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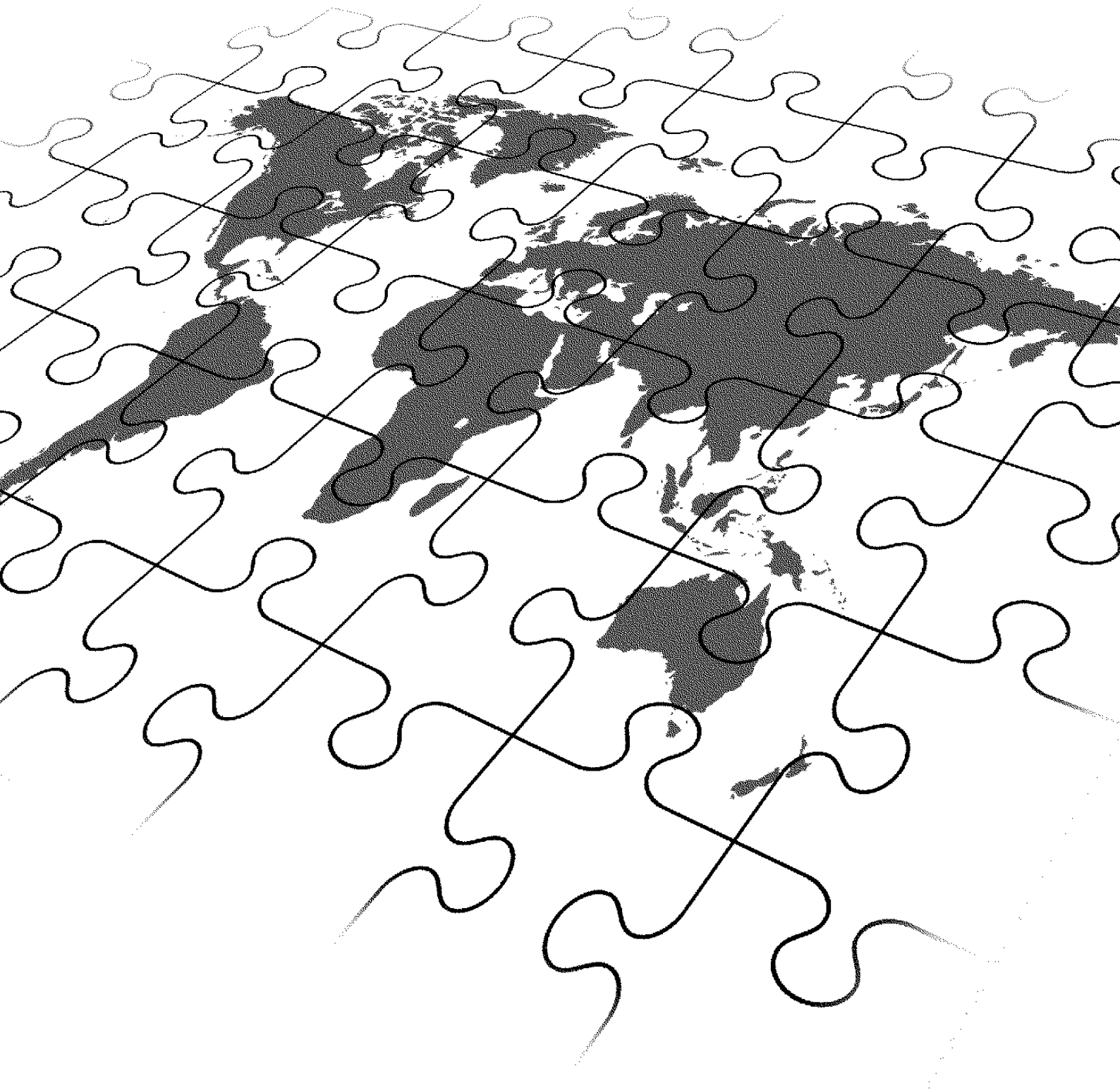
Arbitration News

Newsletter of the International Bar Association Legal Practice Division

VOL 15 NO 1 MARCH 2010



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circumstances to the parties unless they have already been informed of them by him.

