

# Recent developments relating to the use of mediation to resolve international disputes in Canada

Presented to the Advisory Committee on Private Commercial Disputes ( Article 2022 ,NAFTA) by Professor Jeffrey Talpis<sup>1</sup> held in Mexico City on August 28,2015

## Introduction

Twenty years ago this committee acknowledged what distinguished scholars and practitioners had argued<sup>2</sup> that the principal obstacles to the use of médiation to résoudre civil and commercial disputes arising from an international contract was the lack of a legal framework to enforce agreements to mediate and the settlements reached through mediation that will guarantee:

- **The enforceability or effectiveness of agreements to mediate.** This would ensure that competing dispute procedures, litigation or arbitration, no matter where are excluded or can only be instituted after a good faith attempt at mediation has failed and
- **The enforceability of the settlement reached through mediation.** The result must be final and enforceable globally like an arbitral award under the NY Convention.

Since then in spite of the lack of a legal framework in the form of a binding Convention, the first problem has somewhat diminished<sup>3</sup>,in particular as a result of the increased use and recognition of the multi-tiered approach .

What has happened in Canada, since the adoption of the UNCITRAL MODEL Law of 2002 ?

## 1. The International Commercial Mediation Act (2005)

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<sup>2</sup> See,in particular Christian BUHRING-UHLE,“Arbitration and Mediation in International Business,Kluwer law International,1996 ISBN 9041102426,p17 to 37.

The Uniform Law Commission of Canada adopted the Uniform Act on International Commercial Mediation in 2005 .Its purpose was to provide a model Implementation act to Provinces and Territories wishing to implement the UNCITRAL Model Law on International Commercial Conciliation upon which it is based.

As evidenced by the 2015 document prepared by the Justice Department, “Activities and Priorities of the Department of Justice in Private International law “ , the Department considers it a priority to adopt the 2002 UNCITRAL Model Law on International Commercial Conciliation, via the adoption of the Uniform Act or otherwise.

A few comments on the Act:

The term conciliation was changed to “Mediation” to accommodate Canadian Terminology.

According to Article 2 of the Act it applies to International Commercial Mediation. However the Uniform Act gives jurisdictions the option of applying the Uniform Act to (1) international mediations only or (2) international as well as domestic mediations.

There is a definition of International mediation in accordance with article 4, which exists where:

- at the time of the conclusion of the agreement to mediate (which could be at the time of the conclusion of the underlying contract or when a dispute arises) the parties have their place of business in different States ; or
- their places of business are different from the State in which a substantial part of the obligations of the commercial relationship is to be performed or with which the subject-matter of the dispute is most closely connected.

Jurisdictions wishing to apply the Act to both would delete the term “international” in the title as well as subsections 4 and 5 which define international mediation, which definition is based on paragraph 1(4) of the UNCITRAL Model Law.

When the act applies to international mediation, there remains some uncertainty as to the law governing the various elements of the mediation.

## **Enforcement of agreements to mediate under the Uniform Act (10)**

Following the recommendation of the Canadian Working Group , the Act rejected the idea of the providing for the enforceability of an agreement to mediate stipulated in the underlying contract , which would have required completion or termination of a mediation before a party was permitted to bring arbitral proceedings <sup>4</sup>

Article 10 of the Uniform Act represents the closest approach to an enforceability doctrine ,stipulating that where the parties have agreed not to proceed with arbitral or judicial proceedings until a mediation is terminated, neither the arbitrator or judge may proceed (multi-tier clause)

In addition in the case of an international mediation, there is some uncertainty as to the law governing the various elements of the agreement to mediate, since the law governing the validity of the agreement to mediate, its enforceability and execution are not treated in the Uniform Act or for that matter in the Model law upon which the uniform Act is based.

As such, the agreement to mediate must firstly be valid and enforceable under the law governing the contract or even perhaps as a separate contract under the forum's conflict rule, and then article 10(1) applies as a matter of procedure..

## **Enforcement of the settlement agreement under the Uniform Act (11)**

Neither the UNCITRAL Model Law of 2002 nor the Canadian Uniform Act of 2005 defines the notion of settlement agreement , which leaves

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<sup>4</sup> Working group position , p 22.

open the question as to whether it is defined according the domestic law of the forum or forum law from an international perspective .The latter is the better approach.

To the extent the mediation is international and a foreign, law governs the mediation, should the same law should govern the settlement or should another law apply ?

The law governing the settlement should also govern the effects of any settlement reached through mediation, including in particular its res judicata effect and its enforceability. However to the extent the agreement is enforceable under the foreign law, there remains the uncertainty as to the procedure for the enforcement by the enacting court.

The chosen method was a simple one, which provides that the agreement is binding on all parties and it may be registered on application to a court with notice to all parties .Once registered it is enforceable as if it were a judgment of that court. This seems to go further than a modification to the first contract which is the general view in common law jurisdictions.

However it is not clear whether or not article 11 applies where the settlement was confirmed by a court i.e was a judicial transaction ? For example, where the foreign law governing the settlement agreement provides court annexed conciliation schemes, does the simplified mechanism of article 11 apply in lieu of the rules for recognition and enforcement of foreign judgments?

