention on International Commercial Arbitration ("Panama Convention"), [6] the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards ("Montevideo

[1] JOSÉ A. MORENO R., ARBITRAJE COMERCIAL Y DE INVERSIONES 17 (2019).

[2] Code of Civil Procedure, Chapter V, arts. 774–835 (Para.).

[3] Code of Judicial Organization, art. 2 (Para.) ("The Judicial Branch shall be exercised by: …The arbitrators and arbiter judges…").

[4] Paraguayan Constitution, art. 248.

[5] Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 10, 1958, 330 U.N.T.S. 38, 7 I.L.M. 1046; Law No. 948/1996 (Para.).

[6] Inter-American Convention on International Commercial Arbitration ("Panama Convention"), Jan. 30, 1975, T.I.A.S. No. 90-1027, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245.

Convention"),[7] and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States[8] ("ICSID Convention").

In the 1990's, Paraguay was a young new democratic nation, having just overcome a 34-year long dictatorship that caused social and economic damages that are felt to this day. Paraguay was eager to come back and integrate itself into the democratic, globalized world. It enacted a new constitution in 1992 that, as indicated, recognized the validity of arbitral decisions and, more importantly, effected the integration of the Paraguayan nation into the international community.[9]

Seeing the important role international arbitration played in the development of international commerce, providing for a truly neutral, expert, efficient, and peaceful dispute resolution mechanism, on April 24, 2002, the Paraguayan Executive Branch enacted Law No. 1879/2002 "On Arbitration and Mediation" ("Arbitration Act"),[10] giving arbitration in Paraguay an independent legal framework.[11] But more importantly, the Arbitration Act is almost a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), except for minor differences in wording and style.

In this context, the Arbitration Act came to modernize the arbitration process within Paraguay, which before it, was unfit for international procedures and, therefore, made Paraguay an unfriendly jurisdiction for arbitration. In the words of

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[7] Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards ("Montevideo Convention"), May 8, 1979, O.A.S.T.S. No. 51, 1439 U.N.T.S. 90.

[8] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

[9] Paraguayan Constitution, art. 1.

[10] De Arbitraje y Mediacion ("Arbitration Act"), L. 1879/02, abril 24, 2002 (Para.).

[11] This independent legal framework for arbitration was recognized several times by the Paraguayan courts: EDUCPA v. Rosario del Pilar López, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, abril 7, 2014, No. 150 (Para.); Taller RC de Crispín Ruffinelli v. Secretaría Nacional del Ambiente (SEAM), Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, junio 6, 2018, No. 49 (Para.); Consorcio Parxin v. Municipalidad de Asunción, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, noviembre 17, 2021, No. 140 (Para.); OTTONELLI S.A. v. Estado Paraguayo, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Segunda Sala, diciembre 13, 2021, No. 111 (Para.); C. L. P. v. Fundación TESAI, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Primera Sala, diciembre 22, 2017, No. 85 (Para.).

the Asunción Court of Appeals, the Arbitration Act gives "greater validity and legal certainty to arbitration, providing it with its own regulatory framework and thus avoiding confusion with the regulation of proceedings before the ordinary courts."[12] This is a view that has been constantly upheld by different Paraguayan courts, establishing the country as an arbitration friendly jurisdiction.

The year 2022 marks the 20th anniversary of the enactment of the Arbitration Act, and to celebrate it, nothing is better than to analyze some of the cases that helped shape—for better or for worse—the field of international arbitration in Paraguay. These cases addressed important issues, such as the arbitrability of corruption allegations, the valid grounds for setting aside an arbitral award, the standard of review of arbitration clauses, and even the powers enjoyed by the arbitrators in conducting the arbitral proceedings.

II. THE CASES THAT HELPED SHAPE THE EVER-EVOLVING FIELD OF ARBITRATION IN PARAGUAY

A. *Carlos Martinez v. Finlatina: Separability and Autonomy of the Arbitration Clause*

The *Carlos Martinez v. Finlatina*[13] case touched upon an issue considered one of arbitration's conceptual and practical cornerstones: the presumption that an arbitration agreement is separable and independent from the underlying contract.[14]

In the case at hand, the parties had entered into a trust agreement that contained an arbitration clause. Claimant sought to annul the entire agreement filing a claim in ordinary courts. Respondent challenged the ordinary courts' jurisdiction, arguing that the trust agreement contained an arbitration clause.

The ordinary courts sided with respondent and dismissed claimant's claims. On appeal, claimant argued that the trust agreement was a standard form contract and that it was contradictory for an arbitral tribunal to rule on the validity of the same

[12] Consorcio Parxin v. Municipalidad de Asunción, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, noviembre 17, 2021, No. 140 (Para.).

[13] Carlos Alberto Martínez Velázquez v. Finlatina S.A. de Finanzas, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Segunda Sala, junio 9, 2018, No. 366 (Para.).

[14] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 376 (Kluwer Law International, 3rd ed. 2021).

agreement that contained the arbitration clause on which the tribunal based its jurisdiction.

The court of appeals rejected claimant's arguments. The court indicated that both scholars and case law acknowledge that the arbitration clause is an independent contract within the main agreement, that it does not loses its validity even if the arbitral tribunal decides that the underlying contract is invalid.

A more recent case confirmed the reasoning in *Carlos Martinez v. Finlatina.* In *MUVH v. Carlos Ughelli*,[15] claimant sought to set aside an arbitral award arguing, among other things, that the arbitration clause was valid only during the performance of the underlying contract and that, since the contract was terminated, the arbitration clause followed the same fate.

The court of appeals indicated that claimant's argument was fundamentally flawed because, pursuant to the well-established separability doctrine, the effect of the underlying contract's termination does not extend to the arbitration clause contained therein.

As indicated above, the separability doctrine lies at the very core of international arbitration and, while it is expressly recognized in article 19 of the Arbitration Act, its development and interpretation by ordinary courts is just as important.

B. *EDUPCA v. Rosario del Pilar Lopez: Validity of Arbitration Clauses and the Negative Effect of the Kompetenz-Kompetenz Principle*

In *EDUCPA v. Rosario del Pilar López*, the issue revolved around a contract containing two contradictory clauses: on the one hand, an arbitration clause and on the other hand, a choice of forum clause providing for the jurisdiction of the courts of Asunción. When EDUCPA commenced court proceedings, Rosario del Pilar objected to the court's jurisdiction based in the arbitration clause contained in the underlying contract.

[15] MUVH v. Carlos Ughelli, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, julio 4, 2022, No. 35 (Para.).

The court of first instance rejected this objection. On appeal, the Court of Appeal of Asunción stated that article 19 of the Arbitration Act,[16] which establishes the *kompetenz-kompetenz* principle, contains the rule that the arbitrators may decide "any objections with respect to the existence or validity of the arbitration agreement and that, therefore, the judge must immediately decline its competence before the existence of an arbitration agreement."[17]

Moreover, in defining the *kompetenz-kompetenz* principle, the court relied in the doctrine that recognizes the negative effect of said principle, indicating that "[t]he negative effect of the principle allows ordinary courts to limit their review to a prima face determination of the existence and validity of the arbitration agreement so that the arbitrators be the first to examine their competence and later, the ordinary courts may exercise their control with the annulment or enforcement of the award."[18]

However, the court added that article 19 of the Arbitration Act must be interpreted in accordance with the entire text of the law, particularly, article 11 of the Arbitration Act, the sources of which are article II(3) of the New York Convention and article 8 of the Model Law, which establish that "[a] Judge before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed."[19]

Here, the court had an opportunity to analyze whether the exception "unless it finds that the agreement is null and void, inoperative or incapable of being performed" should be subject to a prima face or a complete (*de novo*) analysis. However, it simply stated that article 11 empowers the judge "to rule on the existence of an arbitration

[16] Article 19 of the Arbitration Act has its source on article 16 of the Model Law.