9 12th Civil Chamber - State Court of Appeals of Rio Grande do Sul - Civil Appeal no 70005797774 (*Alcides Severino Milani v Waldoir Vicente Schwerz)*. Judgment date: 3 April 2003.

10 Exceptionally, a party may file a challenge later during the proceeding if it was not aware of the reasons that could potentially give rise to a challenge when the appointment of the arbitrator was made. It is noteworthy that, if true grounds for a challenge exist or arise during the proceeding, a party may seek the judicial annulment of the award (Article 32, II, Brazilian Arbitration Law).

11 17th Civil Chamber - State Court of Appeals of Paraná – Civil Appeal no 436.093-6. Judgment date: 11 November 2007.

12 Pursuant to Article 6.2. of the 'Rules', 'Any person who may be in following situations cannot be appointed as an arbitrator: a) is a party of the dispute; b) has intervened in the settlement of the dispute, as attorney at law of one of the parties, or has acted as witness, expert, or presented any opinion, legal or otherwise; c) is consort, relative of one of the parties, related by blood or by affinity, in "linea recta" or collateral, up to the third degree of kindred; d) is consort, relative of one of the parties, related by blood or affinity, in linea recta or collateral, up to the second degree of kindred, of the lawyer or attorney of one of the parties; e) takes part in a directorate or administrative body of a corporation that is shareholder or part to the dispute; f) Is a close friend or enemy of one of the parties; g) Is creditor or debtor of one of the parties or its consort, or even relatives, in linea recta or collateral, up to the third degree of kindred; h) Is presumptive heir, donee, employer, employee of one of the parties; i) Receives gifts before or after the beginning of the dispute, advises any of the parties about the object of the dispute or provides resources to meet the arbitration costs; j)Is interested in the settlement of the dispute, in behalf of one of the parties; k) Has acted as a mediator or conciliator, before the institution of the arbitration, except if otherwise agreed by the parties.'

13 Although there are no judicial precedents applying directly to the IBA Guidelines, it is nonetheless interesting to note Justice Fátima Nancy Andrighi's (Superior Tribunal of Justice) views on the influence of the of the IBA's 1956 International Code of Ethics in Brazilian arbitration: 'The International Bar Association (IBA) - an association which unites more than ten thousand jurists from fifteen different countries - elaborated in 1956 their International Code Of Ethics. Pursuant to its introductory note to the Code of Ethics for International Arbitrators of the IBA, "an international arbitrator shall be impartial, independent, competent, diligent and discrete". Although these rules tend to establish a standard of conduct for international arbitrators, they are applicable to our arbitrators as well, since they result from a well succeeded experience to which the credibility of the activities carried out by arbitrators may be attributed' (free translation). (Andrighi, Fatima Nancy, *O Perfil do Árbitro e a Regência de sua Conduta pela Lei de Arbitragem*. Available online at: **www.bdjur.stj.jus.br**. <accessed on 12 April 2009>.

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Chile

Recent international arbitration developments in the Chilean courts

In August 2009, the Santiago Court of Appeals issued the first reported decision by Chilean courts on a request to set aside an arbitral award under the 2004 Law 19.971 on International Commercial Arbitration (ICAL).[1]

In September 2009, the Supreme Court decided on the recognition of a foreign award in an *exequatur* procedure. Both cases are emblematic of the deferential attitude of Chilean courts towards arbitration, and international arbitration in particular, and support Chile's ambition to become a centre for international arbitration in South America.