Where under the foreign law governing the settlement, there has never been judicial confirmation of its enforceability , there might be some additional condition for enforceability, such as being notarized Does the simplified regime under article 11 apply without any procedure determining the validity and enforceability of the settlement under the foreign law ? Although nothing is indicated ,some proof of applicable law and its effects would seem necessary before the application of the simplified regime .

In either situation, it is not clear what type of defences are available to recognition and enforcement under the enacting Province.

## **2. Adoption of the Uniform Act in Canada**

The first province to adopt the Model Law via the Uniform Act was the province of Nova Scotia. The Act is entitled “An Act Respecting Commercial Mediation”<sup>5</sup>

Although nothing excludes the Act from being applicable to international mediation, contrary to the Uniform Act, there is no definition of an international mediation, although there is reference to international sources in article 6.

The statute enacts the limited enforceability doctrine of the agreement to mediate via a multi-step provision in article 14, as provided under the Uniform Act and Model Law. Given the silence under the Act where the mediation is international, the above mentioned comments apply.

The second province to adopt the Uniform Act was Ontario. In 2010 the Ontario Legislature adopted the “Commercial Mediation Act”<sup>6</sup> which did not restrict its application to international mediations, although it did not incorporate the definition of international arbitration under the Uniform Act.

According to Article 5, (a) under the rubric “conflict of law, the Act is not to apply to the extent that the Act is inconsistent with the requirements of another Act. Although intended to refer to the domestic acts in the law of Ontario, it would seem to imply that a foreign law may govern the mediation in lieu of the provisions of the Act.

My comments concerning the enforcement of the agreement to mediate under the Uniform Act apply to article 11 where the mediation is international and governed by a foreign law.

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<sup>5</sup> NS 2005,c 36,s.1

<sup>6</sup> S.).2010 c.16,Schedule 3

Article 13 (2) is more explicit about the conditions of enforcement of the settlement reached through mediation, allowing a party ,if necessary , to apply to a judge for judgment on the terms of the agreement or apply to the court for an order authorizing the registration of the settlement agreement with the court.

Yet the same uncertainty in the case of an international mediation applies as indicated in the above comments to the Uniform Act.

Although it remains uncertain, I would assume that the Ontario Act has chosen the simplified procedure (registration or Court) to enforce a cross border settlement which has been homologated by a foreign court.

### **3. Quebec: Recent developments :update and trends**

#### **A. Domestic mediation**

There is a new Code of Civil Procedure in Quebec,<sup>7</sup> which puts the prevention and resolution of disputes by alternative methods at the forefront ,encouraging parties to consider these methods before going to court.

One would have thought this noble beginning would have led the Legislature to adopt rules favouring domestic and international mediation especially given the stated obligation for the parties to consider private prevention and resolution processes before referring their dispute to the courts.

Unfortunately it only applies to domestic mediation with the result that in the case of an international mediation the new rules apply to the extent Quebec law applies under the forum's conflict of law rules.

#### **Agreements to mediate**

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<sup>7</sup> An Act to establish the New Code of Civil Procedure,S.Q.2014,c.1,en force January 1,2015.

The legislator adopted a timid approach to the enforceability of mediation agreements.

Specifically, in accordance with article 7 ,participation in a private dispute method of prevention or resolution ,**other than arbitration** ,does not constitute a renunciation to proceed in court.

The stated objective being to put private dispute resolution at the forefront clearly applies to arbitration , but not to mediation.

One would have thought that given the objective of furthering the increasing use of mediation to resolve civil and commercial disputes, the Quebec legislator would have treated agreements to mediate as agreements to arbitrate rendering them both enforceable.

To this end, they could have modified paragraph 1 of article 7 , by adding to the text, **other than by arbitration or mediation** and a similar modification to article 622.

The failure to declare that agreements to mediate are enforceable is reinforced by article 622, *a contrario*, as the binding effect is only provided for the agreement to arbitrate.

Alternatively they could have adopted article 13 of the UNCITRAL Model law ,applicable to both domestic and international mediations as provided by the Uniform Act ,and adopted by the Nova Scotia and Ontario legislators

Given the stated philosophy to treat alternative methods according to the same objective the legislator contradicts its own stated logic.

Arguably an agreement to mediate ,whether it constitutes a stand-alone clause or as a condition precedent to a more formal procedure , should be enforceable as a matter of contract and sanctioned by the courts. Yet uncertainty in doctrine and under the cases still remains.<sup>8</sup>

Resistance by the Legislature to hold the parties to what they have agreed upon by legislation generally flows from three misconceptions:

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<sup>8</sup> See Corporation Inno-Centre du Quebec c Media Opti Rythmix (2012) QCCQ 8980.

First , the courts cannot order a party to participate in a mediation. However , they can award contractual damages, or an injunction;

Second, enforcing an agreement to mediate is futile because the parties may never agree. The futility doctrine thus rests upon a fundamental misconception about the agreement which is only to enter into a process without necessarily guaranteeing its success..

Thirdly the voluntary nature of mediation suggests that the parties must continue to agree to the procedure and that the original agreement is ineffective if one of them changes his mind when a dispute arises.

In Quebec, as in some other provinces there are other factors that reduce the recourse to mediation and these are present whether the mediation is domestic or international .For example:

Under the Civil code, there are mandatory rules which prohibit resolutions by mediation.