[17] EDUCPA v. Rosario del Pilar López, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, abril 7, 2014, No. 150 (Para.).

[18] *Id.*, citing to Yas Banifatemi and Emanuel Gaillard, *Negative effect of Competence-Competence: The rule of priority in favour of the arbitrators*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 257 (Gaillard, et al., eds. 2008).

[19] Article 11 of the Arbitration Act

agreement without impairing the principle of *kompetenz-kompetenz*" and that such principle:

> [I]s limited to conferring jurisdiction to the arbitral tribunal in order to decide on its own jurisdiction—including the validity of the arbitration clause itself—when the parties have brought their dispute directly before it; however, *if the matter is brought first before the courts, the court seized may also decide, in the first instance*, on the existence and validity of the arbitration agreement....[20]

It is true that in this case the court was faced with a clearly pathological clause.[21] However, it is worth noting that this interpretation of article 11 of the Arbitration Act greatly undermines the effectiveness of an arbitration clause, because it allows ordinary courts to take jurisdiction over disputes regarding the existence or validity of an arbitration clause simply by the fact that it was seized first. That is, a party not satisfied with a valid arbitration clause may go directly to court as soon as it realizes that its dispute can no longer be resolved directly with its counterparty and before an arbitration is initiated.[22]

In this context, under this interpretation, courts would make a complete or *de novo* examination to analyze the validity, existence, or efficacy of arbitration agreements before the arbitrators can do it. In a recent case, the Paraguayan Court of Appeals, Sixth Chamber, appears to have adopted the same standard as in *EDUCPA*. Again, the court recognized the negative effect of the *kompetenz-kompetenz* principle, however, in examining whether to compel the parties to arbitration, the court embarked on a full review of whether the disputed matter was capable of being submitted to arbitration.[23]

Unfortunately, this only reveals a lack of expertise in the field of arbitration on the part of judges, since they incur in an unacceptable contradiction when they recognize the negative effect of the *kompetenz-kompetenz* principle and at the same time adopt

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[20] *EDUCPA*, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, abril 7, 2014, No. 150 (emphasis added).

[21] GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 77 (Kluwer International, 3rd ed. 2021).

[22] This comment refers only to the reasoning used by the court to decide on the standard of review of the arbitration clause, and not on its decision as to whether the arbitration clause was valid.

[23] B. G., E. R. v. O. M., L. C., Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Sexta Sala, noviembre 9, 2021, No. 718 (Para.).

a full review of the validity, existence, or efficacy of arbitration agreements before the arbitrators can do it.

C. *Gunder v. Kia Motors: the Seat of the Arbitration in Agency and Distribution-Related Arbitrations*

The tension between party autonomy and public order in international arbitration is well known, affecting issues such as arbitrability, the arbitral procedure itself, recognition and enforcement, and annulment of awards.[24] Paraguay is not an exception to these issues.

Notably, one of the main issues relating to international arbitration and public order revolves around one of the main features of international arbitration, which is the possibility of choosing the seat of the arbitral proceedings.

This is the case of Law 194/93, which regulates distribution, agency, and representation contracts between a foreign manufacturer or service provider, and a Paraguayan company ("Distribution Law").[25] This law is recognized as being of public order,[26] meaning their provisions cannot be waived by the parties. Article 10 of the Distribution Law contains a dispute resolution provision, stating that:

> Parties shall submit to the competence of the Republic's Tribunals. Parties may settle or submit to arbitration any matter of patrimonial origin before or after the claim has been filed in the ordinary courts, regardless of its status, provided that a final and enforceable judgment has not been rendered.

In 2006, the Paraguayan Supreme Court of Justice ("CSJ") gave an interpretation of article 10 of the Distribution Law that influences courts and tribunals to this date.

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[24] JOSÉ ANTONIO MORENO RODRIGUEZ, DERECHO APLICABLE Y ARBITRAJE INTERNACIONAL 455, 456 (Aranzadi, 2014).

[25] Que se Establece el Régimen Legal de las Relaciones Contractuales Entre Fabricantes y Firmas del Exterior y Personas Físicas o Jurídicas Domiciliadas en el Paraguay ("Distribution Law"), L. 194/93, julio 6, 1993 (Para.).

[26] *Id.*, art. 9: "Parties may freely govern their rights through contracts, subject to the provisions of the Civil Code, but in no way may they waive the rights established in this law."; Alejandro Piera and Wilfrido Fernández, *Aspectos resaltantes de la peculiar Ley 194, que regula las relaciones contractuales entre firmas del exterior y sus representantes, agentes y distribuidores en el Paraguay*, LA LEY PARAGUAYA (2004) (LLP 2004), PY/DOC/17/2004; Electra Amambay SRL v. Compañía Antártica Paulista Ind. Brasileira de Bebidas, Corte Suprema de Justicia del Paraguay [Supreme Court of Paraguay], noviembre 12, 2001, No. 827; Fortaleza Import Export S.A. v. Petrobras Distribuidora S.A., Juzgado de Primera Instancia en lo Civil y Comercial del Séptimo Turno de Asunción [Civil and Commercial Seventh Court of Asunción],, agosto 14, 2008, No. 631 (Para.); Distriware S.R.L. v. Dart Argentina S.A., Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Quinta Sala, junio 19, 2003, No. 84 (Para.).

In the case *Gunder v. Kia Motors*,[27] the CSJ decided a constitutional challenge against an appealed court decision that confirmed the lack of jurisdiction of the ordinary courts based on the arbitration clause included in a distribution contract providing for arbitration in Seoul.

In its decision, the CSJ concluded that, although the Distribution Law recognizes the parties' right to agree to arbitration, "this does not imply that arbitration can be seated outside the territorial jurisdiction of the Republic" and, consequently, declared the decision of the appeals court arbitrary.[28]

This reasoning was based mainly on the public order nature of the Distribution Law, and the first part of article 10, which states that the parties must submit to the territorial jurisdiction of the courts of Paraguay. The CSJ also supported its reasoning stating that the provision "constitutes a guarantee for the parties so that the dispute be heard in the place of performance of the contract."[29]

This reasoning is certainly surprising. First, while it is true that the provisions of the Distribution Law—including article 10—are considered of public order, the choice of a seat outside Paraguay would hardly imply a violation of Paraguayan public order or of article 10 of the Distribution Law. Under Paraguayan law, proving a public order violation requires a high standard, such as the "manifest violation of the legal and economic system" and the "infringement of the most basic and fundamental principles of justice, morality and good customs."[30] Therefore, choosing a seat outside of Paraguay could hardly qualify as an infringement of the most fundamental principles of justice and morality.

Second, and more importantly, both the New York Convention and the Arbitration Act were ratified and enacted, respectively, after the Distribution Law and they both

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[27] Gunder SCSA v. Kia Motores Corporation, Corte Suprema de Justicia del Paraguay [Supreme Court of Paraguay], mayo 25, 2006, No. 285.