The adoption of the 2004 Law 19.971 on International Commercial Arbitration

In September 2004, Chile adopted ICAL, a faithful copy of the 1985 UNCITRAL Model Law on International Commercial Arbitration. Before then, international commercial arbitrations seated in Chile were conducted in accordance with the rules applicable to domestic arbitrations. This imposed serious limitations on international arbitration, including aspects regarding the nationality and legal qualifications of the arbitrators, and also made awards subject to a variety of judicial recourses.

Setting aside under UNCITRAL Model Law grounds

Under ICAL, the only recourse to domestic courts available against an international commercial arbitration award rendered in Chile is the set aside procedure under Article 34. The competent court for deciding requests for setting aside an award is the Court of Appeals of the seat of arbitration, which usually will be the Santiago Court of Appeals. The grounds for setting aside awards correspond to the grounds for refusal of recognition and enforcement of an arbitral award under Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, or the 'New York Convention', which was ratified by Chile in 1975.

Recognition and enforcement under New York Convention grounds

Articles 35 and 36 of the ICAL provide for the recognition and enforcement of an arbitral award, irrespective of the country where it was made. The grounds for refusal are identical to the provisions of Article V of the New York Convention. In accordance with Article 247 of the Chilean Code of Civil Procedure ('CPC'), the Chilean Supreme Court is the court with jurisdiction to decide on requests for recognition of foreign awards in an exequatur procedure. There have been two cases of recognition of foreign arbitral awards since the enactment of ICAL.[2] On 11 January 2007, the Supreme Court recognised an arbitral award rendered in Argentina for the payment of US$500,000 resulting from the breach of a shareholders agreement. On 15 September 2008, the Supreme Court recognised an arbitral award rendered in Brazil against a Chilean company, Garden House, for breach of a distribution agreement. Supplier Garden House was found not to comply with quality standards regarding products to be distributed by a Brazilian company, Gold Nutrition, and was condemned to pay more than US$1 million, plus interest. Although to a lesser extent in the latter than in the former, the overlap between the New York Convention and the ICAL in the reasoning of the Supreme Court (and the parties) has created some confusion.[3] As described below, the Supreme Court, in practice, refers to both sets of standards without establishing a clear hierarchy.

The Santiago Court of Appeals refuses to set aside award against Publicis

On 4 August 2009, the Court of Appeals of Santiago denied the application submitted by Publicis Groupe Holding B V and Publicis Groupe Investments B V (jointly the 'Publicis Groupe' or the 'Publicis respondents') to set aside an arbitral award rendered by a sole arbitrator in an ad hoc arbitration in *Publicitaria Sutil y Asociados S A v Publicis Groupe Holding BV and Publicis Groupe Investments B V.*

The sole arbitrator ordered the Publicis respondents to pay Chilean Peso (CLP) 311,695,000 (approximately US$500,000), plus interest, to Inversiones y Comercial Santa Paula S A (now Ltda) (Santa Paula), in payment for the shares of Publicis Groupe in Publicitaria Sutil y Asociadas (Sutil).

The arbitrator also ordered the Publicis Groupe to initiate negotiations in good faith with Santa Paula to purchase an additional 70 per cent of the shares of Sutil, in accordance with the agreement between the parties. The Publicis respondents were also ordered to pay CLP 475,889,090 (approximately US$750,000), plus interest, to Sutil for breach of the agreement. The Publicis respondents breached the exclusivity covenant of the agreement by maintaining direct or indirect participation in at least three publicity agencies in Chile, causing Sutil to lose Visa and Hewlett Packard as clients. (The damages were based on the amounts invested by Visa and Hewlett Packard in publicity during the years 2001 to 2005.)

The Publicis Groupe requested that the award be set aside invoking Article 34.2(a)(ii): 'The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case', as well as the public policy exception of Article 34.2(b)(ii): 'The award is in conflict with the public policy of Chile.' The Publicis Groupe claimed that they had not been able to present their case because they were denied the opportunity to object or ask questions about a document used by the expert to calculate damages. For the same reason, the Publicis Groupe claimed that the award violated their right to due process and therefore Chilean public order.