Furthermore , in Quebec as in other Canadian Provinces<sup>9</sup> ,the need to begin an ADR procedure is mitigated because once litigation has begun, there now exists at all levels of the judicial system, Court of Quebec, Superior Court and Appeal Court , a compulsory Conference (CRA) under the auspices of a judge who will try to push parties to settle their dispute.

Although the judge is not really a mediator, not trained as such, and is not embodied with the particular skills to guide parties to take into account their common interests, this has not been sufficient to overcome a desire to at least attempt this procedure as a first step, instead of mediation. This incentive is significant , especially since contrary to mediation, the service is free, judges are skilled at analysing and interpreting legal issues and because their views carry

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<sup>9</sup> In Quebec, art.161-165 New Code of Civil Procedure ,see *Kosko v Bijimine* (2006) QCCA 671;In Saskatchewan, see *Condessa Z Holdings Ltd. v Rusnak et al* (104 D.L.R.(4<sup>th</sup>) 96(1993,S.J.No 219;In Alberta, the procedure is called J.D.R , Judicial Dispute Resolution; See *J. W. Abernethy Management & Consulting Ltd.v 705589 Alberta Ltd .and Trillium Homes. Ltd.*(2005)A.J.370,2005ABCA 103.



weight with parties who are reluctant to settle. As a result this has clearly been an obstacle to the increased resort to mediation to resolve civil and commercial disputes in Quebec.

### **Enforcement of settlement agreements**

Essentially, transactions reached through mediation or otherwise are treated in the same way. There are really two issues: the *res judicata* effect of the transaction and its enforceability.

In Quebec, under its domestic law, there is a special contract known as a transaction (Article 2631 C.c.Q.). If the settlement qualifies as a “transaction”, which it usually will, it has the *res judicata* effect and precludes any subsequent proceedings between the same parties in the same matter. This is so whether or not the settlement was reached in the context of litigation. Due to the *res judicata* effect, the transaction is analogous to a judgment, in that both put an end to the dispute.

Where the settlement does not qualify as a transaction, the *res judicata* effect has to be argued successfully in court

As for the question of enforcement, a court must homologate the transaction before it can be enforced (Article 2633 C.c.Q.). As the transaction originates from the will of the parties, its juridical nature does not change by virtue of this requirement of homologation. The procedure is simplified and mirrors, with the requisite adaptations, the homologation of arbitral awards.

### **B. International mediation in Quebec**

In the Province of Quebec, there has been no modification to the private international law governing mediation of disputes arising out of international contracts

Nor is there a definition of international mediation;

There are therefore no conflict rules governing the law applicable to the validity and enforceability of an agreement to mediate and enforceability of a foreign settlement or transaction reached through mediation. As a result, under Quebec law we need to turn to general principles to resolve conflicts that may arise.

### **1. Enforceability of agreements to mediate:**

Party autonomy should allow the parties to determine the law applicable to the substantial validity and effects of an agreement to mediate, subject to the procedural rules of the forum as in all matters of specific performance.

### **2. Enforceability of foreign transactions/settlements -**

There are no articles governing the enforceability of transactions or settlements reached through mediation.

Where there has been a foreign decision declaring a transaction to be enforceable, article 3163 C.c.Q. assimilates the foreign transaction to a judicial decision.

Taking into account the international orientation of book X on private international law of the Civil Code, the expression judicial transactions should be given a broad interpretation and include foreign settlements which do not qualify as a transaction under the domestic law definition in article 2631 C.c.Q.

Such a settlement /transaction may be declared enforceable in Quebec under the conditions for recognition and enforcements of foreign judgments, under article 3163 C.c.Q. Accordingly, under these conditions, no verification as to the law applied is authorized (art.3157 C.c.Q). In fact there is no reference to the conflict rules to govern the validity and effect of the transaction.

A new approach, styled the "recognition" doctrine, which is not yet endorsed by our courts and most of Quebec doctrine, by-passes in some cases the conditions for recognition and enforcement of foreign judicial transactions and would recognize the transaction itself and not the decision homologating it, including its *res judicata* and

enforceable effect, on the condition that the transaction is enforceable in the place of origin.

Where the foreign settlement was not declared enforceable at the place of origin and enforcement is sought in Quebec, article 3163,C.c.Q does not apply.

The transaction/settlement needs to be recognized and declared enforceable in Quebec ,either by way of declaratory judgment or on a motion to have it declared enforceable .In either case the court must determine firstly that it is valid as a transaction, that it has the res judicata effect and is enforceable under the foreign law governing the transaction<sup>10</sup> and then be declared enforceable under the law of the forum (Quebec law) .

Alternatively the court could mirror the rules concerning recognizing and enforcing arbitral awards which were not confirmed by a competent authority as under article 652 CCP et seq., although this is uncertain.

#### **4. Recent Initiative- UNCITRAL Working Group**

Seeing that one obstacle to the greater use of conciliation is that settlements reached through mediation are more difficult to enforce than arbitral awards, practitioners have recognized that the attractiveness of conciliation would be increased if the settlement reached through mediation enjoyed a regime of expedited enforcement or would for the purposes of enforcement be treated as or similarly to an arbitral award.