[28] *Id.*

[29] *Id.* This reasoning was provided in a previous case: Electra Amambay SRL v. Compañía Antártica Paulista Ind. Brasileira de Bebidas, Corte Suprema de Justicia del Paraguay [Supreme Court of Paraguay], noviembre 12, 2001, No. 827.

[30] *Taller RC de Crispín Ruffinelli*, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, junio 6, 2018, No. 49.

constitute special laws regulating arbitration in Paraguay. Therefore, under general principles of legislative interpretation, the rules of the New York Convention and the Arbitration Act providing for no limitation regarding the seat of the arbitration, should prevail.

In fact, the dissenting opinion in *Gunder v. Kia* correctly stated:

> [F]rom the moment Paraguay approved the New York Convention, all territorial limitations were repealed, because the meaning and intention of arbitration precisely grant the choice of arbitral tribunals in any seat, thus admitting international arbitration. Likewise, in accordance with Law 1879/2002 "On Arbitration and Mediation" in its articles 22 and 23 grants the parties the power to agree on the procedure and place of arbitration [...]

More recently, authors have argued that the strict jurisdictional and legal limitations imposed by the Distribution Law may also be overcome through the application of another MERCOSUR agreement,[31] namely, the Mercosur Agreement on International Commercial Arbitration ("Mercosur Agreement"),[32] ratified by Paraguay in 2008.[33] In this context, first, article 3(d) of the Mercosur Agreement establishes it is applicable when the contract has some "objective contact" with a MERCOSUR member State, like Paraguay, which would be the case of distribution contracts ruled by the Distribution Law. Then, article 10 establishes that parties are free to choose the applicable law to their controversy.[34]

Applying the principle of Constitutional Supremacy, enshrined in article 137[35] of the Paraguayan Constitution, authors argue that the Mercosur Agreement supersedes the Distribution Law and, therefore, its more favorable provisions must apply. As such, under the Mercosur Agreement, it is argued that parties to an

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[31] Federico Silva, *Arbitraje Internacional Mercosur. Un Posible Escape a la Ley* 194/93, 45(4) REVISTA JURÍDICA LA LEY PARAGUAY 2617 (2021).

[32] Acuerdo sobre Arbitraje Comercial Internacional del Mercosur, adopted through Decision CMC 3/98.

[33] Que Aprueba el Acuerdo Sobre Arbitraje Comercial Internacional del MERCOSUR ("Mercosur Agreement"), L. 3303/2007, septiembre 11, 2007 (Para.)

[34] Silva, *supra* note 31, at 2620.

[35] Paraguayan Constitution, art. 137: "The supreme law of the Republic is the Constitution. This, the treaties, conventions, and international agreements approved and ratified, the laws enacted by Congress and other legal provisions of lower hierarchy, sanctioned accordingly, integrate the national positive law in the order of hierarchy set forth above."

international distribution contract may choose an applicable law different than Law 194.[36]

D. *Taller RC v. SEAM: arbitrability of corruption issues and the concept of "public policy"*

In the modern era of international arbitration, many times arbitrators encountered themselves having to rule on corruption allegations. It goes without saying that all started in 1963, when Judge Gunnar Lagergren arbitrated ICC Case No. 1110, which arose from an agreement that established the payment of bribes to obtain a governmental contract.[37]

Since then, a number of arbitral tribunals have been confronted with allegations of corruption and decided upon the issue.[38] Indeed, the arbitrators' powers to rule on issues of corruption is relatively settled in the international arbitration community.[39]

However, the decision in *Taller RC v. SEAM* was an important development for arbitration in Paraguay, considering the scarce jurisprudence related to recognition, enforcement, and setting aside of arbitral awards.

In said case, the Appeals Court of Asunción, Third Chamber (the "Court"), decided an annulment application, recognizing that issues of illegality and corruption are arbitrable, as long as such decision does not imply the imposition of sanctions that are reserved exclusively to local criminal courts.[40]

The case involved a contract between Taller RC and the Paraguayan Environmental Secretariat or "SEAM,"[41] for the provision of maintenance and repair

[36] Silva, *supra* note 31, at 2620.

[37] ICC Case No. 1110 (1963).

[38] Westinghouse v. National Power Corporation and the Republic of Philippines, ICC Case No. 6401; Frontier AG v. Thomson CSF, ICC Case No. 7664; ICC Case 3913; ICC Case No. 3916.

[39] *See* NIGEL BLACKABY, CONSTANTINE PARTASIDES, ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 120 (Oxford University Press, 2016); JULIAN D.M. LEW, LOUKAS A. MISTELIS AND STEPHAN M. KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 210, 215 (Kluwer Law International, 2003).

[40] Taller RC v. Secretaría Nacional del Ambiente, Decision No. 49 (Appeals Ct. of Asunción, June 6, 2018).

[41] Since then, the SEAM became the Ministry of Environment and Sustainable Development ("MADES" for its acronym in Spanish).

services of SEAM's vehicles. Taller RC initiated arbitration after SEAM failed to pay several invoices for works performed under the contract. The sole arbitrator ruled in favor of Taller RC, prompting SEAM to apply for the set aside of the award.

SEAM based its annulment application on article 40(b) of the Arbitration Act, which is based on article 34(b) of the Model Law and article V(2) of the New York Convention. SEAM argued that the controversy was not capable of being settled by arbitration under Paraguayan law and therefore, the award was contrary to public policy. SEAM's main argument was that the Prosecutor's Office needed to participate in the arbitration because a corruption and illegality complaint had been filed in relation to the contract which could result in criminal sanctions against the implicated officers.

Taller RC, on its part, argued that the claim before the arbitrator concerned a breach of contract, a subject matter that is arbitrable under the Arbitration Act. Taller RC also added that the claim did not seek a criminal penalty for SEAM, but only the payment of the outstanding invoices.

As such, the Court delimited its analysis on both of SEAM's arguments, namely whether (a) the dispute was arbitrable given an alleged necessary participation of the Prosecutor's Office; and (b) the award was contrary to public policy.

Regarding the first issue, the Court reasoned that, while there was an open criminal cause for irregularities in the performance of the contract between Taller RC and SEAM, such allegation of illegality did not "in itself deprive the arbitral tribunal of jurisdiction. On the contrary, it is generally held that the arbitral tribunal is entitled to hear the arguments and receive evidence, and to determine for itself the question of illegality."

Moreover, the Court added that, "if in the course of an arbitration an allegation of corruption is made in clear terms, the arbitral tribunal has a clear duty to take it into consideration and decide whether it has been sufficiently proven or not."

In this sense, the Court recognized a clear power of arbitrators to pursue the analysis of corruption allegations brought before them, irrespective of whether there is an ongoing criminal investigation pending resolution.

The Court concluded that the SEAM did not prove its allegation that the claim was not arbitrable because its only evidence on this matter was a memo from its Anticorruption Office recommending SEAM's Minister to order an administrative investigation against the officers involved in the corruption allegations.

The Court then took the opportunity to clarify certain issues. First, it indicated that the fact that a criminal investigation was ongoing did not mean that the Prosecutor's Office needs to participate in the arbitration, because in the criminal case, the Prosecutor has an active role, as plaintiff, whose main interest is the investigation and punishment of the crime. On the contrary, the claim submitted to arbitration was for the breach of a contract. Second, the Court addressed the administrative nature of the contract, explaining that no specific or ex-post laws prevented or limited the arbitrability of disputes arising from its performance.