The Court of Appeals rejected these contentions as factually incorrect because the document used by the expert had been duly presented in the arbitration and, indeed,

commented upon by the Publicis Groupe.

Furthermore, the Court of Appeals confirmed that the purpose of the ICAL is to provide a special regime for international commercial arbitration and, in particular, limit the intervention of domestic courts to only those situations established by the law. The court also characterised the set aside procedure as extraordinary and stated that its own competence is limited to verifying compliance with the formal requirements established by the law.

The Fiscal Judicial, a court official representing the public interest who issues an advisory opinion to the court, confirmed that the public order exception must be applied restrictively to situations in which basic and fundamental rules of the State of Chile are violated.

This first decision of the Court of Appeals of Santiago under Article 34 of the ICAL is an important precedent confirming the limited role of the Court of Appeals in set aside procedures, as well as the restrictive interpretation of the grounds for setting aside arbitral awards.

The Chilean Supreme Court recognises a New York ICDR award in favour of Comverse

On 8 September 2009, the Chilean Supreme Court[4] recognised an arbitral award rendered by a panel of three arbitrators sitting in New York City under the International Centre for Dispute Resolution (ICDR) Rules of the American Arbitration Association.

Comverse Inc (Comverse) and American Telecommunication Inc Chile S A (ATI Chile) entered into a distribution agreement in 2004. In 2006, Comverse terminated the agreement and shortly thereafter initiated arbitration under the ICDR Rules against ATI Chile and other related companies for breach of contract. ATI Chile submitted counterclaims. The arbitral award was issued on 29 November 2007.

Comverse sought to enforce the award based on the New York Convention, alleging in particular that the award complied with the requirements set forth in Article IV. Comverse presented copies of the translated versions of the award and the distribution agreement, which had been submitted to various official procedures both in New York City and in Santiago, including consular notarisation.

ATI Chile objected to the admissibility of the application and the grounds for recognition of the award. ATI Chile first invoked Article 303 of the CPC alleging that Comverse was not properly represented due to certain alleged errors in the power of attorney of its counsel and also claimed that the award was not properly translated. ATI Chile also claimed violations of Article V(A)(ii) of the New York Convention and Article 36 of the ICAL, arguing that it had not been afforded an opportunity to present its case. It stressed that since it did not have the same financial resources as Comverse, it could not afford expert fees and also could not challenge Comverse's submission of documentary and witness evidence. ATI Chile also invoked Article V(e) of the New York Convention and Articles 245 and 246 of the CPC[5] and argued that the award lacked the necessary finality and authenticity, and that none of the formalities followed by Comverse, including a confirmation decision from the Southern District Court of New York, was sufficient to prove the finality of the award.

After hearing both parties, the Supreme Court received the opinion of the Fiscal Judicial who found that there was no evidence of any violation of the New York Convention and ICAL, and that ATI Chile had been given adequate opportunity to present its case during the arbitral proceedings. The Fiscal Judicial explained that the *exequatur* proceeding is not a revision on the merits. Finally, the Fiscal Judicial added that the confirmation of the Southern District Court of New York complied with Article 246 of the Code of Civil Procedure because it is a judgment of a superior court in the country where the award was rendered.

By way of introduction, the Supreme Court summarised the allegations of ATI Chile and then went on to explain the history and the purpose of the exequatur proceeding in the CPC.[6] The court stated that where parties chose to arbitrate abroad and under foreign law, the award must comply with the requirements of Articles IV and V of the New York Convention and Article 36 of the ICAL.

On the merits, the court found that the objections raised by ATI Chile were unfounded in light of the applicable provisions, ie, the New York Convention, Articles 242 et seq of the Code of Civil Procedure, and Articles 35 and 36 of the ICAL. The submissions of the parties showed that ATI Chile had ample opportunity to present its case, the award was final according to the law at the place of arbitration, and the authenticity of the award had been adequately proven.[7]

Conclusion

These recent decisions of the Chilean courts demonstrated deference to the arbitral tribunals and did not assess the merits of the awards, sending a clear message in favour of a restrictive interpretation of the grounds for setting aside and denying recognition of foreign arbitral awards.

