

NAFTA ADVISORY COMMITTEE ON PRIVATE COMMERCIAL DISPUTES

Minutes of the XXIV Meeting

**October 5-7, 2014
Sheraton Hotel Newfoundland
St. John's, Newfoundland and Labrador**

Monday, October 6, 2014

The business of the Committee was preceded by the opening reception on the evening of October 5th hosted by the law firm of McInnes Cooper. Amongst attendees was the Honourable John Crosbie whose long and distinguished career has included Minister of International Trade. Mr. Crosbie spoke on the occasion of the twentieth anniversary of the entry into force of the North American Free Trade Agreement.

The Canadian government co-chair, Reuben East, opening the meeting by formally welcoming the participants, recognizing the co-organizer of the meeting Daniel Whalen, outlining the agenda for the Committee's XXIVth meeting (see attached program) and reviewing the meeting's materials. The U.S. and Mexican government co-chairs, respectively Michael Coffee and Geovanni Hernandez Salvador, made opening remarks.

The Minutes of the XXIII meeting in Los Angeles, which were circulated several months in advance of the meeting in final form, were formally adopted.

Subcommittee and taskforce reports were made in plenary in the following order: (1) Website Subcommittee; (2) Outreach Subcommittee; (3) Taskforce on the Development of Judicial Training; (4) Transportation Taskforce; (5) Energy Taskforce; (6) Taskforce on Arbitral Agreements.

Report of the Website Subcommittee (Elizabeth Pocock and Kevin Banks)

The full written report of the Website Subcommittee was provided to the attendees and subsequently circulated to the full Committee electronically. Key activities over the past year include: website revisions, removal of the arbitration institutions page, the Linked-in proposal and the addition of Committee member bios. The website revisions were circulated by the government co-chairs for comment, having been presented in detail at the 2013 meeting. All changes are detailed in table format as Annex I to the subcommittee's written report. Subject to the highlighted areas set out in the revisions, which require input and/or drafting, the Committee approved the revisions to be implemented by the webmaster.

ACTION: The Website Subcommittee will ensure the implementation of the revisions through liaising with the Committee website's webmaster (Elizabeth Pocock and Kevin Banks).

The highlighted areas requiring drafting for which the subcommittee will seek input are as follows:

- a. Add sentences from the Legal Development Subcommittee about how ADR is used within the NAFTA region-including statistics if possible

- b. Consider adding a paragraph on limited enforcement and recognition of mediation settlements (i.e. in certain states)
- c. Consider adding more information on enforcement of awards
- d. For discussion on enforcement of arbitral awards in the NAFTA region, see 'Enforcing Agreements to Arbitrate and Arbitral Awards in the NAFTA countries' (seeking to locate the document)
- e. Section on Conciliation- requires drafting

ACTION: Website Subcommittee to draft an email seeking assistance for drafting of the above list for approval and circulation to the Committee by the government co-chairs.

The Committee revisited the removal of the principal arbitration institutions page in favour of revising the page so as to ensure equality as between institutions selected in the region, avoiding the appearance of recommending/endorsing the use of an arbitral institution and ensuring that the list is inclusive, i.e. so that non-listed entities could apply to be included. One of the key issues discussed was the process by which such intuitions would be approved.

ACTION: On behalf of the Website Subcommittee, Kevin Banks has offered to draft the links to arbitration institutions page for circulation and review.

During the 2013 meeting, the Website Subcommittee proposed the use of Linked-in as a tool of communication on a members' only basis. Full details of the proposal were included in the materials. The government co-chairs agreed to consider the proposal in each country. The Mexican government co-chair indicated that he would complete internal consultations and revert to other government co-chairs with his government's position in the coming weeks.

ACTION: Mexico to complete internal consultation in respect of the Website Subcommittee's linked-in proposal and revert to U.S. and Canadian government co-chairs with response in the coming weeks.

Finally, the Website Subcommittee received a number of short Committee member bios to be added to the Committee website, based on circulation of the forms by the government co-chairs.

ACTION: Government co-chairs to submit all approved bios received to the Website Subcommittee for uploading onto the website. The Website Subcommittee to liaise with the webmaster to ensure they are uploaded.

ACTION: Mexican government co-chair to appoint member of its delegation to the website subcommittee.

**Report of the Outreach Subcommittee and taskforce on the development of judicial training
(Elizabeth Pocock with Jim Nelson)**

The full written report of the Outreach Subcommittee was provided to the attendees and subsequently circulated to the full Committee electronically. The Outreach Subcommittee presented the events for 2013-2014, which were: (1) Southwestern Law School Outreach in conjunction with 2013 NAFTA 2022 Committee meeting in Los Angeles; (2) Tucson Business Event, "Making ADR Accessible to All" and (3) 2014 Arizona Bar Conference Panel, "Best Practices in International Arbitration). Included in the

Outreach subcommittee's report was a separate report from Jim Nelson in respect of judicial training programs of the Colorado Judicial Institute. There were no future outreach events to report.

Report of the Task force on Sectoral ADR for the Transportation Industry (Elizabeth Pocock)

Elizabeth Pocock delivered the transportation taskforce's report, which was also included in the materials circulated to the Committee members. The report included an update on the cross-border trucking pilot program to be completed in the fall of 2014, a survey developed for circulation to industry association partners and a summary of interviews of counsel and arbitrators who deal with international transportation matters.

Report of the Taskforce on Sectoral ADR for the Energy Industry (Reuben East on behalf of James Redmond)

As at the time of last year's Committee meeting the Task Force had created a survey to be used to try to determine if there was a need for or any interest in the creation of some sort of sectoral arbitration system for energy. The energy task force tried to make contact with some organizations in the supply and services area without much success, but managed to elicit some interest on the part of one organization, the Resource Industry Suppliers Association (RISA). RISA had indicated a willingness to post the Task Force's survey on their website so that their members could access the survey and respond to it if they wished, with the intent that RISA members would indicate their experiences in resolving cross-border disputes. The task force had the necessary adjustments made to the survey so that it could be posted, and provided it to RISA. However, RISA apparently had a change of heart and when their updated website appeared it did not include a link to the survey.

Jim Nelson noted an upcoming conference in Calgary in the fall of 2014 in which several Committee members, along with his contact would be attending. It was proposed that the Committee members attending would reach out to key participants to gauge interest and report back to the task force and government co-chairs, after which the mandate of the taskforce could be reviewed.

ACTION: Bill Horton and Jim Nelson to reach out to Committee members attending the fall conference and his contacts in the industry attending to gauge interest on the Energy Task force's behalf.

Taskforce on Arbitral Agreements (William (Bill) Horton)

Bill Horton updated the Committee on the progress of two documents: (1) a general discussion document, introducing international arbitration and noting key issues to assist in the drafting of an arbitration agreement; (2) an arbitration clause builder presented as a series of questions in table format. Both documents were presented to the Committee at the 2013 meeting and have since undergone revisions based on task force member input. The first document is ready to be uploaded.

The Committee thanked Bill for his work on these documents and discussed the contents of both documents.

ACTION: U.S. delegation to review the arbitration clause builder document presented by Bill Horton on behalf of the Task Force on Arbitral Agreements. US delegation to provide any edits to Canadian and Mexican government co-chairs and to Bill Horton for review. Government co-chairs to decide if clause builder document should be uploaded to the Committee website.

Luncheon Speaker: Andrew Noseworthy

Andrew Noseworthy, Senior Advisor to the President (Energy) of the Atlantic Canada Opportunities Agency delivered a presentation: "Newfoundland and the Petroleum Sector".

Legal Development reports

1. United States (Carolyn Lamm)

Carolyn Lamm submitted and presented the US report. The written report, circulated to the members, is appended to these Minutes.

2. Mexico (Francisco Gonzalez de Cossio)

Francisco Gonzalez de Cossio presented Mexico's report via telephone. Mexico also provided a written report in two parts which were circulated to the Committee members and have been appended to these Minutes.

3. Canada (Bill Horton and Kevin Banks)

Bill Horton and Kevin Banks presented two important case law developments in respect of *Sattva Capital Corp. v. Creston Moly Corp.* and *Union Carbide Canada Inc. v. Bombardier Inc.* Written summaries of their remarks to follow.

ACTION: Bill Horton and Kevin Banks to submit written summaries of their remarks that comprise Canada's Legal Developments Report which will be to be circulated to the Committee members.