On the second issue, the Court clarified that while each State may have its definition of "public policy," the story is different with arbitration, which is an "institution that develops from the autonomy of the parties with a transnational framework." As such, the Court adopted the definition of international or transnational public policy from ILA's interim report on the topic of public policy as a bar to enforcement of international arbitral awards, which states that such concept, of universal application, comprises "fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as "civilized nations."[42]

Under this premise, the Court explained that issues of corruption certainly raise questions of public policy, but such questions relate to the criminal and disciplinary consequences of corrupt actions, and not to the performance of the contract. Thus, since SEAM neither proved that there was a flagrant violation of the judicial and economic system, nor that the arbitration process violated the most basic and fundamental principles of justice, morality, and customs, and that the dispute was

[42] Audley William Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT'L 217, 220 (Oxford University Press, 2003).

arbitrable pursuant to the Arbitration Act, the request to set aside the arbitral award was denied.

As indicated above, the issue of the arbitrators' powers to decide on issues of illegality and corruption in the execution and performance of a contract is relatively settled in the field of international arbitration; however, for a country in which arbitration is still developing, this decision was certainly welcomed.

The Court made a clear distinction as to which matters pertaining to illegality and corruption are for national courts, and which ones can be decided by the arbitrators, that is, are arbitrable. This is in line with the modern approach based on the separability principle, according to which an arbitration clause, even though included in, and related to an underlying contract, is a separate and autonomous agreement.[43]

As such, a claim that the contract is invalid because it was procured by corrupt means, does not invalidate the arbitration clause contained in it, it only means that arbitrators can hear arguments and admit evidence to determine such questions of illegality and corruption underlying the contract.

The reasoning on the issue of public policy violation is also welcomed, since it provides for a standard that can be applied in future cases of annulment and enforcement before Paraguayan courts. As is well known by arbitration practitioners, the issue of setting aside and denial of enforcement on the grounds of public policy violation is always a tricky one. Each State may have its own definition and clarifying the standard of proof gives more security to practitioners that choose Paraguay as their seat. It is worth mentioning that in a more recent case, this same Court confirmed the high standard applicable to determine whether and arbitral award violated public policy.[44]

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[43] EMMANUEL GAILLARD AND JOHN SAVAGE (EDS.), FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 197 (Kluwer Law International, 1999); BORN, *supra* note 24, at 432.

[44] Consorcio Chaco Boreal v. Estado Paraguayo (Servicio de Saneamiento Ambiental), Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, marzo 16, 2022, No. 13.

E. *Grupo Villalba Piñeiro v. Secretaría Nacional del Deporte*: *Arbitrators' Broad Powers*

The flexibility and discretionary powers of the arbitrators are a main feature of international arbitration. Contained in article 19(2) of the UNCITRAL Model Law[45] and in many of the main international arbitration rules,[46] the arbitrators' powers to conduct the arbitral procedure as they consider appropriate, but always treating the parties with equality, is settled law.

This principle was confirmed by the Asunción Civil and Commercial Court of Appeals, Fifth Chamber ("Fifth Chamber") in the case *Grupo Villalba Piñeiro v. Estado Paraguayo*.[47] There, the Fifth Chamber highlighted the arbitrators' broad discretion to conduct the arbitration, specifically in relation to the admissibility of evidence. The decision also reaffirmed the already established criterion of avoiding analyzing the merits of the arbitral award.

Going to the core of the case, in *Grupo Villalba Piñeiro v. Estado Paraguayo*, claimant requested the annulment of the arbitral award arguing that the arbitral tribunal admitted the production of certain evidence after the expiration of the evidentiary period set by the tribunal itself, which, in its opinion, violated its constitutional right to defense at trial. In particular, the evidence admitted was a report of the Comptroller General of the Republic and testimonial evidence.

In its reasoning, the Fifth Chamber first recalled that under art. 40 of the Arbitration Act, the grounds for challenging an arbitral award are limited and narrow and are based on the Model Law. Bearing this in mind, the Fifth Chamber stated that there was no such defenselessness argued by claimant because the arbitrators considered and analyzed every claim and evidence produced. Particularly, the Fifth

[45] Model Law, article 19(2): "…the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

[46] UNCITRAL Arbitration Rules (2021), art. 17; SCC Arbitration Rules (2017), art. 23; ICC Arbitration Rules (2021), art. 22; LCIA Arbitration Rules (2020), art. 14.5.

[47] Grupo Villalba Piñeiro v. Estado Paraguayo, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Quinta Sala, enero 15, 2015, No. 01 (Para.).

Chamber ruled out that admitting evidence beyond the procedural limit violated the right to due process and went on to recognize the broad powers enjoyed by the arbitrators to conduct the proceedings.

The Fifth Chamber confirmed that, from article 22 of the Arbitration Act (which is based on article 19 of the Model Law), "the broad discretionary powers of the arbitrators in evidentiary matters," is inferred and therefore, "the admission of the evidence indicated is within the powers of the arbitrators."

The Fifth Chamber's ruling is consistent with case law from foreign countries with a more consolidated jurisprudence (such as the United States or the United Kingdom) and with the opinion of scholars which, commenting on article 19 of the Model Law (which inspired article 22 of the Paraguayan law), supports the arbitrators' broad powers to determine the procedure in the absence of an express agreement.[48]

Moreover, although not expressly, the Fifth Chamber also confirmed that due process violations require a high standard under the Arbitration Act, giving arbitrators conducting proceedings seated in Paraguay the opportunity of avoiding the well-known "due process paranoia" that often affects arbitrators' decisions regarding procedural matters.[49]

The deference and respect towards the arbitrators' decision regarding a procedural matter—such as the admission of evidence—was an important step for Paraguayan arbitration case law, which has been affected by procedural formalism in the past. The ruling in *Grupo Villalba Piñeiro v. Estado Paraguayo* constituted a step in the right direction for Paraguay's development as a pro-arbitration jurisdiction.

In a more recent case, another court followed this same reasoning, confirming that arbitrators are not bound by the strict formalisms of the Paraguayan Code of

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[48] PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION IN UNCITRAL MODEL LAW JURISDICTIONS 337 (Kluwer Law International, 2019) ("…the importance of these provisions arises from their establishing procedural autonomy by granting the parties maximum freedom in the choice of their procedural rules and, failing such choice by the parties, by assigning the tribunal wide discretion on how to conduct the proceedings.").

[49] *See* Klaus Peter Berger and J. Ole Jensen, *Due Process Paranoia and the Procedural Judgment Rule: a Safe Harbor for Procedural Management Decisions by International Arbitrators*, 14 REVISTA BRASILEIRA DE ARBITRAGEM 73 (Kluwer Law International, 2017).

Civil Procedure—as are the judges of ordinary courts—and thus, it is sufficient that the arbitral award clearly settles the disputes and resolves the claims brought by the parties.[50]

F. *Ruiz Diaz Labrano v. Maximino Lazzarotto et al: Arbitration Costs and the Nature of Arbitration Law as Lex Specialis*

As indicated at the beginning of this article, the Paraguayan Arbitration Act adopted the Model Law with minimal differences in wording and style. One of these differences is the "costs" regime. While the Model Law does not address this issue, the Arbitration Act has an express definition of costs, which does not, in principle, include the parties' legal expenses.[51]

However, despite the definition of costs contained in the Arbitration Act, many practitioners request the payment of their legal expenses as part of the arbitration costs, based on Law No. 1376/88, which regulates attorneys' fees ("Fees Law"). This generates a clear confusion as to which law should be applied when counsel judicially claims their legal fees for acting in an arbitration proceeding.