To that end, the United States has proposed that Working Group II develop a multilateral convention on the enforceability of international commercial settlement agreements reached through mediation, with

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<sup>10</sup> Where there has been a settlement under the foreign law governing the mediation, but the matters in dispute , appreciated individually are governed by other laws. In my view the law governing the settlement should determine this question even though separately the object thereof is governed by different laws.

the goal of encouraging conciliation in the same way that the New York Convention facilitated the growth of Arbitration.

The Convention would then provide that settlement agreements reached through conciliation are binding and enforceable subject to certain limitations (Similar to but not identical to Article V of the New York Convention as arbitral awards). This is now treated as a high priority.

Various legal and practical questions were discussed at the February 5,2015 meeting:

It was agreed that a Convention would provide a clear and uniform framework for facilitating enforcement in different jurisdictions.

It was agreed that the Convention should only introduce a mechanism to enforce international settlement agreements. Yet ,it remained to be discussed as to how to determine whether they are enforceable under the foreign law (if applicable) before the new mechanism . Specifically , is there a need for a procedure to prove that under the foreign law it is enforceable and then the simplified regime applies or should the Convention provide it is enforceable, and subject to a defence that someone can raise that it is not under the law governing the settlement (as under Article V of the New York Convention ?)

Whether or not the New York Convention should serve as a model was also discussed .

They also discussed whether there is the need for a definition of foreign or international settlement agreements as well as the definition of international for such purpose

**NAFTA 2022 ADVISORY COMMITTEE  
2014-2015 Report on U.S. Arbitration Developments<sup>1</sup>**

**I. U.S. COURT CASES**

**A. SUPREME COURT OF THE UNITED STATES**

The US Supreme Court has not issued any significant arbitration-related decisions in the current term. However, the Court did reject, without explanation, Argentina’s request that the Court consider again the *BG Group PLC v. Republic of Argentina* investment arbitration award that the Court addressed in a 2014 decision.<sup>2</sup>

**1. Pending, Petition, 2015 WL 5359805 (U.S. 21 October 2014)**

The Supreme Court granted review in *DIRECTV, Inc v. Imburgia*, a class action arbitration case<sup>3</sup> to be heard in the 2015–2016 term. *DIRECTV* challenges a California state court decision applying California law to invalidate an arbitration clause because it contained a class action waiver, contending that the decision is contrary to the Court’s precedent in *AT&T Mobility LLC v. Concepcion*. In *Concepcion*, the Court found that a state law invalidating arbitration clauses that contain class action waivers was pre-empted by the FAA’s directive that arbitration clauses be enforced as written (even in contracts of adhesion).<sup>4</sup>

**B. FEDERAL COURTS**

**2. Employers Insurance Co. of Wausau v. OneBeacon American Insurance Co., 744 F.3d 25 (1<sup>st</sup> Cir. 2014)**

**Roles of arbitrators and courts in determining gateway issues of arbitrability**

The U.S. Court of Appeals for the First Circuit held that the preclusive effect of a prior arbitration award on pending arbitration proceedings is a matter for arbitrators to decide and that the “broad agreement among the circuit courts that the effect of an arbitration award on future awards . . . is properly resolved through arbitration.” This holding came in response to a petition by the defendant to preclude an arbitration issued by the plaintiff of the same claim that was previously arbitrated and which the plaintiff lost against a different reinsurer, pursuant to a materially identical contract.

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<sup>1</sup> This report is derived from numerous reports on U.S. ADR legal developments produced by the “Year-in-Review,” an annual publication of the ABA/Section of International Law, various dispute resolution publications, and law firm, ADR practitioner and provider newsletters.

<sup>2</sup> See 2013-2014 Report on U.S. Arbitration Developments, NAFTA 2022 Advisory Committee, *BG Group Plc v. Republic of Argentina*, 134 S.Ct. 1198 (2014) 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.

<sup>3</sup> See other class action cases addressed by Lower Courts below.

<sup>4</sup> See 2011-2012 U.S. ADR Development Report, NAFTA 2022 Advisory Committee, for a summary of *AT&T Mobility LLC v. Concepcion*.

3. *Katz v. Cellco Partnership, No. 14-138 (L), 2015 WL 4528658 (2d Cir. July 28, 2015)*

**A stay of proceedings—rather than a dismissal of the action—must be entered when all claims have been referred to arbitration and a stay has been requested**

The U.S. Court of Appeals for the Second Circuit held that a stay of proceedings is “necessary” when all claims have been sent to arbitration and a stay has been requested. The Second Circuit relied upon the plain language of Section 3 of the FAA: “if any suit or proceeding be brought in any of the courts of the U.S. upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending...shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement...” This decision bars the entry of dismissal following an order compelling arbitration where certain limited conditions are met. In the process, it removes the opportunity for a plaintiff in the Second Circuit to immediately challenge the referral of its claims to arbitration in an effort to avoid the arbitration requirements of an agreement governing the relationship of the parties. Because the district courts have no discretion and must issue an interlocutory stay in these circumstances, a plaintiff must wait to challenge an order to compel arbitration until that process reaches its completion. This is an issue on which the Courts of Appeals are squarely divided. The Third, Seventh, Tenth and Eleventh Circuits have held or suggested that the proper course of action when a party seeks to enforce an arbitration clause in a proceeding in which all of the claims presented are arbitrable is to stay the proceedings, while the First, Fifth and Ninth Circuits have held that the district courts enjoy the discretion to dismiss. The issue is unresolved in the Fourth Circuit. The U.S. Supreme Court has yet to address this conflict.