Other

The Canadian government co-chair closed Mondays' portion of the meeting by noting that the discussion of work plans for each subcommittee and taskforce would occur Tuesday morning in plenary. The Government of Canada's Department of Foreign Affairs, Trade and Development hosted a reception for local arbitrators, mediators and members of the local Bar on the evening of the October 6th.

Tuesday, October 7, 2014

Work Plans for 2014-2015:

The Canadian government co-chair reviewed work plans for each subcommittee and taskforce. Action items developed in addition to those noted above included the following:

ACTION: Website Subcommittee to liaise with Bill Horton in respect of the general discussion document he prepared on behalf of the Taskforce on Arbitral Agreements.

ACTION: As a means of facilitating communication of various subcommittees and task forces' activities, government co-chairs to attend at subcommittee and taskforce calls.

ACTION: Outreach events to be held at subsequent annual meetings: (1) social event – perhaps hosted by the local Bar, in the manner of the two receptions at the St. John's meeting; (2) formal discussion - in which the Committee hears from the local ADR community what is happening locally. Outreach Subcommittee with interested Committee members to organize. Government co-chairs to assist.

Luncheon Panel: Chair, Hon. Robert Wells (Arbitrator & Mediator), James Thistle (Partner, McInnes Cooper) and Thomas O'Reilly, Q.C. (Partner, Cox & Palmer).

The luncheon panel presented views on the development of ADR in Newfoundland & Labrador in respect of key commercial industries in the region.

Closing Remarks

Canadian government co-chair, Reuben East, concluded the XXIV meeting by thanking his co-organizer, Daniel Whalen, the government co-chairs and Committee members for attending a productive meeting. U.S. and Mexican government co-chairs thanked Canada for hosting a successful meeting.

ACTION: Electronic Materials submitted to Website Subcommittee to be posted on the Committee website, as applicable.

The XXV meeting will be hosted by the Government of Mexico in 2015.

Summary of Action items

1. **ACTION:** The Website Subcommittee will ensure the implementation of the website revisions through liaising with the Committee website's webmaster (Elizabeth Pocock and Kevin Banks).
2. **ACTION:** Website Subcommittee to draft an email seeking assistance from the Committee for drafting of the list items highlighted in the website revisions (see Website Subcommittee report) for approval and circulation to the Committee by the government co-chairs.
3. **ACTION:** On behalf of the Website Subcommittee, Kevin Banks has offered to draft the links to arbitration institutions page for circulation and review by the Committee.
4. **ACTION:** Mexico to complete internal consultation in respect of the Website Subcommittee's Linked-in proposal and revert to U.S. and Canadian government co-chairs with response in the coming weeks. Co-Chairs to report decision to Website Subcommittee and full Committee.
5. **ACTION:** Government co-chairs to submit all approved biographies received to the Website Subcommittee for uploading onto the website. The Website Subcommittee to liaise with the webmaster to ensure they are uploaded.

6. **ACTION:** Mexican government co-chairs to appoint new member from its delegation to the website subcommittee.
7. **ACTION:** Bill Horton and Jim Nelson to reach out to Committee members and his contacts in the energy industry attending at Calgary energy arbitration conference to gauge interest on the Energy Task force's behalf.
8. **ACTION:** Bill Horton and Kevin Banks to submit written summaries of their remarks that comprise Canada's Legal Developments Report which will then be to be circulated to the Committee members.
9. **ACTION:** New Mediation and Conciliation task force (working title) to be created with members to create mandate and work plan. Government co-chairs to appoint Committee members.
10. **ACTION:** Website Subcommittee to liaise with Bill Horton per the general discussion document he prepared on behalf of the Taskforce on Arbitral Agreements.
11. **ACTION:** As a means of facilitating communication of various subcommittees and task forces' activities, government co-chairs to attend at subcommittee and taskforce calls. Subcommittees and taskforces to copy government co-chairs on meeting invites.
12. **ACTION:** U.S. delegation to review the arbitration clause builder document presented by Bill Horton on behalf of the Task Force on Arbitral Agreements. US delegation to revert to Canadian and Mexican government co-chairs with any edits. Government co-chairs to decide if clause builder document should be uploaded to the Committee website.
13. **ACTION:** Outreach events to be held at meetings going forward: (1) social event – perhaps hosted by the local bar, in the manner of the two receptions at the St. John's meeting; (2) formal discussion/panel - in which the Committee hears from the local ADR community what is happening locally. Outreach Subcommittee with interested Committee members to organize. Government co-chairs to assist.
14. **ACTION:** Electronic Materials submitted to Website Subcommittee to be posted on the Committee website, as applicable.



XXIV Meeting of the NAFTA Advisory Committee on Private Commercial Disputes
St. John's, Newfoundland & Labrador

Sheraton Hotel Newfoundland
115 Cavendish Square, St. John's Newfoundland A1C 3K2

October 5-7, 2014

PROGRAM

Sunday, October 5

6:00 pm – 8:00 pm Welcoming Reception for Delegations
Refreshments and light hors d'oeuvres

Location: McInnes Cooper LLP, 10 Fort William Place, 5th Floor
Hosted by: McInnes Cooper LLP

8:00pm Dinner (informal group option)

Monday, October 6

8:00 am – 9:00 am Breakfast

9:00 am – 9:30 am Opening of Plenary Session
Welcoming Remarks & Introductions
(Reuben East, Government of Canada Co-Chair of NAFTA 2022 Committee)

9:30 am - 10:00 am Taskforces & Subcommittee Meetings
(Preparation for reports)

10:00 am – 11:00 am Presentation of Taskforce & Subcommittee Reports

11:00 am – 11:15 am Break

11:15 am – 12:15 pm Presentation of Taskforce & Subcommittee Reports

12:30 pm – 2:00 pm Lunch and Guest Speaker
(Andrew Noseworthy, Senior Advisor to the President (Energy), Atlantic Canada Energy Office)

Location: Sheraton Hotel

2:00 pm – 3:00 pm Updates on current legal developments for each country



3:00 pm – 3:15 pm	Break
3:15 pm – 4:00 pm	Updates on current legal developments for each country
5:30pm – 7:00pm	Evening Reception (Foreign Affairs, Trade and Development Canada) Location: Sheraton Hotel
7:00 pm	Dinner (informal group option)

Tuesday, October 7

7:30 am – 8:30 am	Breakfast
8:30 am – 9:30 am	Taskforce/Subcommittee meetings (Developing work plans for 2014-2015)
9:30 am – 9:45 am	Break
9:45 am – 11:00 am	Taskforce/Subcommittee Work Plans 2014-2015: Presentations
11:00 am – 11:30 am	New Business
11:30 am – 1:30 pm	Lunch & Outreach/In-reach event (Hon. Robert Wells, Q.C., Arbitrator & Mediator James Thistle, Partner, McInnes Cooper Thomas O'Reilly, Q.C., Partner, Cox & Palmer)
Location: Sheraton Hotel	
1:30 pm – 1:45 pm	Closing Remarks
2:00 pm – 4:00 pm	Cultural Event: Tour of the "Rooms" (Province of Newfoundland & Labrador's Archives, Art Gallery and Museum)

NAFTA 2022 Advisory Committee
2013-2014 Report on U.S. Arbitration Developments

I. US Court Cases¹

A. Supreme Court of the United States

1. *BG Group Plc v. Republic of Argentina*, 134 S.Ct. 1198 (2014)

Pre-condition to arbitration

The Supreme Court held that when reviewing an arbitration award rendered under an international treaty, U.S. courts should interpret and apply “threshold” provisions concerning arbitration within the U.S. law framework developed for interpreting similar provisions in ordinary contracts. Consequently, the Court decided that the local litigation requirement contained in the Argentina-UK bilateral investment treaty is a “procedural” pre-condition to arbitration, and thus a matter for arbitrators primarily to interpret and apply, subject to court review under a properly deferential standard.

B. Second Circuit

2. *Abu Dhabi Investment Authority v. Citigroup, Inc.*, 557 Fed.Appx. 66 (2d Cir. 2014)

Manifest disregard, Excess of powers

The U.S. Court of Appeals for the Second Circuit rejected the motion of Abu Dhabi Investment Authority (ADIA) to vacate an American Arbitration Association (AAA) award in favor of Citigroup in a \$7.5 billion dispute. The Court held that ADIA did not meet the “high hurdle” of showing that the AAA panel demonstrated a “manifest disregard of the law” or exceeded its powers in ruling for Citigroup. ADIA had alleged that the panel wrongly applied New York law instead of Abu Dhabi law in manifest disregard of the law and excess of the panel’s powers under the U.S. Federal Arbitration Act.