In a decision from 2021, the Paraguayan Supreme Court of Justice had the opportunity to rule on this issue for the first time. In its decision, the CSJ clarified that the fees of the lawyers participating in an arbitration are not part of the arbitration costs if there is no prior agreement (whether claimed before the arbitral tribunal or before the judiciary) and that the lawyers of the winning side can only claim payment from their clients. The ruling also makes it clear that the procedural mechanisms for determining costs in lawsuits are not transferable to arbitration.

The arbitration that gave rise to the decision had been conducted under the rules of the 2015 Paraguayan Arbitration and Mediation Center ("CAMP"), whose rules—unlike other rules—did not include legal fees in their definition of costs.

[50] *Consorcio Chaco Boreal*, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, marzo 16, 2022, No. 13.

[51] Arbitration Act, article 3.

Thus, in *Ruiz Diaz Labrano v. Maximino Lazzarotto*,[52] counsel for the prevailing party (Ruiz Diaz Labrano or "RDL") requested the regulation of his fees before the Paraguayan courts after the arbitration was terminated. The arbitral tribunal had decided not to award professional fees, in the absence of an agreement of the parties.

RDL argued in court that it was appropriate to grant its request for fee regulation under the decades-old regime for judicial proceedings of the Fees Law. It alleged that articles 73(7)[53] and 11[54] of said law allowed judges to regulate arbitration fees and impose them to the losing party. It added that the losing party in the arbitration should pay its fees under the general principle contemplated in the Paraguayan Code of Civil Procedure that the loser pays the expenses of its opponent. The action was rejected at first instance, upheld on appeal, and finally rejected by the CSJ.

In its decision, the CSJ first stated that attorneys' fees in an arbitration are not always part of the costs (as is the case in court proceedings). This is because article 3(c) of the Arbitration Act provides that attorneys' fees are part of the arbitration costs only "if the parties agreed to claim such cost during the arbitration proceedings...." In this case, that had not been done, as it appeared from the award that noted "that there was no agreement on the claim of such cost in the arbitration clause, nor throughout the proceedings" and that therefore "the sentence in costs as pronounced [...] does not include the professional fees due to lack of agreement between the parties."[55]

The CSJ also made an important clarification, noting that since the Arbitration Act is a special and subsequent law to the Code of Civil Procedure and the Fees Law, the rule of the Arbitration Act must prevail. Therefore, the CSJ concluded that, although

[52] Ruiz Diaz Labrano v. Maximino Lazzarotto et al, Corte Suprema de Justicia del Paraguay [Supreme Court of Paraguay], marzo 8, 2021, No. 06.

[53] Arancel de Honorarios de Abogados y Procuradores ("Fees Law"), L. 1376/88, art. 73(7), diciembre 20, 1988 (Para.): "The following rates are hereby established for other professional activities: [...] 7. In arbitration or amiable compositeurs' proceedings, the professionals representing the parties shall receive fees equal to those established for contentious proceedings."

[54] Fees Law, art. 11: "The fixed fees entitle the professional to demand payment, at her option, from the party ordered to pay the fees or from her principal."

[55] *Ruiz Diaz Labrano*, Corte Suprema de Justicia del Paraguay [Supreme Court of Paraguay], marzo 8, 2021, No. 06.

the lack of settlement of fees in the arbitration did not prevent RDL from claiming his fees in court, this claim could only be against his client. Not against the opposing party (as can be done when the fees are generated at trial and there is a ruling on costs). In other words, the regulation established in the Code of Civil Procedure and the Fees Law does not apply to "make up for" neither the lack of agreement on the arbitration costs nor for the lack of a decision in the arbitration regarding costs. It only applies for fixing the fees between the attorney and her client.

This decision had relevant impact, because before it was issued, this was a frequently debated issue. Another important aspect of the decision is the application of the Arbitration Act as a special law to resolve the case instead of resorting to procedural principles of the judicial process, which can happen from time to time in less sophisticated courts.

G. *Yvu Poty v. PABENSA: Limited Grounds for Annulment*

It is settled in international arbitration case law that the annulment of an arbitral award can be made only on specified and limited grounds.[56] This is also true in Paraguayan case law, with many decisions confirming that the annulment action against arbitral awards are not to be confused with the annulment action contained in the Paraguayan Code of Civil Procedure and, as such, an arbitral award can only be set aside on one or more of the limited grounds provided for in article 40 of the Arbitration Act,[57] which is identical to article 34 of the Model Law.

[56] BORN, *supra* note 14, at 3447; Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int'l NV, 1999 E.C.R. I-3055.

[57] *Grupo Villalba Piñeiro*, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Quinta Sala, enero 15, 2015, No. 01; *Taller RC de Crispín Ruffinelli*, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, junio 6, 2018, No. 49; IT Consultores Tecnología y Organización v. BBVA Paraguay S.A., Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Primera Sala, febrero 18, 2022, No. 14 (Para.); Estado Paraguayo – Ministerio de Urbanización, Vivienda y Hábitat (MUVH) v. Carlos Ughelli, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, julio 4, 2022, No. 35 (Para.); Julio Galiano Morán v. Estado Paraguayo, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, augusto 28, 2018, No. 79 (Para.).

However, more often than not, parties seeking to set aside an arbitral award seek to justify such action on grounds beyond those established in article 40 of the Arbitration Act.

This was the case in *Yvu Poty v. PABENSA*. Here, PABENSA sought to set aside the arbitral award arguing that the arbitral tribunal issued its award "in violation of constitutional principles and the provisions of the civil code" and the arbitral award was "unjust, reckless and deviates from the general principles of law, it makes a forced, illogical, and self-serving interpretation to favor Yvu Poty…."[58]

The Appeals Court sided with PABENSA, indicating that the arbitrators failed to consider the evidence filed by the parties and that the award "incurs in inaccuracies" [59] and therefore, proceeded to set aside the arbitral award for arbitrariness. Moreover, the Appeals Court based its decision not in the Arbitration Act, but in article 159(e) of the Code of Civil Proceedings, which contain rules for the issuing of judicial decisions.

Yvu Poty then challenged the Appeals Court decision before the Constitutional Chamber of the Supreme Court, arguing that the Appeals Court decision was arbitrary for failing to apply the Arbitration Act, which is a special law applicable to arbitration.

The Supreme Court indicated that the issue was "to determine whether the decision of the lower court was framed within the specific legal regime applicable to the annulment of arbitral awards; more specifically, if the grounds invoked by the lower court to justify its decision, are included in any of the hypotheses exhaustively foreseen as grounds for annulment in article 40 of the [Arbitration Act]."[60]

Then, the Supreme Court went on to indicate that as a general principle, arbitration is governed by the principles of party-autonomy, non-recourse and finality of arbitral awards, "to avoid unnecessary and unjustified interference from the ordinary justice system, that conspire against its effectiveness as an alternative

[58] Yvu Poty v. PABENSA, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Primera Sala, diciembre 29, 2016, No. 111 (Para.).

[59] *Id.*

[60] Yvu Poty v. PABENSA, Corte Suprema de Justicia del Paraguay [Supreme Court of Paraguay], marzo 28, 2019, A.I No. 111.

method of dispute resolution"[61] and that, precisely to protect these principles, the Arbitration Act provides a limited framework for the possibility of reviewing arbitral awards, which is limited only to annulment, but only in the event of the grounds strictly listed in the Arbitration Act.