4. *Opalinski v. Robert Half International Inc., 761 F.3d 326 (3d Cir. 2014)*

**Availability of class arbitration to be decided by an arbitrator**

The U.S. Court of Appeals for the Third District was asked to determine whether, in the absence of allocation in the contract, availability of class arbitration should be decided by the district court or left to an arbitrator. The Third Circuit held that the availability of class arbitration was a “question of arbitrability” to be decided by the court because it was a question of whose claims an arbitrator is actually authorized to arbitrate.

5. *Santoro v. Accenture Fed. Servs., LLC, 748 F.3d 217 (4th Cir. 2014)*

**Arbitrability of statutory claims**

The U.S. Court of Appeals for the Fourth Circuit applied the holding of *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012) to affirm a motion by *Accenture Federal Services, LLC* to compel arbitration, denying that an arbitration clause was unenforceable against the plaintiff because of a Dodd-Frank exception. The Fourth Circuit noted that, as the Supreme Court pointed out *in dicta* in *CompuCredit*, certain whistleblower claims brought under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) are not arbitrable. However, because the plaintiff was not bringing any Dodd-Frank whistleblower claims, all of his federal statutory claims were subject to arbitration.

6. *W.J. O’Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc., 765 F.3d 625 (6th Cir. 2014)*

**Res judicata non applicable to a party non-signatory to an arbitration agreement**

The U.S. Court of Appeals for the Sixth Circuit held that the indemnification claims brought by a subcontractor against a design professional were not part of the arbitration and not barred by res judicata. The court applied a technical approach to res judicata<sup>5</sup> based on the principle that a party cannot be forced to arbitrate a claim against another party with whom it has not agreed to arbitrate.

**7. *MediVas, LLC v. Marubeni Corp.*, 741 F.3d 4 (9th Cir. 2014)**

**Appealability of District Court orders compelling arbitration**

The District Court entered an order compelling arbitration with respect to certain claims and remanding the remaining claims to state court. The U.S. Court of Appeals for the Ninth Circuit held that an order compelling arbitration is not appealable when the District Court neither explicitly dismisses nor explicitly stays the court action during the arbitral proceedings. On appeal, the Ninth Circuit adopted a presumption that an order compelling arbitration but not explicitly dismissing the underlying claims stays the action as to those claims pending the completion of the arbitration. Thus, the district court's order was not final and appealable under Section 16(a)(3) of the FAA.

**8. *Martinez v. Carnival Corp.*, 744 F.3d 1240 (11th Cir. 2014)**

**Appealability of District Court orders compelling arbitration**

The U.S. Court of Appeals for the Eleventh Circuit was asked to decide whether the District Court's order compelling arbitration of a worker's action against a cruise ship owner was a final appealable decision, even though the District Court did not dismiss the case but closed it for administrative purposes. The Eleventh Circuit reasoned that "what matters is whether the case, in all practicality, is finished." The District Court dismissed as moot all other pending motions, and did not retain jurisdiction to confirm the arbitration award or to award attorneys' fees, hence, the District Court had nothing more to decide, and the order was final.

**9. *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014), cert. denied, 134 S. Ct. 2886 (2014)**

**Arbitrability of statutory claims**

Plaintiffs argued that arbitration agreements were unenforceable because they contained a waiver of their statutory right to file a collective action. The U.S. Court of Appeals for the Eleventh Circuit noted that the focus of its analysis must be on whether the statutory text contains a "contrary congressional command" that specifically precludes the arbitration of FLSA claims. The Eleventh Circuit held that claims brought under the FLSA are arbitrable because there is no "contrary congressional command" in the statute's text. Hence, the arbitration agreements' waivers of plaintiffs' right to file FLSA collective actions were valid and enforceable under the Federal Arbitration Act.

**10. *Clientron Corp. v. Devon IT, Inc*, Civil Action No. 13-05634 (E.D. Pa 2014)**

**US Court cannot enforce awards of non-signatory countries to the New York Convention**

An arbitral panel in Taiwan (before the Chinese Arbitration Association) issued an Arbitration Award in favor of Clientron, in the amount of US\$ 6,574,546.17. A Taiwanese court granted

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<sup>5</sup> Literally "a matter judged", *res judicata* is the principle that a matter may not, generally, be re-litigated once it has been judged on the merits.

Clientron's enforcement petition. Clientron also sought enforcement of the award in the United States under the 1958 New York Convention as well as under Pennsylvania's Uniform Foreign Money Judgment Recognition Act (UFMJRA). The District Court for the Eastern District of Pennsylvania held that Clientron could not seek enforcement under the NY Convention because the award was rendered in Taiwan, a non-signatory state; it further ordered that proceedings continue in respect of enforcement under the UFMJRA. The Court also held that it is irrelevant that Chapter 2 of the Federal Arbitration Act (FAA) does not mention the reciprocity reservation since Art. I (3) of the Convention functions as pre-clearance from the signatory states of the two optional provisions, reciprocity and the commercial reservation. When a state exercises one of these options by making such a declaration, as the U.S. did, this amendment becomes part of the original treaty under a principle of treaty interpretation. Thus, the Senate's declarations on reciprocity and commercial reservation became a part of the NY Convention.