3. *Citigroup, Inc. v. Abu Dhabi Investment Authority*, 2013 WL 6171315 (S.D.N.Y. 2013)

Res Judicata, Previous arbitration

The U.S. District Court for the Southern District of New York denied Citigroup’s request for an injunction against a second International Centre for Dispute Resolution (ICDR) arbitration brought by AIDA, ruling that the bank’s objections should be decided by the arbitrators. Citigroup alleged that the second ICDR arbitration was an improper attempt to rehear claims that had been already decided, contrary to the doctrine of *res judicata*.

¹ Intra-NAFTA cases are marked with an *.

4. *Ometto v. Asa Bioenergy Holding AG*, 549 Fed.Appx. 41 (2d Cir. 2014)

Set aside, Arbitrator's failure to disclose his firm's involvement in related matters

The U.S. Court of Appeals for the Second Circuit denied a petition by Ometto to set aside two International Chamber of Commerce (ICC) awards on the ground that one of the arbitrators had failed to disclose that his law firm had advised clients on related corporate transactions where Abengoa (Asa Bioenergy) was a counterparty. The Court held that the arbitrator's carelessness did not reach the level of "willful blindness," referencing its *Applied Indus Materials v. Ovalar Makine* decision of 2007.

5. *Sonera Holding BV v. Cukurova Holding AS*, 750 F.3d 221 (2d Cir. 2014)

Enforcement, Refusal of recognition for lack of personal jurisdiction

In an action brought by Sonera for the enforcement of an arbitral award against Cukurova, the U.S. Court of Appeals for the Second Circuit, on appeal, found that the district court should have dismissed the action for lack of personal jurisdiction over Cukurova because Cukurova's "contacts with New York [were] insufficient to subject it to general jurisdiction." The Court of Appeals remanded the case to the district court and directed the court to dismiss the action for lack of personal jurisdiction.

6. *Blue Ridge Investments LLC v. Republic Of Argentina*, 735 F.3d 72 (2d Cir. 2013)

Enforcement of ICSID awards, Sovereign immunity, Interlocutory order

The U.S. Court of Appeals for the Second Circuit affirmed the district court's ruling on sovereign immunity (see # 7 below), holding that because the award to be enforced was issued pursuant to the ICSID Convention, a treaty which contemplates the enforcement of awards against sovereigns who are parties to the Convention in the territories of other signatory States, Argentina had waived its sovereign immunity under two exceptions to the Foreign Sovereign Immunities Act (FISA): (i) the so-called implied waiver exception under 28 U.S.C. § 1605(a)(1) and (ii) the so-called arbitral award exception under 28 U.S.C. § 1605(a)(6).

7. *Blue Ridge Investments v. Republic of Argentina*, 902 F.Supp.2d 367 (S.D.N.Y. 2012)

Enforcement of ICSID awards

The U.S. District Court for the Southern District of New York held that (i) a defendant sovereign may not avoid an action to enforce an ICSID award by pleading lack of subject matter or personal jurisdiction, (ii) nothing in the ICSID Convention, in the federal legislation implementing the Convention, or in New York law prevents an assignee from enforcing an ICSID award, and (iii) the statute of limitations for enforcing an ICSID award in New York is properly borrowed from New York state law applicable to enforcement of a final money judgment from the court of another state, which is 20 years.

8. *Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of The Lao People's Democratic Republic*, 997 F.Supp.2d 214 (S.D.N.Y. 2014)

Set aside under New York Convention

The U.S. District Court for the Southern District of New York granted a motion to vacate its earlier confirmation of a Malaysian arbitration award that was subsequently set aside by the Malaysian courts, finding that the extraordinary circumstances required to refuse to recognize the Malaysian set-aside judgment did not exist in this case.

9. *Variblend Dual Dispensing v. Seidel GmbH & Co., KG*, 970 F.Supp.2d 157 (S.D.N.Y. 2013)

Agreement to arbitrate, Succession of obligation to arbitrate

The U.S. District Court for the Southern District of New York compelled arbitration in Geneva pursuant to a contract between the defendant and the plaintiff's predecessor in interest. The court held that when a contract generally transfers all rights, but not obligations, the obligation to arbitrate is nonetheless transferred.

10. *Yukos Capital SARL v. OAO Samaraneftegaz*, 963 F.Supp.2d 289 (S.D.N.Y. 2013)

Enforcement, Public policy, Due process

Granting summary judgment to enforce an arbitration award, the U.S. District Court for the Southern District of New York rejected arguments suggesting that the arbitration award was unenforceable (i) for lack of due process due to the mailing of notices to the defendant's management company rather than to defendant's corporate address, and (ii) due to alleged incompatibility with public policy of the United States against foreign tax fraud.

11. *Corporación Mexicana de Mantenimiento Integral v. Pemex Exploración y Producción*, 962 F.Supp.2d 642 (S.D.N.Y. 2013)*

Enforcement of an award that was set aside by the court of the arbitration seat

The U.S. District Court for the Southern District of New York granted the petition of Corporación Mexicana de Mantenimiento Integral (COMMISA) to enforce an ICC award rendered against Pemex Exploracion y Produccion (PEP). The Court found that a Mexican court decision in 2011 setting aside the award violated basic notions of justice because "it applied a law that was not in existence at the time the parties' contract was formed."

COMMISA's parent company, Houston-based engineering company KBR, commenced a NAFTA Chapter 11 arbitration against Mexico claiming that "PEP and Mexican courts have harmed KBR and COMMISA by respectively seeking and declaring the annulment of the ICC Final Award." (See # II.6 below.)

C. Fifth Circuit

12. *First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding*, 703 F.3d 742, 745 (5th Cir. 2012)

Enforcement, Refusal of recognition for lack of personal jurisdiction

The U.S. Court of Appeals for the Fifth Circuit held that, although personal jurisdiction is not specifically identified as a ground for non-recognition under the New York Convention, refusal of recognition for lack of personal jurisdiction is appropriate as a matter of constitutional due process.

13. *Covington Marine Corporation v. Xiamen Shipbuilding Industry Company*, 504 Fed.Appx. 298 (5th Cir. 2012)

Enforcement, Refusal of recognition for lack of personal jurisdiction

The U.S. Court of Appeals for the Fifth Circuit held that, as a matter of first impression, a petition for confirmation of an arbitral award pursuant to the New York Convention may be dismissed for lack of personal jurisdiction.

D. Sixth Circuit

14. *Venture Global Engn. v. Satyam Computer Services*, 730 F.3d 580 (6th Cir. 2013)

Set Aside, Fraud and violation of RICO as a ground

The U.S. Court of Appeals for the Sixth Circuit reinstated claims for fraud and violations of the RICO Act, 18 U.S.C. §§ 1961–1968, based on an alleged massive accounting fraud perpetrated by Satyam, and left open the possibility that a previous judgment enforcing an earlier arbitral award in Satyam's favor could be set aside as a result of the alleged fraud.

E. Seventh Circuit

15. *GEA Group AG v. Flex-N-Gate Corporation and Shahid Khan*, 740 F.3d 411 (7th Cir. 2014)

Discovery

The U.S. Court of Appeals for the Seventh Circuit held that a federal court has the power to allow discovery by a co-defendant even when the fruits of such discovery could be used by the other co-defendant in a pending foreign arbitration.

F. Ninth Circuit

16. *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069 (9th Cir. 2013)

Arbitrability, Arbitrators to decide on arbitrability

The U.S. Court of Appeals for the Ninth Circuit held that the UNCITRAL Arbitration Rules delegate resolution of gateway questions of arbitrability to the arbitrator. Unlike the provisions of the BIT in *BG*

Group (see # 1 above), the arbitration clause at issue in this case contained no procedural preconditions to arbitration. Rather, the clause simply specified that any dispute arising out of or related to the license agreement would be resolved by arbitration.

17. *Modsa of Islamic Rep. of Iran v. Cubic Def. Sys.*, 984 F.Supp.2d 1070 (S.D. Cal. 2013)

Enforcement, Attorneys' fees

The U.S. District Court for the Southern District of California, following the Ninth Circuit's instruction that federal law permits an award of attorneys' fees in an action under the New York Convention, awarded attorneys' fees to a party where the arbitral award debtor "simply ignored the validity of the [a]rbitration [a]ward and sought to avoid payment."