Notes

1 Publicis Groupe Holdings B V con Arbitro Don Manuel José Vial Vial, Rol No 9134-2007.

2 Max Mauro Stubrin, Jacqueline Stubrin, Darío Fabián Stubrin y Walter Gerardo Stubrin con Sociedad Inversiones Morice SA, Rol No 660-2005 and Gold Nutrition Industria e Comercio con Laboratorios Garden House S A, Rol No 6.615-2007. For the text of the decision and a commentary, see Dyalá Jiménez Figueres, Revista Ecuatoriana de Arbitraje, 2009, pp 379-413.

3 See Gonzalo Fernández and Dyalá Jiménez, 'La evolución de las normas de exequatur de laudos extranjeros en Chile', in Carlos A Soto Coaguila (Director), *Arbitraje Comercial y Arbitraje de Inversión, Tomo 2: Convención de Nueva York de 1958. Reconocimiento y Ejecución de Laudos Arbitrales Extranjeros* (Instituto Peruano de Arbitraje, 2009).

4 Comverse Inc con American Telecommunication Inc Chile S A, Rol No 3225-08.

5 Article 245 of the CPC establishes the requirements that foreign decisions must meet to be recognised by the Supreme Court. Article 246 requires foreign arbitral awards to be recognised by an authority in the place of arbitration.

6 The passage dedicated to this explanation is similar to the *dictum* in the decision State Street Bank and Trust Company con Inversiones Errázuriz Limitada et al, Rol No 2349-2005 concerning the enforcement of a US court judgment.

7 It bears noting that the Court – and the parties – almost instinctively applied domestic procedural rules. Even the *Fiscal Judicial*, who stated that the only provisions applicable were the New York Convention and ICAL, commented on Article 246 of the Code of Civil Procedure and the requirement of double *exequatur*, which the New York Convention meant to eliminate.

Five years after the enactment of the Model Law, Chilean courts continue to support international arbitration

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While domestic arbitration has enjoyed a long tradition in Chile, international arbitration has taken hold only more recently. Indeed, even though Chile was one of the first countries in Latin America to ratify the New York Convention,[1] it was not until 2004 that Chile enacted the UNCITRAL Model Law in full, taking a crucial step in the development of international arbitration in Chile.[2]

Looking back after five years under the UNCITRAL Model Law, Chile is emerging as a regional centre for international arbitration. Since the passing of the Model Law, several arbitrations held under the auspices of the International Chamber of Commerce, or ICC, have been seated in Chile.[3] In addition, Chile's primary domestic arbitration institution, the Arbitration and Mediation Center of Santiago (CAM Santiago), opened a special facility for international commercial arbitration in 2006.[4] Most importantly, Chilean courts have consistently rendered decisions fostering the development of international arbitration in Chile. This article offers a brief survey of the key Chilean decisions in matters of arbitration over the last five years.

The UNCITRAL Model Law applies broadly

The first relevant ruling by Chilean courts under the UNCITRAL Model Law was to establish the scope and extent of its application. A local court was faced with this issue in 2006 when a party appealed the arbitrator's decision to apply the Model Law to arbitral proceedings between a French party and a Chilean party.[5] The claimant argued that the Model Law was inapplicable because the parties' contract and arbitration agreement were entered into prior to the enactment of the Model Law. The court, however, held that the Model Law is procedural in nature and thus, according to Chilean law regarding retroactivity, applies from the moment it entered into force.

The Model Law therefore is applicable to international arbitration regardless of when the arbitral agreement was executed. In support of this conclusion, the court declared that the Model Law is 'a guarantee of legal certainty to the parties and an example for the international community of the fair and impartial role of the [Chilean courts].'