**11. *United States Ex Rel. Hicks v. Evercare Hosp., Case No. 1:12-cv-887 (S.D. Ohio Jul 23, 2015)***

**Court requires employers to arbitrate underlying claims**

The District Court for the Southern District of Ohio, Western Division, compelled arbitration of three nurses' that sued a hospital in Ohio alleging that the hospital: i) engaged in Medicare fraud in violation of the False Claims Act (FCA) and ii) violated the anti-retaliation provisions of the FCA by retaliating against them for being whistleblowers. The court held that since the nurses were parties to arbitration agreements with the hospital that required them to arbitrate any dispute relating to employment including whistleblower and retaliation claims, they were also required to arbitrate their underlying claim that the hospital defrauded Medicare. However, since the nurses were acting as "relators" and seeking to recover damages on behalf of the U.S. government for the "qui tam" claim and since the government is not bound by the arbitration agreement between the hospital and the nurses has a stake in the outcome, following the arbitration award, the parties must either request that the government consent to the arbitrator's award or resume litigation of the qui tam claims.

**C. STATE COURTS**

**12. *Sanchez v. Valencia Holding Co., S199119, 2015 WL 4605381 (Cal. Aug. 3, 2015).***

**Class arbitration agreement is not unconscionable**

Plaintiff filed a class action lawsuit against Defendant alleging the Defendant violated the Consumer Legal Remedies Act by making false representations about the condition of an automobile sold. Defendant filed a motion to compel arbitration pursuant to an arbitration clause in the sale contract that had a class action waiver. The Supreme Court of California reversed a decision of the Court of Appeals, determining an arbitration agreement requiring the plaintiff to arbitrate was not unconscionable. The Supreme Court determined the class action waiver was enforceable and the arbitration agreement as a whole was not unconscionably one-sided in favor of Defendant.

**13. *Arrasola v. MGP Motor Holdings, LLC, 3D15-381, 40 Fla. L. Weekly D1837b (Fla. 3d DCA August 5, 2015)***

**Claims of unconscionability to be decided by an arbitrator**

The Florida Third District Court of Appeal was asked to consider whether a court or an arbitrator should decide if an automobile purchase agreement containing an arbitration provision was



abandoned or terminated by the parties and/or whether or not the arbitration provision itself was unconscionable. The Court held it was not for a court to decide, relying not on the terms of the arbitration agreement itself, but rather Fla. Stat. 682.02(3), which provides that “an arbitrator shall decide whether a contract containing a valid agreement to arbitrate is enforceable.” The Third DCA held that “claims of unconscionability, like the claims of abandonment or termination, may be presented to the arbitrator for determination.”

**14. *American Bankers Ins. Co. of Florida v. Tellis*, 2015 WL 3935260 (Ala. June 26, 2015).**

**Arbitration agreement in homeowner’s insurance policy is not unconscionable**

The Alabama Supreme Court held that an arbitration provision in homeowners’ insurance policy is valid and enforceable. The Court rejected the policyholders’ argument that they did not agree to the provision, holding that each manifested assent to the policies, including the arbitration provision, by accepting and acting upon the policies when they renewed coverage and paid premiums. The Supreme Court held that the insureds had a duty to read the policy, including the declarations page which indicated that the arbitration provision was contained in the policy. It also held that the Federal Arbitration Act compelled arbitration because the policies—issued to Alabama residents by a Florida insurer—affected interstate commerce. Finally, it rejected the claim of unconscionability, holding that arbitration would not be more costly to the policyholders because, according to the provision’s terms, the costs would be paid by the insurer and the arbitration proceedings would be conducted in the county where each policyholder resided.

**II. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE U.S.**

**15. *Comm’ns Imp. Exp. S.A. v. Congo*, 916 F. Supp. 2d 48 (D.D.C. 2013), rev’d 757 F.3d 321 (D.C. Cir. 2014)**

**Enforcement of foreign judgements that already enforce an arbitral award under the FAA**

The D.C. District Court dismissed an action brought to enforce a foreign judgment under D.C.’s Uniform Foreign-Country Money Judgments Recognition Act (D.C. Recognition Act) because the foreign judgment was itself the enforcement of an arbitration award. The U.S. Court of Appeals for the D.C. Circuit reversed the District Court decision and held that the FAA does not preempt parallel schemes for the enforcement of foreign judgments, even if those judgments are based on an underlying arbitral award.