G. Eleventh Circuit

18. *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262 (11th Cir. 2014)

Discovery under 28 U.S.C. § 1782

The U.S. Court of Appeals for the Eleventh Circuit held that the contemplated suits by a company against its former employees in Ecuador, in connection with a foreign contract dispute, and with another entity, met the statutory requirements for the discovery order. The Court of Appeals decided that it need not address the issue of whether the language "international tribunal" in 28 U.S.C. § 1782 included arbitration proceedings commenced in Ecuador.

H. District of Columbia Circuit

19. *Commissions Import Export v. Republic of Congo*, 916 F.Supp.2d 48 (D.C. 2013)

Enforcement, Statute of Limitations

The U.S. Court of Appeals for the District of Columbia Circuit ruled that the three-year limit on enforcement of foreign arbitral awards under US federal law (the Federal Arbitration Act) does not prevent award creditors from benefiting from longer time limits for enforcement of foreign money judgments, in this case a foreign judgment enforcing the award, under DC law.

20. *Concesionaria Dominicana de Autopistas y Carreteras, SA v. Dominican State*, 926 F.Supp.2d 1, 3 (D.D.C. 2013)

Enforcement, Attorneys' fees

Citing *Cubic Defense Systems* (see # 17 above), the U.S. District Court for the District of Columbia ordered the Dominican Republic to pay the award creditor's attorneys' fees where the State had unjustifiably and "obstinately refused to participate in [the confirmation] action, resulting in a default and default judgment being enforced against it."

I. Federal Circuit

21. *Sanofi-Aventis Deutschland GmbH v. Genentech*, 716 F.3d 586, 588 (Fed. Cir. 2013)

Res Judicata, Preclusive effect of domestic judgment on foreign arbitration

The U.S. Court of Appeals for the Federal Circuit declined to enjoin a foreign arbitration holding that the parties are different and that "an injunction would frustrate the policies of [the US] in favor of enforcement of forum selection clauses in arbitration agreements."

II. NAFTA Cases (Tribunals seated in the US)

1. *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (2014)

Dismissed for lack of jurisdiction, Res Judicata

Majority of the tribunal held in final award that an earlier arbitral ruling in a separate NAFTA case brought by the claimants should stand as "res judicata" with respect to whether the claimants' activity qualifies as a NAFTA-protected investment. (See # 2 below.)

2. *Apotex Inc. v. United States of America* (2013)

Dismissed for lack of jurisdiction, Notion of investment

Canadian company alleged that U.S. courts erred in interpreting federal law, and that such errors are in violation of NAFTA Article 1102 and Article 1105.

On June 14, 2013, the Tribunal issued an award dismissing all of the claims on the ground that Claimant's activity was not a NAFTA-protected investment.

3. *Detroit International Bridge Company v. Government of Canada*

Pending, Mexico and the U.S. filed submissions under Art. 1128 on the interpretation of the NAFTA

The claim concerns legislation passed by the Government of Canada that gives the Government of Canada authority over the construction, operation and ownership of international bridges.

4. *Eli Lilly and Company v. Government of Canada*

Pending, statement of defense of Canada filed on 30 June 2014

The dispute arises from a Canadian federal appellate court decision that invalidated the claimant's patent on a medicine; an appeal of that decision was dismissed by the Supreme Court of Canada.

5. *Mesa Power Group, LLC v. Government of Canada*

Pending, U.S. made submission pursuant to Art. 1128 on interpretation of the NAFTA

Mesa Power's claim concerns measures taken by the Government of Ontario, as they relate to the Feed-in Tariff (FIT) program enabled by the Green Energy and Green Economy Act.

6. *KBR, Inc. v. United Mexican States*

Pending, U.S. made submission pursuant to Art. 1128 on interpretation of the NAFTA

KBR and its Mexican subsidiary COMMISA (see # 1.11 above) brought the NAFTA claim as part of their long-running efforts to collect on an ICC award rendered against Mexican State oil company Pemex in 2009. The NAFTA Tribunal issued its first procedural order on April 1, 2014, ruling on fundamental procedural issues.

III. Institutional Developments

A. Arbitration Rules and Guidelines

- IBA Guidelines on Party Representation in International Arbitration
- WIPO Revised Mediation, (Expedited) Arbitration and Expert Determination Rules
- UNCITRAL Transparency Rules for Treaty-Based Investor-State Arbitration
- UNCITRAL Arbitration Rules 2014
- ICDR International Dispute Resolution Procedures
- LCIA Arbitration Rules

B. Specialized Courts and Arbitration Facilities

- New York State, Justice Hon. Charles E. Ramos (Commercial Division of the Supreme Court, New York County) (Sept. 2013)
- Florida State, Eleventh Judicial Circuit of Florida (Dec. 2013)
- ICC The International Court of Arbitration's Secretariat Office in New York (2013)
- New York International Arbitration Center (2013)
- Atlanta Centre for International Arbitration and Mediation (opens in fall 2015)

REPORT ON MEXICAN ADR DEVELOPMENTS¹

Since the 2008 constitutional reform, the inclusion of alternative dispute resolution ("ADR") mechanisms as part of the judicial and private resolution procedure has significantly increased. Federal law has been constantly modified aiming to evolve judicial procedures into brief proceedings and reduce courts' caseload. Along the same line of evolution, criminal procedures have progressed by setting forth ADR mechanisms to secure victims and offenders' rights and to reduce the amount of imprisonments. The executive branch has taken matters into its hands playing an axial role in promoting ADR mechanisms in Mexico. The latest reforms are to be tested now that cases whereby other human rights might be jeopardized (such as class's actions) if agreeing to arbitrate, thus, putting into question which one of those rights is to prevail.

I. Court-annexed mediation *vis-à-vis* private mediation.

One of the purposes of the above referred constitutional reforms was that private parties embraced ADR methods as regular conditions in their commercial negotiations. Regrettably, ADR mechanisms have not developed on their own but only as a legally commanded method rather than a voluntary submission to private dispute resolution.

Mexico's court-annexed mediation programs fall far from private mediation. The core difference between both figures rests on the fact that the former is strictly regulated by law (the mediation agreement is considered *res judicata* as long as the mediation was conducted before a judicial center) while in the latter the parties are not legally dragged into agreeing (the mediation agreement reached in private proceedings is considered a private contract, a transaction without the *res judicata* quality). Consequently, the outcome is an obvious absence of agreements over these figures for the resolution of private commercial disputes.

II. General Legal Reforms

The latest legal reforms, such as the energy and the public infrastructure reforms have been greatly impacted by the growth of alternate dispute resolutions mechanisms in Mexico; proof of it, is that inclusion of both court-annexed mediation and ADR mechanisms as a way to resolve disputes of the relevant matters. Hence, individuals and authorities may settle their disputes though ADR mechanisms.

In regards to the energy reform, the Hydrocarbon Act §21 sets forth the following:

"Regarding the controversies that arise from the Exploration and Extraction Agreements, with the exception of those referred on the foregoing disposition,² alternative dispute resolution mechanisms may be provided by the parties.

¹ Cecilia Azar Manzur and Paola Aldrete Rivas.

² Administrative rescission

including arbitration agreements in accordance with the Fourth Title of the Fifth Book of the Commercial Code and with the international treaties on arbitration and dispute resolution signed by Mexico.

The National Fossil Fuel Commission and the Contractors shall not be subject, in any case, to foreign laws. The arbitration procedure shall be in accordance to the following:

- 1. The applicable law shall be Mexican Federal statutes;*
- 2. The language shall be Spanish; and*
- 3. The award shall be drafted in accordance to law and binding and final for both parties."*

With the exception of termination and early termination of agreements, all other disputes that may arise among parties can be finally settled, if agreed, through ADR mechanisms. Due to the foregoing, it has been discussed by practitioners and academics the pros and cons of the exception provided in §21 in conjunction with §20, since the ability to request termination of the agreement through arbitration is prohibited.

From a practitioner perspective, the ideal scenario of the reform referred hereto would have been the addition of the arbitration as an ADR mechanism without restriction or limitation whatsoever, since those limitations or exceptions lead to an increase in the project's costs.

III. The Criminal Alternative Dispute Resolution Bill

Following the alternate disputes resolution trend, earlier this year, the President of Mexico submitted the Criminal Alternative Dispute Resolution Bill ("Criminal ADR Bill") providing several dispute resolution mechanisms, among them, mediation and restorative (redress) process. The expectation around this bill is growing with the idea to improve both criminal law and ADR procedures in Mexico. The Criminal ADR Bill's main objective is to guarantee the protection of victim and offender's rights.