The Supreme Court also stressed the strict regime of annulment of arbitral awards, considering the exhaustive grounds listed in the Arbitration Act and thus, stating that any attempt to judge the reasoning or interpretation made by the arbitrators if off-limits.

After this introduction, the Supreme Court reminded the seven grounds under which an arbitral award may be set aside:

a) If a party to the arbitration agreement was under some incapacity, or said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Paraguayan law;

b) If the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

c) If the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;

d) If the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Arbitration Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;

e) If the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under Paraguayan law; or

[61] *Id.*

f) If the court finds that the award is in conflict with Paraguayan or international public policy.

With this background in mind, the Supreme Court observed that PABENSA's challenge was directed to discrepancies around the arbitral tribunal's interpretation of the facts and the evidence produced by the parties and, while the Appeals Court noted that PABENSA's challenges were directed to the merits of the award, it still sought to analyze the arbitral award looking for a public order violation. However, the Appeals Court annulment decision was based exclusively on inconsistencies and inaccuracies defects it found in the arbitral award.

In this context, the Supreme Court explained that PABENSA's challenges had to do with the arbitrators' interpretation of contractual clauses and evidence produced during the arbitration, matters that where beyond the scope of powers granted to the Appeals Court when seized to decide on the annulment of an arbitral award. In the words of the Supreme Court:

> [T]he Appeals Court for Civil and Commercial Matters, First Chamber, in issuing Decision No. 111 dated December 29, 2016, annulling Arbitral Award No. 01/2016, as well as its rectification and clarification, has departed from the special rule applicable to the case—art. 40 of [the Arbitration Act]—which defines the specific grounds that authorize the annulment of the arbitral award, having exceeded its jurisdictional power of review granted to it by the special law, all of which authorizes its disqualification as a jurisdictional act for arbitrariness.

As indicated above, the limited grounds for setting aside an arbitral award are well incorporated into the Paraguayan case law. However, more often than not, we find ourselves with outliers such as this case, and for this reason, the decision of the Supreme Court is very much welcomed for the continuous development of the arbitration field in Paraguay, because it confirms that any attempt to set aside an arbitral award for grounds that are not provided for in article 40 of the Arbitration Act (which is *lex specialis*), is to be labeled as arbitrary and contrary to the best interests of Paraguayan arbitration law.

H. *Consorcio Trinidad* MM S.A., *et al v.* SENASA: *Constitutional Control of Arbitral Awards*

In 1989, Paraguay freed itself from the longest dictatorship in South America.[62] As part of this new era, a new constitution was passed in 1992, one with provisions directed to strengthen the judiciary, economic and social rights, and fundamental human rights enshrined in different treaties.

Within these new provisions were the express recognition of arbitration as a dispute resolution mechanism, but also the creation of constitutional remedies, such as the amparo action[63] and the constitutionality challenge.[64] The first is directed to protect fundamental rights from an act or omission which, because of its urgency, cannot be protected through ordinary means. The second one, is directed to challenge legal rules and judicial decisions that violate the Paraguayan Constitution.

Now, arbitration in Paraguay, as explained above, is governed by a special law, the Arbitration Act, which provides for an exclusive remedy against arbitral awards: the annulment action provided for in article 40 of said law. This is also the understanding of Paraguayan legal scholars in the field,[65] and in many cases, appeals courts have repeated the formula that "the establishment of the annulment action as the only remedy to challenge arbitral awards [...] is not a matter of chance or fortuitousness; it responds to the necessity of endowing arbitration with more strength and certainty...."[66]

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[62] From 1954 to 1989, Paraguay was ruled by dictator Alfredo Stroessner.

[63] Paraguayan Constitution, art. 134.

[64] Paraguayan Constitution, art. 132.

[65] JOSÉ MORENO RODRIGUEZ, ARBITRAJE COMERCIAL Y DE INVERSIONES 46 (2019).

[66] *Ottonelli* S.A., Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Segunda Sala, diciembre 13, 2021, A.I No. 111; *see also*, *Taller RC de Crispín Ruffinelli*, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, junio 6, 2018, No. 46; *IT Consultores Tecnología y Organización*, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Primera Sala, febrero 18, 2022, No. 14; *Estado Paraguayo – Ministerio de Urbanización, Vivienda y Hábitat (MUVH)*, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, julio 4, 2022, No. 35; *Julio Galiano Morán*, Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Tercera Sala, augusto 28, 2018, No. 79.

However, in 2019, arguably for the first time, the constitutional chamber of the CSJ decided a constitutionality challenge against an arbitral award. In *Consorcio Trinidad v.* SENASA,[67] claimant challenged the arbitral award because the decision was not based in the applicable law and lacked proper reasoning and therefore, violated constitutional principles.

In its reasoning, the CSJ first analyzed the text of article 132 of the Paraguayan Constitution, which established that "[t]he Supreme Court of Justice has the power to declare the unconstitutionality of legal norms and judicial resolutions in the manner and with the scope established in this Constitution and in the law."[68]

It also analyzed article 550 of the Code of Civil Procedure: "[a]ny person injured in her legitimate rights by laws, decrees, regulations, municipal ordinances, resolutions, or other administrative acts that infringe, in their application, the principles of the Constitution, shall have the right to file an action of unconstitutionality before the Supreme Court of Justice."[69]

Following the text of both provisions, the Supreme Court understood that arbitral awards do not constitute any of the scenarios envisaged for the constitutionality challenge and, therefore, it could not be subject to such legal action. Moreover, it stressed that the place where the remedy against arbitral awards can be found is the Arbitration Act and such a law clearly provides that annulment before the appeals court is the only remedy available against arbitral awards.

The issue of constitutional control of arbitral awards is a hot matter in Latin America. Some jurisdictions, such as Mexico and Brazil have ruled out the possibility of constitutional actions being used to challenge arbitral proceedings or awards; others, like Guatemala, empower judges to modify or overturn arbitral awards to redress constitutional rights violations. In some jurisdictions, like Chile, this

[67] Consorcio Trinidad MM S.A., et al. v. SENASA, Corte Suprema de Justicia del Paraguay [Supreme Court of Paraguay], Sala Constitucional, abril 17, 2019, No. 211.

[68] *Id.*

[69] Code of Civil Procedure, art. 550 (Para.).

possibility is merely theoretical, and in others, like Colombia and Peru, constitutional challenges are exceptional.[70]

Yet, irrespective of the different levels of constitutional control, it remains true that any type of interference with arbitral awards and proceedings is contrary to the principle established in article 34(1) of the Model Law, which states that "[r]ecourse to a court against an arbitral award may be made only by an application for setting aside."[71] Moreover, as explained by the European Court of Justice, "it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances."[72]

Thus, the decision of the Paraguayan Supreme Court in *Consorcio Trinidad v. SENASA* is certainly welcomed and in line with the general principle that arbitral awards may be challenged only on exceptional and limited grounds. Any judicial interference beyond those established in the Arbitration Act will only undermine the effectiveness of arbitration and the stance of Paraguay as a pro-arbitration jurisdiction.

In any case, a direct constitutional challenge against an arbitral award may be translated into a transgression of the due process guarantee enshrined in several constitutional provisions because it is settled in Paraguayan constitutional case law that the constitutional action is not an additional instance for reviewing the merits of a case or the reasoning given by the judges.[73]

As such, the grounds for setting aside an arbitral award established in the Arbitration Act, in general terms, are applicable to all cases in which the due process

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[70] Eduardo Silva Romero and Javier Echeverri Díaz, *Constitutions Meet Arbitration in Latin America*, in JOSÉ ASTIGARRAGA (ED.), THE GUIDE TO ARBITRATION IN LATIN AMERICA 58 – 60 (2022).