**16. *In re Wal-Mart Wage & Hour Emp’t Practices Litig.*, 737 F.3d 1262 (9th Cir. 2013)  
**Parties’ ability to waive defenses to arbitral award confirmation and enforcement****

As part of a global settlement agreement with Wal-Mart, the parties agreed that any fee disputes among plaintiffs’ counsel would be resolved through “binding, non-appealable arbitration.” The U.S. Court of Appeals for the Ninth Circuit reasoned that a non-appealability clause in an arbitration agreement that eliminates all federal court review of arbitration awards, including review under §10 of the FAA, is unenforceable. The Ninth Circuit reasoned that allowing parties to waive the FAA’s grounds for vacatur, “would not only run counter to the text of the FAA, but would also frustrate Congress’s attempt to ensure a minimum level of due process for parties to an arbitration.”

**17. *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela, No. 14-8163-cv*  
(S.D.N.Y. 2015)**

**Recognition and Enforcement of an ICSID arbitral award**

Venezuela sought modification of a prior order of the court which confirmed Plaintiff's \$1.6 billion ICSID arbitral award, arguing that the post-judgment interest rate should be modified to reflect the rate provided under 28 U.S.C. §1961, and not the higher rate of 3.25% compounded annually as provided in the ICSID award. The U.S. District Court for the Southern District of New York denied Venezuela's request for a modification and held that a federal court may look to forum state law on the recognition and enforcement of foreign judgments to convert an ICSID arbitration award into a Federal court judgment and enforce the award. It also held that the award creditor can start enforcement proceedings on an *ex parte* basis in accordance with New York law. The court said that the case law supports looking to the law of the forum state, New York, to fill the procedural gap in Section 1650a as to the manner in which a recognition proceeding are to occur. In the court's view, the *ex parte* procedure did not affect the substantive rights of Venezuela, especially because: (1) the merits of an ICSID award cannot be reviewed at the enforcement stage; and (2) the state could resist attachment of its assets even if the award was recognized on an *ex parte* basis. Under the ICSID Convention, U.S. courts are "required to recognize all aspects of awards issued by ICSID" and cannot "undertake substantive review of such awards." Furthermore, the court added, it is not empowered to review or re-assess the merits of the award. In addition, Defendant's motion requested "clarification" of the award, however the court noted that there was nothing unclear about the award's grant of compound interest from the date of expropriation to the date of payment in full. Lastly, the court addressed Defendant's reliance on cases applying §1961 FAA arbitration awards. The court first cited the enabling statute, which prohibits application of the FAA to enforcement of ICSID awards, and then noted that the statute does not provide for any substantive review or amendment of an award. The court concluded by admonishing Defendant for attempting to argue against application of the very same arbitral rules it chose to resolve this dispute.

**18. *CBF Industria de Gusa S/A/ v. AMCI Holdings, Inc., 14 F. Supp. 3d 463* (S.D.N.Y. 2014)**

**Court lacks jurisdiction to enforce an unconfirmed foreign award**

Plaintiffs brought an action to enforce a previously unconfirmed French arbitration award against the alter egos or successors-in-interest of the award debtor. The District Court of the Southern District of New York held that it did not have subject matter jurisdiction under the FAA to enforce an unconfirmed award against a party who is not the award debtor. The District Court dismissed the case for lack of jurisdiction. It also noted that plaintiffs were free to recommence their enforcement action after successfully petitioning to have the arbitration award modified in a French court with primary jurisdiction.

**III. NAFTA CASES**

**1. *Clayton v. Government of Canada, NAFTA, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability* (17 March 2015)**

U.S. investors, members of the Clayton family, and Bilcon (a corporation in their control), filed a claim against the Government of Canada alleging that the type of environmental assessment undertaken with respect to the White Point Quarry and/or Marine Terminal Project, as well as the

administration and conduct of the environmental assessment, violate NAFTA Article 1102 (national treatment), Article 1103 (most favored nation treatment), and Article 1105 (minimum standard of treatment). The assessment was carried out by a joint review panel formed under local environmental legislation to provide a recommendation on whether the project should be approved. The tribunal found that the Canadian government had specifically encouraged the investor's project, fostering the investor's reasonable expectations, but that contrary to those expectations, the joint review panel did not provide the project with procedural or substantive fairness, failing adequately to consider the extensive expert evidence submitted by the investor. The Canadian and Nova Scotia governments incurred NAFTA liability when they failed to fix the problematic aspects of the joint review panel's recommendation to halt the project. Damages will be determined in the next phase.

2. *Pending, Detroit International Bridge Company v. Government of Canada*<sup>6</sup>
3. *Pending, Eli Lilly and Company v. Government of Canada*<sup>7</sup>
4. *Pending, KBR, Inc. v. United Mexican States*<sup>8</sup>

#### Sources

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- U.S. Department of State
- Foreign Affairs, Trade and Development Canada
- Westlaw
- Lexology
- The International Arbitration Review
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<sup>6</sup> See in 2014-2015 Report on U.S. Arbitration Developments.

<sup>7</sup> See in 2014-2015 Report on U.S. Arbitration Developments.

<sup>8</sup> See in 2014-2015 Report on U.S. Arbitration Developments.



## XXV MEETING OF THE NAFTA ADVISORY COMMITTEE ON PRIVATE COMMERCIAL DISPUTES

### MEXICO:

#### Arbitrators. Are Not Considered as Authorities for *Amparo* Claim Purposes

Cecilia Flores-Rueda, *FloresRueda Abogados*

In a recent court precedent, the Eighth Collegiate Civil Court of The First Circuit ruled that arbitrators are not considered as authorities for *amparo* claim purposes, in view of Article 5 of the new Mexican Amparo Law.