Supporting its issuance over articles 17th and 73rd of the constitution, the executive branch is aiming to reduce the negative effects associated with imprisonment by settling criminal offenses through ADR mechanisms including a redress process. Along its legislative process, members of the 2022 Committee were invited to provide their comments regarding the Bill.

On September, 2014, the Criminal ADR Bill was passed by Senate and forwarded to the Chamber of Deputies. The bill is expected to reach the Deputies' floor on late 2014.

Despite the steps taken on this matter, the referred bill shows loopholes and inconsistencies that are still pending of amendment and improvement. Nevertheless, Mexican legislation's progress, at its national level to promote ADR mechanisms is quite encouraging.

IV. Arbitration and Class Actions

Class actions are a novelty in Mexico; its insertion comes along with the reform of the constitutional articles 2nd and 17th, *inter alia*, in late summer of 2011. The verbiage employed in § 17th seems to exclude class's rights from the arbitrability concept. Two postures arose from the aforementioned uncertainty; the first one asserts that the arbitral tribunal lacks jurisdiction to hear cases related to class's rights. The second one, avers that the intent of this legal provision was to determine, when seeking judicial intervention, what type of court would hear class actions cases without limiting arbitral tribunals to doing so whenever class's rights were involved. Without yet having the answer as to the intention of §17th in regard to the arbitrability of disputes involving class's rights, a recent case heard by the Supreme Court has created tension in this matter since it will be fixing a precedent of perspective and interpretation of the issue.

This case initiated when a class action was filed on August 2013 by a class comprised by 62 plaintiffs (owners of a golf club membership) before a Federal District Court. The class demanded compliance of the terms and conditions of the Golf Membership Agreement. An arbitration clause was included in such agreement; therefore any dispute arising out of such agreement was to be resolved through arbitration. The real problem lies on the lack of precedents addressing the arbitrability of classes' rights.

Without notifying the counterparty or giving right to the plaintiffs to submit their comments in regard to the existence of the arbitration agreement, the Federal District Court ruled it lacked jurisdiction to hear the case since the parties had agreed on arbitration. It is important to highlight two issues that took place: (i) none of the parties demanded the judge to turn the case over to arbitration since the judge decided its lack of jurisdiction without notifying the respondent, and (ii) the judge did not determine whether the classes' rights were part of the concept of arbitrability in Mexico. Therefore, the Federal District Judge should have not ruled lacking jurisdiction.³

After the class appealed the Federal Judge's decision, the Federal Appeals Court upheld the lower court's decision. On their last attempt to secure protection of their collective rights, the class filed an *Amparo* claim, claim that was attracted by the Supreme Court of Justice.

The Supreme Court of Justice decided on September 24th, 2014 to reverse the Federal Appeals Court decision and that of the Federal District Court⁴ on the grounds that: (i) notwithstanding the presence of an arbitral agreement, the Federal District Court cannot declare itself incompetent *ex officio* since the parties may have afterwards agreed to take the case before the courts. (ii) the fact that the legal relationship is one of the business-

³ In Mexico when one party brings the case before a judicial court and the agreement (base of the dispute) provides arbitration; it is essential, for the judge to turn the case over to arbitration, the request to do so by one of the parties involved. Article 1424 of the Commerce Code.

⁴ Supreme Court of Justice's findings brief is attached hereto.

consumer relationship, and (iii) when class's rights are involved, the Court cannot excuse itself just because there is an arbitration clause. The Supreme Court of Justice's findings orders the Federal Appeals Court to reverse its ruling and order the Federal District Judge to restore the judicial proceedings. Consequently, the incompetence of a court to hear a case cannot be argued only because an arbitration agreement has been set in a certain contract.

V. Arbitration and Amparo

The enactment of the new *Amparo* Act in 2013 provides the admissibility of an *Amparo* claim against acts of particulars equivalent to those of authorities. In order to be considered an authority under the *Amparo* Act, the following elements of the act must exist and prevail:

1. The act itself has to affect and modify the legal situation of the plaintiff ("Quejoso");
2. Such act has to be unilateral and binding;
3. The powers of the particular must be determined on a general law.

The dangers of an arbitrator being considered an authority under those terms is high, since the award affects and modifies the legal situation of the arbitration parties (respondent and claimant), it is decided unilaterally and is binding for all the arbitration parties.

However, recent decisions on this regard have shown that Courts will maintain the current criteria, that is, the arbitrator is not an authority under the *Amparo* Law terms.

VI. Conclusion

Even when Mexico's regulations regarding alternate dispute resolution have been considerably enhanced, specifically on the strengthening of the judicial public service known as alternate justice, efforts to implement those mechanisms into other areas, where citizen's attention is given, is still underway. The presence of arbitration clauses in standard contracts should be interpret as to the will of the parties to arbitrate their disputes related to individual rights, without waiving its right to seek judicial protection of its collective rights. It is expected and ideal for the Mexican government to kick off a national movement that boosts the use of these figures as public policy.

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RESUELVE CORTE ACCIÓN COLECTIVA RELACIONADA CON CLUB DE GOLF

La Primera Sala de la Suprema Corte de Justicia de la Nación (SCJN) resolvió el amparo directo 33/2014, a propuesta del Movimiento Ciudadano (MC).

El pretendido amparo directo denuncia la interposición de una demanda de acción colectiva individual homologada por parte del representante común de 60 adquirentes de membresías de un club de golf en contra de la persona moral con quien celebraron los contratos de membresía. Entre las pretensiones que la demandada demandó destaca el cumplimiento forzoso de las condiciones y términos contractuales originales y la declaración de nulidad de la cláusula que permite a la empresa demandada modificar unilateralmente los términos del contrato de adhesión. La autoridad de primera instancia declaró carecer de competencia para conocer del asunto, pues advirtió la existencia de una cláusula en los documentos de membresía que imponía una sumisión expresa a la competencia de un árbitro en la Ciudad de México.

La Primera Sala estimó incorrecta la declaración fija vez que dicha autoridad no puede hacer valer su incompetencia de oficio pues las partes, libremente y conveniente voluntariamente sometieron a la instancia judicial. Ademas pierde de vista que la relación entre los integrantes de la colectiva es que la parte demandada es una relación de consumo, la cual permite la aplicación de disposiciones que constituyen excepciones a las reglas generales establecidas en la legislación civil y mercantil con la finalidad de romper la simetría existente entre las procedimientos y las consumidores.

También determinó que la cláusula arbitral no puede ser el sustento para que la autoridad jurisdiccional de primera instancia incurra en incompetencia para no conocer de la acción colectiva. Lo anterior se debe a que se estaba privando a la colectividad consumidora del derecho a no establecer en el fondo constitucional para defender sus derechos como consumidores y, finalmente, se estaba condonando a que se rompiera la simetría existente entre procedimientos y consumidores en la cual ésta última generalmente es la parte débil.

Por tanto, el amparo fue concedido para el efecto de que el tribunal unitario responsable dege revisar sustento la sentencia reclamada que contenía la declaración de incompetencia y ordene al juez a emitir un nuevo auto inicial de juicio y continuar con la etapa de certificación establecida en el Código Federal de Procedimientos Civiles. Asimismo, se estableció que el juzgado federal tendrá que tener en cuenta que el asunto versa de una relación de consumo y por ende, debe aplicar el régimen de protección al consumidor regulado principalmente en los artículos 17 y 28 constitucionales y el Código Federal de Protección al Consumidor. Consecuentemente la cláusula arbitral contenida en el contrato que aquejado en su perte ser el fundamento para determinar carecer de competencia legal para conocer del asunto.

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ARBITRAJE EN MÉXICO: 2013-2014

REPORTE PARA EL GRUPO DE EXPERTOS EN ARBITRAJE DE 2022

Octubre 2014

*Francisco González de Cossío**

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Este reporte destaca ciertos desarrollos en México en materia de arbitraje para la reunión anual del grupo de expertos de NAFTA 2022.

Como se verá, en el periodo 2013-2014 se han generado desarrollos que son como regla positivos. Como excepción, existen áreas en estado de fluctuación que merecen atención con miras a asegurar que el resultado sea positivo. A continuación se explican.