[71] Model Law, art. 34(1).

[72] Case C-126/97, Eco Swiss China Time Ltd v. Benetton Int'l NV, 1999 E.C.R. I-3055.

[73] C.A.V.C.A. v. ABC Color y otros, Corte Suprema de Justicia del Paraguay [Supreme Court of Paraguay], Sala Constitucional, octubre 14, 2019, No. 89; A.A.D. v. M.B., Corte Suprema de Justicia del Paraguay [Supreme Court of Paraguay], Sala Constitucional, No. 747; R.C.F. v. M.C.C., Corte Suprema de Justicia del Paraguay [Supreme Court of Paraguay], Sala Constitucional, marzo 26, 2021, No. 133; Asunción Golf Club v. Municipalidad de Asunción, Corte Suprema de Justicia del Paraguay [Supreme Court of Paraguay], Sala Constitucional, diciembre 29, 2020, No. 485.

could be jeopardize during the proceedings,[74] which is why it is unnecessary to establish a further constitutional challenge for the review of the same issues.

III. CONCLUSIONS

Paraguayan arbitration law has certainly come a long way since the enactment of the Arbitration Act, and not without bumps and falls, as seen in some of the cases described in this article and others that did not make the cut.[75]

But the case law cited here also foretells a positive future. The decisions regarding the limited grounds for setting aside applications, the constitutional control of arbitral awards, the special nature of the Arbitration Act and its prevalence over the Code of Civil Procedure, and the recognition of the arbitrators' broad powers to govern arbitral proceedings, coupled with the favorable legal framework in place thanks to the adoption of the Model Law and the ratification of the New York Convention, are worthy of a pro-arbitration jurisdiction.

Moreover, it is worth mentioning that the field of international arbitration in Paraguay is becoming more and more popular among young practitioners and law students, who regularly take part in most of the leading international arbitration moots around the world, including the Willem C. Vis International Commercial Arbitration Moot held annually in Vienna, Austria. This early preparation in the field assures a bright future for international arbitration in Paraguay.

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[74] Pablo Debuchy, *Dinámicas Entre el Control de Constitucionalidad y la Jurisdicción Arbitral en el Ordenamiento Jurídico Paraguayo: Dos Escenarios*, 2 REVISTA ARGENTINA DE ARBITRAJE (2018).

[75] For example, VyV S.A. v. Instituto de Previsión Social (IPS), Tribunal de Apelación en lo Civil y Comercial [Civil and Commercial Court of Appeal of Asunción], Quinta Sala, junio 30, 2015, No. 361 (Para.) (where the, invalidated an arbitration clause on the basis that the underlying contract had ended, showing a lack of understanding of basic principles of arbitration law.).

Paraguay's arbitrators' list, an Assistant Editor to ITA in Review, and a delegate from Paraguay before the ICC Commission on Arbitration and ADR.

#YOUNGITATALKS SOUTH AMERICA, A COMMENTARY: A DISCUSSION ON THE DO'S AND DON'TS IN DIRECT AND CROSS-EXAMINATION OF WITNESSES IN INTERNATIONAL ARBITRATION.

by Ignacio Rosales

I. INTRODUCTION

In August 2022, Young ITA South America and the Latin America Interest Group of the American Society of International Law (ASIL), in collaboration with Ecuador Very Young Arbitration Practitioners (ECUVYAP), Lima Very Young Arbitration Practitioners (LVYAP), Red Juvenil de Arbitraje de Bogotá and Red Juvenil de Arbitraje de Medellín, held a live webinar with the goal of providing young students and professionals in the region with tools to improve their oral advocacy skills, particularly in matters related to preparing and conducting direct, cross and redirect examination of a fact witness.

This article covers the first part of the webinar, a panel discussion on selection, preparation, and examination of witnesses. The session was conducted by the following well regarded speakers, with decades of experience in arbitration:

- Gaela Gehring Flores, partner in the International Arbitration practice at Allen & Overy in Washington, D.C. She has decades of focused experience representing both multinational corporations and sovereign states in international commercial and investment arbitrations.
- Ignacio Minorini Lima, partner of the Energy and Litigation, International Arbitration & Bankruptcy departments at Bruchou, Fernández Madero & Lombardi in Buenos Aires, Argentina. He has developed extensive expertise in energy & regulatory law, and international and domestic arbitration proceedings.
- Eduardo Zuleta-Jaramillo, partner at Zuleta Abogados in Bogotá, Colombia. Throughout his career, he has participated in more than 40 arbitration proceedings, acting as arbitrator and counsel. He is vice president of the International Court of Arbitration of the International Chamber of Commerce (ICC).

After the panel discussion, participants were paired in groups, led by a coach, to put in practice what was discussed in the panel discussion, by simulating direct, cross and redirect examination of a witness based on a fact pattern previously provided to

the participants.

II. SELECTING A WITNESS

Mr. Minorini Lima commented that the first interview is key to understanding witnesses and how their testimony can serve a case. He emphasized the importance of paying attention to the actual knowledge of facts that witnesses may have, as well as their personality, character, and their willingness to testify in the case. It is also important to investigate the witness' background as this helps attorneys choose the best witnesses to present.

He cautioned that witnesses that lie about their background, lack knowledge of the facts or simply display an unwillingness to testify, would be unconvincing for the tribunal and may be more helpful to the opposing party.

Another strategic decision to consider is how many witnesses to present to prove each point. With respect to this issue, Mr. Minorini Lima commented that presenting a high number of witnesses may help in giving more strength to an argument. However, it would also give an opportunity to the opposing counsel to cross-examine several witnesses, which could lead to them finding inconsistencies that could affect the credibility of all the witnesses presented. It can also make the proceedings last longer and increase the costs.

III. PREPARING A WITNESS

Fact witnesses in general are inexperienced. In most cases, it will be their first-time giving testimony in any sort of proceedings. Because of that, it is not advisable to subject an unprepared witness to examination of any kind.

Mr. Minorini Lima stressed the importance of explaining the procedure and the substance of the examinations the witness will be subjected to. Attorneys should always inform the witness in what order the questions will be asked, the stages of the examination, and what to expect from the lawyer that appointed them and from opposing counsel. It is especially important to warn the witness about the tactics that the other party's lawyer may use. The opposing party's lawyer may try to earn the witness' trust and lead them to reveal information that could harm the case of those who appointed the witness.

It is also important that witnesses know how to answer the questions, as well as what lawyers are allowed to ask.

IV. WRITTEN STATEMENT

In international arbitration, it is common practice to submit a written statement containing the witness' recollection of the facts prior to the evidentiary hearing. The big question, as presented by Mr. Minorini Lima, is whether it should be written by the attorneys or by the witnesses themselves and then later edited by the attorneys. The International Bar Association (IBA) Rules on the Taking of Evidence only provide for "a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute," with no mention as to who should be the one drafting it.[1]

It seems that the more sensible option is having a witness' draft reviewed by counsel. The cross-examination of witnesses over a testimony they didn't write could only bring problems, even if what's written is true, as they might try to follow what's written rather than providing a testimony based on their knowledge. There is also the risk of tampering with the witness' actual recollection of the facts, which would be counterproductive. Mr. Zuleta-Jaramillo commented on the issue that arbitrators can usually tell when the testimony was not written by the witness, which could end up affecting the witness' credibility.