#### The concept of “responsible authority” under the new Amparo Law

On April 2, 2013, a new Amparo Law went into force in Mexico. A revised concept of “responsible authority” was introduced under Article 5, section II, which reads as follows:

*Article 5.- Are parties to the amparo proceeding:*

...

*II. The responsible authority, being held as such, despite of its formal nature, the one that pronounces, orders, enforces or attempts to enforce the act that creates, modifies, or terminates legal situations in a unilateral and obligatory manner; or fails to perform the act, that if performed, it would create, modify or terminate such legal situations.*

*For the purpose of this Law, private parties will be held as a responsible authority when they perform acts equivalent to those of an authority, that affect rights in terms of this section, and whose functions are determined by a general law.*

...

The question raised was whether arbitrators should be considered as “responsible authorities”, under the new concept introduced by the Amparo Law.

## Case 195/2014 tried question raised

The case (*queja*) 195/2014, before the Eighth Collegiate Civil Court of The First Circuit (“Eight Collegiate Court”) tried the question raised in view of the new Amparo Law.

Following are the facts of the case:

Party Y requested for the constitution of the arbitral tribunal before the Thirteenth District Civil Judge in the Federal District (“Thirteenth District Judge”), under articles 1427 and 1466 of the Code of Commerce. The arbitral tribunal was constituted by three arbitrators, appointed by said Thirteenth District Judge.

Party X filed an amparo claim, before the Thirteenth District Civil Judge, for the constitution of the arbitral tribunal. The members of the arbitral tribunal were pointed out as responsible authorities, for the acts carried out aiming to initiate the arbitration proceeding.

The members of the arbitral tribunal filed a complaint before the Eight Collegiate Court, against the Thirteenth District Judge for the admission of the amparo claim filed by Party X. They considered they could not have the nature of responsible authorities since:

- (i) Notwithstanding the arbitrators were appointed by a judge, their powers and appointment is grounded on the parties’ agreement to submit their dispute to arbitration.
- (ii) The arbitrators’ duties and powers are not given by a general law, but by the parties’ arbitration agreement.
- (iii) The arbitrators perform their duties and exercise their powers as private persons and not as public authorities. For of that reason, arbitrators lack *imperium* to enforce their own determinations and awards.
- (iv) As a result, the arbitrators’ acts such as their very acceptance to act as arbitrators and the performance of the actions intended to initiate the arbitration proceeding, are not equivalent to those performed by a responsible authority.

As for the above reasons, the Eighth Collegiate Civil Court ruled that arbitrators cannot be considered as “responsible authorities” under Article 5, section II of the new Amparo Law. Hence, it reversed the admission by the Thirteenth District Judge of *amparo* claim, filed by Party X against the acts of the arbitral tribunal in an arbitration proceeding.

## Court precedent

This criteria by the Eight Collegiate Court was published on the following court precedent:<sup>1</sup>

Era: Tenth Era  
Registry: 200939  
Instance: Collegiate Circuit Courts  
Type of thesis: Isolated  
Source: Weekly Federal Court Report  
Publication: Friday, May 15, 2015, 09:30 am  
Matter: (Common)  
Thesis: I.8o.C.23 C (10a.)

### **PRIVATE ARBITRATORS. DO NOT HAVE THE CHARACTER OF RESPONSIBLE AUTHORITIES IN THE AMPARO PROCEEDING.**

Articles 1 and 5, section II, of the Amparo Law provide that the Constitutional Trial [*Amparo*] can be filed against private parties' acts and that they have the nature of responsible authorities when their duties are given by a general law and their acts are equivalent to those performed by an authority. Moreover, private arbitration is a proceeding founded on the parties' agreement, who waive the courts' power to try the dispute by entrusting one or more private parties (arbitrator or arbitrators) the resolution of certain or all disputes that may have arisen or may arise between them in regards to a determined contractual relationship. Hence, it should be said that although private arbitrators have the power of solving legal disputes that the parties submit for their consideration, as such power comes from an agreement entered by private parties, the arbitrators' duties are private and the same nature shall have all of the activities they perform in order to solve the dispute dealt with, that is, [arbitrators] are neither public servants from the State, nor they have jurisdiction by their own or delegated, as their powers do not derive from a general law, but from the will of the parties expressed in the agreement that the law recognizes, and as the one which appoints arbitrators and determine the limits of their duties, does not act on sake of the public, that is, with the nature of the State's institution, but on the sake of private parties, logically the duties of such arbitrators are not public, but private, that means that they lack *imperium*, as a result some arbitrators cannot be considered as State's authorities and their acts are not equivalent to such of an authority, therefore the *amparo* proceeding is not admissible against them.

EIGHTH COLLEGIATE CIVIL COURT OF THE FIRST CIRCUIT.

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<sup>1</sup> Author's translation.

Queja 195/2014. Cecilia Flores Rueda and others. October 29, 2014. Unanimous votes. Writer: Abraham S. Marcos Valdés. Secretary: Patricia Villa Rodríguez.

This thesis was publish on Friday, May 15, 2015 at 09:30 am on the Weekly Federal Court Report.