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I. PERMISIÓN DEL ARBITRAJE EN LA REFORMA ENERGÉTICA

En diciembre 2013 se modificó la Constitución Federal para implementar un cambio total al régimen de hidrocarburos en México. Se trata de la reforma más importante en la materia en los últimos 80 años. El 11 de agosto de 2014 se emitió legislación secundaria, dentro de la cual destaca la *Ley de Hidrocarburos*. El artículo 21 de dicha ley permite *expressis verbis* pactar arbitraje, al establecer:

Tratándose de controversias referidas a los Contratos para la Exploración y Extracción, con excepción de lo mencionado en el artículo anterior, se podrán prever mecanismos alternativos para su solución, incluyendo acuerdos arbitrales en términos de lo dispuesto en el Título Cuarto del Libro Quinto del Código de Comercio y los tratados internacionales en materia de arbitraje y solución de controversias de los que México sea parte.

La Comisión Nacional de Hidrocarburos y los Contratistas no se someterán, en ningún caso, a leyes extranjeras. El procedimiento arbitral en todo caso, se ajustará a lo siguiente:

I. Las leyes aplicables serán las Leyes Federales Mexicanas;

II. Se realizará en idioma español; y

III. El laudo será dictado en estricto derecho y será obligatorio y firme para ambas partes.

El punto tiene es en general positivo (§a). Algunos aspectos merecen comentario, sin embargo (§b).

A. LO POSITIVO

El punto es una gran victoria. Se trata de una pieza legislativa importante. El que como regla se habilite la arbitrabilidad de la materia es loable, máxime el (intenso) debate que existió sobre la posibilidad de utilizar arbitraje. (El autor fue consultado al respecto en dos ocasiones por autoridades administrativas y legislativas.)

B. LO MEJORABLE

El régimen adoptado merece dos observaciones: (1) respecto de la no arbitrabilidad de la rescisión administrativa y terminación anticipada, y (2) si la arbitrabilidad de la materia es general o especial.

1. No arbitrabilidad de la rescisión administrativa y terminación anticipada

La inarbitrabilidad de la rescisión administrativa y terminación anticipada hace eco del estatus actual de la materia, que ha provocado discusión y un caso lamentable. En reportes anteriores he comentado este desarrollo. A su vez, lo he analizado en detalle en otros contextos.¹ En este reporte me limito a informar al Grupo Latinoamericano que la restricción continúa.

2. ¿Régimen de excepción?

El artículo establece la posibilidad de pactar arbitraje en contratos de exploración y extracción, exceptuando el régimen de rescisión administrativa. El que ello sea un régimen de excepción o la forma en que el legislador comunica que la materia es arbitrable *in genere* es un tema abierto, dado la forma en que se redactó. Aunque alude al contrato que constituye el corazón de la ley, de propiciarse la necesidad de usar otros detonará la duda sobre si ello es posible conforme a dicha *lex specialis*. Ante ello, hubiera sido conveniente simplemente indicar que la *materia* (*no un contrato* que versa sobre ella) es arbitrable. Por ende, se sugiere que tengan lugar pasos para defender la idea que la norma es en una

¹ ARBITRAJE Y CONTRATACION GUBERNAMENTAL, visible en www.gdea.com.mx/Publicaciones. ARBITRAJE, 4^a Ed., 2014, capítulo XVII, pp. 1193 *et seq.*

norma habilitante con impacto general. De decidirse que el régimen es de excepción, el paso será lamentable pues invitará ambigüedades y procedimientos paralelos.

II. ORDEN PÚBLICO

La saga del caso *Conpresa*² recientemente arrojó dos decisiones importantes y que merecen aplauso por varios motivos. A continuación me enfoco en orden público, para luego enunciar algunos puntos loables.³

A. DEFINICIÓN DE ORDEN PÚBLICO

La definición empleada en el caso *Conpresa* es loable por tres motivos: su contenido, lo alto del estándar y el método seguido.

1. Noción

La definición empleada es:⁴

... un laudo arbitral es contrario al orden público y ... por ende constituye una causal de nulidad, cuando la cuestión dilucidada se coloque más allá de los límites del dicho orden, es decir, más allá de las instituciones jurídicas del Estado, de los principios, normas e instituciones que lo conforman y que trasciende a la comunidad por lo ofensivo y grave del yerro cometido en la decisión. Un laudo de este tipo estaría alterando el límite que marca el orden público, a saber, el mecanismo a través del cual el Estado impide que ciertos actos particulares afecten intereses fundamentales de la sociedad. ...

la violación a los principios esenciales del Estado, que trasciende a la comunidad por lo ofensivo y grave del yerro cometido en la decisión. ...

el orden público se afecta cuando con motivo de la decisión se priva a la colectividad de un beneficio que le otorgan las leyes o se le infiere un daño que de otra manera no resentiría...

2. Adjetivos

El juez de nulidad no sólo adoptó una definición plausible, sino que le incluyó dos adjetivos que tienen por efecto elevar el estándar y hacerlo más estrecho:

Una vez sentado lo que ... debe entenderse por orden público, conviene decir además que *la violación ... debe ser evidente*, es decir, cuando se invoque dicha causal, el tribunal deberá llevar a cabo un *análisis restrictivo* de la supuesta violación y *sólo ante una patente violación podrá ordenar la nulidad*.⁵ ...

² Arbitraje ICC 11760/KGA, laudo de 23 de diciembre de 2011 (junto con addenda de 19 de abril de 2012).

³ Sentencia del Juez Décimo Primero de Distrito en Materia Civil del Distrito Federal del 11 de noviembre de 2013 que resolvió la demanda de nulidad en contra del laudo, expediente 485/2012 ("Sentencia Nulidad"). Sentencia del Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito de 3 de julio de 2014 que resolvió el amparo directo en contra de la Sentencia de Nulidad, expediente D.C. 4/2014 de ("Sentencia").

⁴ Sentencia, pp. 65-66.

⁵ Sentencia, p. 66.

- Seneca, p. 348.
Seneca, p. 347.
Es decir, la fracción II del II
Seneca, p. 343.
Seneca, p. 343.
Seneca, p. 348.
Seneca, p. 348.
Seneca, p. 92.
Seneca, p. 80.

...para que se actualice la nulidad de laudo por una violación al orden público, dicha
tragedia debe ser de tal manera grave y trascendente que constituya una verdadera
ofensa al orden jurídico interno del país en que se resuelva.¹³

...un laudo sería contrario al orden público cuando la decisión adoptada, como
unido, sea de tal manera grave y trascendente que choque frontalmente con el orden
jurídico establecido.¹⁴

Algunas de ellas no lo dicen; la violación al orden público debe ser evidente, patente, grave y notoria ... para considerar que un laudo arbitral es contrario al orden público ... tiene que acentuarase una violación más allá de las instituciones jurídicas del Estado ... mientras que existan otras que lo contradicen y que no se respeten las normas que rigen el orden público, esto es, el mecanismo a través del cual el Estado impide que ciertos actos particulares afecten intereses fundamentales de la sociedad.

“un mundo abierto es contrario a orden público y por ende constituye causa de novedad cuando la cuestión difundida se coloque más allá de los límites de dicho orden, es decir, más allá de las instituciones jurídicas del Estado, de los principios, normas e instituciones que lo conforman y que trasciende a la comunitad por lo intensivo y grave del error cometido en la decisión.”

El tribunal colegiado (de apelación) empleó otros adjetivos al caracterizar la sentencia atacada "verdaderamente grave y notoria". El tribunal colegiado repitió un criterio de la Suprema Corte de "justicia y lo sumario así:

En otros contextos utilizo la palabra "manífestista" y "paciente" para calificar el tipo de violación que existe en el orden público.
(entrevistas amistad)

... la violación al orden público debe ser evidente, no pueden autorizarse las cuestiones de fondo como si se tratara de una apelación en la que se revisa la legalidad de los trámites de del tribunal".

3. Método

El método seguido merece reconocimiento y aplauso. Las decisiones hicieron un análisis de la ley modelo de la UNCITRAL, (incluyendo sus trabajos preparatorios), su guía de implementación, y su digesto. Además, utilizó derecho comparado arbitral. Finalmente, citó a tres tratadistas arbitrales: Dyalá Jiménez,¹⁵ Jan Paulsson¹⁶ y Francisco González de Cossío.¹⁷

El que dichos tribunales hayan hecho dicho paso comunica mucho de la predisposición favorable del Poder Judicial mexicano hacia el arbitraje.