V. DIRECT AND REDIRECT EXAMINATION

To better prepare for conducting the direct examination of a witness, Mr. Minorini Lima stated that it is important to consider the time available for conducting the direct examination and whether there was a written statement previously submitted. Time in hearings is not unlimited, so attorneys must be aware of what questions to ask. If there is a written statement, it could be convenient to focus on key topics to bring to the attention of the arbitrators, as most arbitrators disfavor lengthy direct examinations.[2] If there is not a written statement, more descriptive questions would

[1] IBA Rules on the Taking of Evidence in International Arbitration (2020), art. 4.5(b), *available at* https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b.

[2] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION § 15.08[11][c] (3d ed., 2021) (hereinafter BORN).

be necessary to better illustrate the witness' points. Additionally, questions in a direct examination must be open-ended or non-leading.

Another important issue to consider, when there is a written statement, is whether attorneys can ask questions outside of what was included in the statement. Mr. Minorini Lima warned that is important to know to what extent this is allowed in the procedural order and what the attitude of the tribunal is in each case. Usually, arbitrators allow this with very few exceptions and for good reason–such as testimony on recent events that happened after the submission of the written statement–unless agreed by the parties that this practice is allowed.[3]

As for the redirect examination, the matters covered in it are usually strictly limited to those addressed in the cross-examination, to prevent last minute testimony from the parties.[4] As Mr. Minorini Lima pointed out, parties must quickly decide whether to conduct it or not. Lawyers use this examination to correct mistakes, clarify issues, or to give witnesses a chance to better explain him or herself. Questions have to be precise and short so that the witness can briefly answer them. If questions are too long or too numerous, then this may be contra-productive to the credibility of the witness.

VI. CROSS-EXAMINATION

Cross-examination can be regarded as the central event in an evidentiary hearing.[5] Even though is not expressly provided for in particular rules of arbitration, common law-trained lawyers believe oral cross-examination to be "the greatest legal engine ever invented for the discovery of truth".[6] This tradition has made its way into the world of international arbitration so that today most proceedings include the cross-examination of witnesses.

It is usually said, however, that the oral direct and cross-examination of witnesses

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[3] *Id.*

[4] *See id.* § 15.08[11][d].

[5] Gabrielle Kaufmann-Kohler, *Beyond Gadgetry: Substantive New Concepts to Improve Arbitral Efficiency*, J. WORLD INV. & TRADE, 5, 69 (2004).

[6] JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 , (James H. Chadbourn ed., 1974); U.S. v. Salerno, 505 U.S. 317 (1992).

is mainly supported by common law practitioners, while civil law-trained lawyers favor written testimonies.[7] In my opinion, as a civil law-trained attorney, oral testimony is the most powerful way to present testimony. It is more spontaneous and thus more authentic. Additionally, in recent years there has been a clear tendency to orality in evidence-taking by civil law countries.[8] For instance, in Argentina, a civil law jurisdiction, oral examination of witnesses is required even in written procedures.

For the preparation and conducting of cross-examination, Ms. Gehring Flores underscored the importance of time management. In preparing the cross-examination, attorneys should consider how much time it will take to prove each point by each line of questioning. To know this, she stressed the importance of knowing the ins and outs of the case. This includes knowing and understanding the arguments of the opposing party in the proceedings, as well as their intentions in selecting each witness. She also noted the importance of "living the experience," by being present and aware, including the ability to be able to adjust and respond to the variability of the cross-examination and not only reading the questions prepared in advance.

According to Ms. Gehring Flores, it is essential to have an outline of the case. This outline should explain in detail each point an attorney is trying to prove by examining the witness. It must always include citations and references to relevant documents to help the witness and tribunal to easily locate them. This saves time, which is essential, as mentioned previously.

The questions intended for the witness in the cross-examination must be leading. These are the types of questions that that call for a "yes" or "no" answer. As for the line of questioning, it is frequently accepted by parties and tribunals, in general, to address matters not included in the witness' written statement, subject to the control

[7] *See* BORN, *supra* note 2, § 15.08[10].

[8] Katarina Sevcova, *Civil process in the context of orality*, VISEGRAD JOURNAL OF HUMAN RIGHTS, *available at* https://journals.indexcopernicus.com/api/file/viewByFileId/906232.pdf.

of the tribunal.[9]

Finally, Ms. Gehring Flores stated that the most important factor in conducting a successful cross-examination is practice. I will elaborate further about this in the conclusion.

VII. AN ARBITRATOR'S POINT OF VIEW

Regardless of the parties being the ones who conduct witness examination, the hearing is subject to the control of the arbitrators. In exercising their authority, the arbitrators should conduct themselves with a "mixture of firmness, diplomacy and careful preparation," to achieve the most efficient and successful examination of witnesses.[10]

In this sense, it can be quite difficult for the tribunal to know when and how to intervene. Mr. Zuleta-Jaramillo stated the importance for the tribunal to set clear rules with the parties at the beginning of the proceedings on how everyone should conduct themselves during the examination. He commented that one important issue in this sense is establishing beforehand if questions can be made outside of the matters addressed in the witness' written statement. This was mentioned before and is a key issue to resolve as the witness may know relevant information that would help arbitrators better understand his or her testimony and the dispute. Another relevant issue discussed is whether the arbitrators can call on witnesses whose testimony was cited by the parties but who were ultimately not selected for examination. This should be agreed upon first but could be very useful for the tribunal in case of contradicting arguments based on the same testimony.

Mr. Zuleta-Jaramillo also noted that is important for the arbitrators to intervene for the sake of the examination's efficiency. This could be done in the form of questions. Arbitrators should–and usually tend to–ask questions at the end of an attorney's examination, as it may be disruptive for the attorney making an argument to be interrupted during their presentation.[11] However, interventions during the

[9] *See* BORN, *supra* note 2, § 15.08[11][d].

[10] *See id.* § 15.08[14].

[11] *See id.* § 15.08[11][f].

examination of the witness can be necessary when, for example, the attorney is repetitive with a question that is answered consistently by the witness, the line of questioning is irrelevant to the matters in dispute, or the attorney is asking the witness to simply read documents that are already on the record. In my opinion, the arbitral tribunal should also intervene when the attorney gets excessively aggressive with the witness.

VIII. CONCLUSION

It was mentioned by Ms. Gehring Flores and Mr. Zuleta-Jaramillo that practice is a key element for conducting a successful examination of witnesses in an international arbitration.

Practice can be achieved first in law school. Law students should take practical courses (*e.g.*, mock seminars) and participate in many of the arbitration moot competitions available throughout the world.

For young attorneys, attending training sessions like the one I am commenting on are important tools that prove instructive. As a young attorney, it has been critical in my experience to observe and learn how senior attorneys perform and advocate. It is important for law firms to allow and encourage young attorneys to perform examinations of witnesses in order to further develop this practical skill. It is also our responsibility as young attorneys to commit to this task and seek out opportunities to do so. As discussed above, it is essential to be very well prepared, know the case to perfection, and as Ms. Gehring Flores mentioned, prepare an outline and "be present" during the entirety of the hearing in order to be able to adapt to its developments.

Learning skills, practicing argumentation, and following the advice of those more experienced than us will help us young practitioners shape the future of international arbitration.

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