B. OTROS PUNTOS LOABLES

La Sentencia está plagada de determinaciones y aseveraciones atinadas y plausibles sobre derecho arbitral. Por ejemplo:

1. El arbitraje es de naturaleza contractual; convencional.¹⁸
2. El arbitraje es consensual.
3. Los tribunales arbitrales no son órganos de Estado. No son autoridades.¹⁹
4. La autonomía de la voluntad prima en el arbitraje.
5. Eco continuó que el juicio de nulidad no debe en modo alguno entrar al fondo del laudo.
6. Debido proceso no es orden público. (La reclamante argumentaba que la violación al deber de un proceso debido era también una violación al orden público. El juez esclareció que no existió violación al debido proceso. Y aunque hubiera existido, el concepto de nulidad era diverso al de orden público.)
7. Para que exista una violación a debido proceso, para que sea una causal de nulidad, debe ser “evidente”; “palmario”. En sus palabras:

el análisis del debido proceso para efectos de declarar la nulidad del laudo arbitral debe resultar *evidente*, es decir, debe probarse que la parte que se asiente afectada de manera notoria no tuvo oportunidad de probar ni alegar en el procedimiento arbitral o bien que en el laudo mismo sus pruebas de ningún modo se tomaron en cuenta; es decir, el quebranto al debido proceso debe ser *palmario*.²⁰ (énfasis añadido)

¹⁵ En el contexto del tema relacionado con la (posible) renuncia al juicio de nulidad.

¹⁶ En el contexto de la noción de orden público. La obra citada fue: *El orden público como criterio para negar el reconocimiento y la ejecución de laudos arbitrales*, en *El Arbitraje Comercial Internacional*, Guido S. Tawil y Eduardo Zuleta, (Eds.), Adeleido Perrot. (Sentencia, p. 343.)

¹⁷ Sentencia, pp. 295 y 345. Las citas fueron al ensayo *Hacia una Definición Mexicana de orden público* y el amparo 755/2011 donde la Suprema Corte de Justicia de la Nación uso un artículo de dicho autor publicado en la revista del Club Español del Arbitraje para fijar un criterio respecto de la definición de orden público.

¹⁸ El tribunal colegiado (de apelación) dedicó todo un apartado previo, como exordio, para indicar la naturaleza del arbitraje. (pp. 275 *et seq.*) Al hacerlo, hizo hincapié en su carácter consensual, convencional, el efecto vinculante del laudo “como si hubiera resuelto un juez del Estado”.

¹⁹ Sentencia, p. 142.

²⁰ Sentencia, p. 108-109.

8. El que el laudo impacte dinero *público*, gasto *público*, no lo implica violación al orden *público*.²¹

C. APORTACIONES A DERECHO ARBITRAL.

La Sentencia está plagada de aportaciones plausibles a derecho arbitral. Por ejemplo:

1. Énfasis en que la intervención judicial debe ser mínima; y nunca involucra meterse en fondo. En sus palabras: “El control judicial del procedimiento arbitral no es una vía para acceder a una instancia que revise integralmente la controversia resuelta por el tribunal arbitral”.²²
2. La negativa a impugnar un laudo parcial tiene por efecto que no pueda recurrirse su contenido en el juicio de nulidad del laudo final.²³ Se torna en obligatorio pues se entiende que renunció a su derecho a impugnar conforme al artículo 1420 del Código de Comercio.²⁴ El Tribunal Colegiado hizo eco del punto.²⁵
3. La aclaración del laudo forma parte del laudo;
4. Motivación del laudo no es orden público;²⁶
5. La renuncia contenida en el artículo 28(6) del anterior Reglamento ICC (39 del actual, 2012) no significa renuncia al juicio de nulidad.
6. El artículo 1420 del Código de Comercio (equivalente al 4 de la Ley Modelo de UNCITRAL, y 39 del reglamento ICC) tiene el efecto procesal de una preclusión. Un consentimiento procesal o pérdida de derechos procesales por falta de reclamo o paso del tiempo.²⁷
7. Reconocimiento y Ejecución: definió atinadamente lo que es el “reconocimiento” y la “ejecución” de un laudo.²⁸

D. TEMAS DISCUSIBLES

La Sentencia toca (mas no abunda sobre) algunos aspectos profundos e interesantes que merecen ser comentados:

1. Parcialidad de un perito *puede* actualizar la causal de debido proceso.²⁹ Sin embargo, en el caso no ocurrió pues el tribunal arbitral que conoció de la objeción decidió que no existía tal parcialidad, por lo que “no existe razón para afirmar que en ese aspecto se dejó sin defensa a la accionante [Pemex]”.³⁰

²¹ Sentencia, p. 197.

²² Sentencia, p. 67.

²³ Sentencia, p. 53.

²⁴ Sentencia, p. 206

²⁵ Sentencia, pp. 315-316.

²⁶ Sentencia, pp. 221.

²⁷ Sentencia, p. 281.

²⁸ Sentencia, p. 283-284.

²⁹ Artículo 1457(1)(b) del Código de Comercio.

³⁰ Sentencia, p. 213.

2. El alcance de la motivación de un laudo. Al respecto, razonó que:

... esta juzgadora advierte que el laudo ... contiene las razones por las cuales los árbitros estimaron procedentes las condenas que las partes sometieron a su potestad, de ahí que no puede determinarse que no esté motivado ...

... revisar si la motivación expresada es exhaustiva y adecuada para sostener las condenas, es una cuestión que no está permitida pues ello equivaldría a analizar la legalidad de lo decidido.³¹

III. ÁRBITRO COMO AUTORIDAD PARA EFECTOS DEL AMPARO

La improcedencia del amparo en contra del árbitro o sus actos era aceptada y clara tanto en derecho escrito, derecho jurisprudencial y la práctica hasta abril 2013. A la luz de la nueva ley de amparo (2 de abril de 2013),³² se ha revivido la discusión sobre el punto. A continuación se comenta el régimen y los desarrollos.

A. RÉGIMEN NUEVO QUE INVITA DUDA

La fracción II del artículo 5 de la nueva Ley de Amparo establece:

La autoridad responsable, teniendo tal carácter, con independencia de su naturaleza formal, la que dicta, ordena, ejecuta o trata de ejecutar el acto que crea, modifica o extingue situaciones jurídicas en forma unilateral y obligatoria; u omita el acto que de realizarse crearía, modificaría o extinguiría dichas situaciones jurídicas.

Para los efectos de esta Ley, los particulares tendrán la calidad de autoridad responsable cuando realicen actos equivalentes a los de autoridad, que afecten derechos en los términos de esta fracción, y cuyas funciones estén determinadas por una norma general.

Del precepto citado, tres cuestiones merecen comentario:

1. El criterio “modifique situaciones jurídicas en forma unilateral y obligatoria”;
2. Los ‘particulares’ serán considerados ‘autoridad responsable’ cuando realicen “actos equivalentes a los de autoridad”; y
3. El requisito “funciones determinadas por una norma general”.

1. Modificación de situaciones jurídicas en forma unilateral y obligatoria

El primer párrafo cristaliza en ley el criterio conocido como ‘autoridades’ *de facto*. El paso obliga la pregunta: ¿actualiza el árbitro dicha hipótesis normativa? Existe diferencia de opinión. Hasta recientemente, la respuesta del Poder Judicial había sido que el árbitro no puede ser considerado autoridad—inclusive *de facto*.³³ Sin embargo, dado el ánimo garantista de la reforma, algunos cobijaban sospechas.

³¹ Sentencia, p. 221.

³² Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, publicada en el Diario Oficial de la Federación el 2 de abril de 2013 (“*Ley de Amparo*”).

³³ El motivo esencial es que se trata de un ente privado, producto de la libertad contractual. Concebir como *público* lo que en esencia es *privado* es desnaturalizarlo.

2. Actos equivalentes a los de autoridad

El segundo párrafo del artículo 5.II de la Ley de Amparo introduce una novedad: la posibilidad que entes *privados* puedan ser considerados como ‘autoridades responsables’ para efectos del juicio de amparo.³⁴ Ello ha generado diferencias sobre si el criterio se cumple por el árbitro. Mientras que algunos consideran que la labor de juzgar que hace un árbitro es ‘equivalente’ a la del juez nacional, otros distinguen las actividades *inter alia*, en base a la fuente, alcance y naturaleza de la jurisdicción ejercida.³⁵

3. Funciones determinadas en norma general

El criterio “funciones determinadas por una norma general” ha generado dudas. Tomado *ad litera*, incluiría a los árbitros. Sin embargo, obliga la pregunta: ¿qué actividad no lo actualiza? Toda la actividad humana tiene (directa o indirectamente) un soporte en una norma. Luego entonces, el poder judicial necesitará zanjar. Debe hacerse labor para cerciorar que la figura del árbitro quede fuera del radio de acción de la misma.

B. IMPLEMENTACION JUDICIAL.

Recientemente ha habido desarrollos sobre este tema, tanto lamentables como plausibles.

1. Lamentables

En un par de casos se ha sostenido que el amparo puede proceder en contra de un árbitro. En mayo de 2013 un juez admitió un juicio de amparo en contra de un árbitro.³⁶ Es la primera vez que ello ocurre.³⁷ Aunque el juicio está pendiente, tres cosas merecen ser resaltadas:

- i) El acto reclamado fue el laudo arbitral;
- ii) La decisión (*auto*) carece de análisis sobre la procedencia del amparo;
- iii) El recurso presentado por el árbitro (*queja*) fue rechazado por considerar que no tiene legitimación procesal para hacerlo.³⁸

Lo anterior merece análisis, no sólo por que el resultado parece incorrecto, sino además porque es parte del acomodo que tendrá lugar en el Poder Judicial dado que se trata de una nueva ley con paradigmas novedosos.

³⁴ El desarrollo merece mucho comentario que aquí no hago. En otro contexto lo he hecho: GARANTISMO Y ARBITRAJE: UN FALSO DILEMA, en RETOS Y PERSPECTIVAS DEL DERECHO MEXICANO DEL SIGLO XXI, ¿COMO DEBE EVOLUCIONAR?, Colección Foro de la Barra Mexicana, Colegio de Abogados, A.C., Ed. Themis, México, D.F., 2012, p. 1089; y GARANTISMO Y ARBITRAJE: UN FALSO DILEMA, Post Scriptum, (visibles en www.gdea.com.mx/publicaciones/arbitraje).

³⁵ Ver artículo EL ÁRBITRO NO ES AUTORIDAD que se adjunta a este Reporte.

³⁶ Exp. 434/2013-III. Auto del 22 de mayo de 2013.

³⁷ Para ser exactos, existió un antecedente, pero explicable más como un error judicial que reflectivo de una tendencia. Además, no ocurrió en base al nuevo derecho de amparo.

³⁸ Sentencia de Recurso de Queja Q.C. 67/2013, 8 de julio de 2013.

A su vez, en el contexto del juicio de ejecución de un caso ICC reciente, se admitió el amparo en contra de árbitros. (El caso se encuentra *sub indice* y ha sido atraído a la Suprema Corte de Justicia de la Nación para definición.)

2. Plausibles

Se observa una tendencia a no considerar al árbitro como autoridad. Existen casos que han sostenido que el árbitro no es autoridad, generando criterios plausibles. Además, ministros importantes de la Suprema Corte de Justicia de la Nación han sido activistas en considerar que el árbitro no es autoridad.

Un caso reciente, se sostuvo que:³⁹

“Lo anterior pone de manifiesto que al árbitro privado no se le pueda considerar autoridad responsable para efectos del juicio de amparo, al no contar con imperio por sí mismo para poder hacer cumplir sus determinaciones.”

A su vez, en otro caso reciente se emitió el siguiente criterio:⁴⁰

LAUDO EMITIDO POR ÁRBITRO PARTICULAR, ES INCOMPETENTE EL TRIBUNAL COLEGIADO DE CIRCUITO PARA CONOCER DE ÉL EN EL AMPARO DIRECTO. De las fracciones III, inciso a) y V, inciso c), del artículo 107 de la Constitución Política de los Estados Unidos Mexicanos, así como en el diverso 170 de la nueva Ley de Amparo, se advierte que los Tribunales Colegiados de Circuito son competentes para conocer de los juicios de amparo directo, los que sólo proceden contra sentencias definitivas, laudos y resoluciones que le ponen fin al juicio, dictadas por tribunales judiciales, administrativos o del trabajo. En ese contexto normativo, la validez de un laudo emitido por un árbitro particular no puede dilucidarse a través de dicho medio de defensa, al tratarse de una decisión que no es emitida por los tribunales de referencia, pues no es suficiente para estimar la competencia de dichos órganos, que la decisión señalada como acto reclamado tenga la denominación de laudo, ya que tal es la noción que corresponde a las resoluciones definitivas que emiten los tribunales del trabajo, y esa naturaleza no corresponde al árbitro que emitió el acto que se reclama en un procedimiento arbitral pactado por las partes, pues un requisito sine qua non para estimar la posibilidad de que en el amparo directo pueda cuestionarse la regularidad de ese tipo de actos, es que sean emitidos por tribunales del Estado y no por árbitros privados. Por ende, en estos casos el Tribunal Colegiado de Circuito, con fundamento en el artículo 45 de la Ley de Amparo, debe declarar su incompetencia y remitir el asunto al Juez de Distrito que corresponda, quien deberá pronunciarse sobre la posibilidad de que el árbitro, como particular que emite un acto equiparable al de autoridad, pueda ser considerado como responsable para efectos del juicio de amparo.

Aunque merece refinación, en términos generales el criterio es plausible.⁴¹

³⁹ Queja 121/2014, sentencia de 28 de agosto de 2014, p. 72.

⁴⁰ Amparo directo 384/2013, 8 de agosto de 2013. Unanimidad de votos. Tesis: I.5o.C.76 C (10a.), Registro 2007320. Décima Época, Tribunales Colegiados de Circuito. Estoy en deuda con Claus von Wobeser y Adrián Magallanes por haber compartido este criterio.

⁴¹ Existe algunos aspectos a pulir, que abordo en *Arbitraje*, Ed. Porrúa, 4a ed., 2014 (capítulo XV). En esencia, puede invitar confusión dada la redacción del rubro y su primera porción del criterio. Por ejemplo, podría leerse en el sentido que el juicio de amparo que procede es el *indirecto*, no el *directo*. La interpretación no sería la mejor. Después de todo, el criterio es atinado en que sostiene que el juicio de amparo no procede en contra de los laudos arbitrales al razonar que “...la validez de un laudo emitido por un árbitro particular no puede dilucidarse a través de [juicio de amparo] al tratarse de una decisión que no es emitida por los tribunales de referencia [tribunales estatales; colegiados]...”

C. COMENTARIO

El desarrollo ha generado crítica—en ocasiones, exagerada. Deseo proponer que, aunque es necesario evitar que se utilice para mermar la eficacia del arbitraje, la crítica debe *entender* y evitar *radicalizar*.

El desarrollo debe *entenderse* antes de *criticarse*. La ampliación textual de la noción ‘autoridad responsable’ es positiva. Busca ampliar el radio tutelar de los derechos humanos brindando la posibilidad de sujetar a control constitucional actos que podían colarse por las ranuras de la definición anterior.⁴² Para ello, necesitamos entender la *raison d'être* del desarrollo y—en base al idioma del derecho de amparo—hacer ver que no procede.⁴³ *Esto es sutil pero importante.* Mucha de la defensa de la figura ocurre desde el perspectiva arbitral, mas no constitucional. Como resultado, con frecuencia detecto un diálogo de sordos carente de resultados constructivos.

La critica exagerada y radical debe erradicarse. Escucho voces de colegas que pronostican el fin del mundo arbitral. La apreciación no sólo es técnicamente incorrecta y exagerada, sino que además invita el resultado negativo—pues los detractores afilarán sus dientes —e incrementarán esfuerzos— ante tal posibilidad.

⁴² El artículo 11 de la Ley de Amparo de 1936 definía a la ‘autoridad responsable’ como: “la que dicta, promulga, publica, ordena, ejecuta o trata de ejecutar la ley o el acto reclamado.” Bajo dicha definición se generaron muchos criterios que buscaban resolver dudas generadas por áreas grises. El ‘árbitro’ siempre quedó fuera de la hipótesis.

⁴³ El autor ha realizado esfuerzos en dicho sentido (*vid* ensayos el pies de pagina 6 y 7, así mismo, [EL DERECHO HUMANO ARBITRAL: EL DERECHO FUNDAMENTAL A CONTAR CON PROCESOS ARBITRALES LIBRES DE INTERFERENCIA JUDICIAL y LO LÍDICO DEL ORDEN PÚBLICO](http://www.gde.mx/publicaciones/arbitraje) (www.gde.mx/publicaciones/arbitraje).