PANEL #7: ALTERNATIVE DISPUTE RESOLUTION AS APPLIED TO INTERNATIONAL TRADE AND INVESTMENT

Politics and the law have been naturally intertwined since the creation of the State. That fact that the judicial process and the practice of law are affected by the political environment cannot be avoided. Arbitration is a valuable method to resolve controversies for those who participate in these two areas; the ability to avoid the court system and to receive an impartial and expert adjudication is a very attractive option. Nevertheless, it is possible that political parties will need to utilize the power of the courts for these arbitration decisions to be enforced.

PANELISTS

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MR. STEPHEN ANDERSEN: Well, let us begin. Good afternoon. I would like to thank LexisNexis and the expert analysts that are here with us this afternoon for a discussion on international commercial arbitration. In this session, we are going to talk about commercial arbitration, which occurs between companies, as well as talk about some of the issues, some of the common problems that exist with international commercial arbitration.

We already know about some of the advantages of arbitration. Such advantages include the ability to save time and money, the ability to choose an arbiter who is an expert in the particular field, and the ability of companies to avoid the judicial system and instead control the manner in which the conflict is resolved. Indeed, arbitration came

about because of this idea that companies wanted a way to resolve their issues while saving time and money.

Today, we see many obstacles to arbitration in this region and, perhaps, around the world. For example, there is what we would call a general ignorance about international arbitration. It could be from a lack of knowledge of the process itself or ignorance of the details, like not knowing how to choose it in the first place or how to utilize it to resolve one's issue. Moreover, although it is partly a lack of confidence in the arbitration process and in choosing arbiters, there is also a lack of confidence in the justice system. There has also been bad publicity from the actions of arbitration participants in certain cases from various areas of Central and South America. It is how we respond to this bad news that will enable us to overcome the stigma.

In order to overcome these problems, we need to educate others, like we are doing today. We need to develop the arbitration infrastructure, and to improve the arbitration system as well as the participants in the process, including the arbiters and the lawyers. As an institution, we have already done a great deal to introduce and implement arbitration worldwide. We are participating in programs like this and in other events around the world. We are trying to train the arbiters and put in place an ethics system for the arbitration process. There is a great deal still to be done. That is why we are here today with experts to talk a little bit more about the problems with commercial arbitration and how we can overcome them. I would like Dra. Macarena Tamayo-Calabrese to start.

DRA. MACARENA TAMAYO-CALABRESE: Thank you for giving me the opportunity to speak with all of you. I would like to first start by joining with my colleagues in thanking Reed Elsevier and LexisNexis. I also want to extend my personal thanks to Henry Gorbazweski for this opportunity, which I think is very important, not only on behalf of the organization that I represent, but for everyone who is here today.

My talk will focus on what we do and the services we provide, identifying the problems with the current arbitration system, and looking for effective projects and effective solutions. This includes researching what needs to be done and developing strategies to help improve international arbitration or even arbitration in general. Although we always talk about arbitration in an intellectual manner, thinking about what the laws do and do not include, and discussing what the agreements include, I have already heard mentioned at least

three times in this conference the confidence, or lack thereof, that people have in the arbitration process.

Such feelings and raw emotions play an important role in how arbitration will develop, but at this point, we will concentrate this talk on how to develop these projects. In this sense, I am going to begin with a small introduction to the American Bar Association, the ABA, although some of you are already familiar with it. We are essentially a non-governmental organization, an NGO, that represents more than 400,000 lawyers in the United States. We are the largest organization of volunteer professionals in the world and we have 2,200 sub-organizations. We are the voice of the legal profession in the United States and with this, one of our principal objectives is to promote the rule of law internationally and the operation of this rule of law system. We always provide this technical collaboration with the express invitation of a country or an institution. We provide neutral technical collaboration without an agenda, without impositions; we are always invited, we listen, and we find ways to collaborate with local institutions. We also follow strict guidelines to avoid conflicts of interest; that is, our member volunteers do not go in order to develop businesses. The Latin American and Caribbean division of the ABA provides a service, a public service dedicated to strengthening the rule of law in this region. We also provide other services; you can see them on the presentation screen, but to save time, I will not be covering them. We work on a series of legal projects, from criminal law to commercial law.

With that basic introduction of who we are and what we are working on, I am going to talk a little about our approach to arbitration in general. For our part, it is important that you see how we put together a project, how we decide what to do. We know that recent technical advancements have led to the creation of markets that were unimaginable years ago; the business world is evolving very quickly, much faster than the legal system can change to keep up. And yet, we must figure out how to create a common legal framework that can keep up and work with these new business markets and technologies.

One of the main reasons arbitration was developed was in response to these fast-changing markets; an appropriate fast-evolving legal framework was needed and arbitration had, as Steve [Andersen] and others have already mentioned, the various benefits of neutrality, et cetera. But what exactly is the legal framework that we are working with? For my part, since I represent an American organization, I will use the example of the United States. Arbitration has been around in the United States for about eighty years, more or less, beginning with

the New York Arbitration Act of 1919[1] and the Farrell Arbitration Act of 1925.[2] As compared to other legal practices, arbitration is somewhat unusual in the United States. Although today arbitration is the exception, an arbitration culture has developed, complete with procedures and a certain level of expertise. When we look at Latin America, we see somewhat of a practical disadvantage, as the region lacks the eighty-year development. The introduction of arbitration to the region was initially met, as with anything new, with some resistance, but that appears to have been overcome. Indeed, I think we have developed a legal infrastructure for arbitration in every Latin American country through protocols, international agreements, and the model laws of arbitration.

The question that remains, however, is whether it is sufficient to meet the needs of the marketplace, the new business markets. We have seen a series of criticisms and problems arising while these new markets are developing. With all the benefits of arbitration, there are still issues with ethics. Although I am not speaking of any particular problem that has arisen, ethics is still an important concern relative to perception, because it is essential that the public views arbitration as a viable and ethically sound alternative. As the arbitration world is rather small, there is the great probability that the same arbiter would be used by the same parties, and it is important that the arbiter avoid even the appearance of any conflict of interest to ensure the validity of the process. There is also the potential problem of false expectations on the part of one party. For example, when a company selects a particular arbiter, the company may expect favoritism in return. In my experience, although I tell the parties they must respect my position of neutrality, I have had the person who hired me tell me that they chose me because they wanted me to help them, not create difficulties for them.

These issues and expectations certainly influence the arbitration process and in Latin America there are some doubts about its effectiveness, especially in centers such as ICSID (the International Centre for Settlement of Investment Disputes). Again, I would like to emphasize, we are not talking about specific examples; rather, we are talking about general criticisms that are voiced and heard, about the relative credibility of the arbiters and the general problems with the overall process. We know arbitration is here to stay and we need to use it. These criticisms, however, are something we must be aware of, and we need to factor that into our efforts when we work on a project.

1. N.Y. CPLR § 7501 et seq. (1919).
2. 9 U.S.C. § 1 et seq. (1925).

What are these criticisms? Arbitration is portrayed as a secret science, that it is not an open proceeding as compared to the judicial proceedings in the United States, where everything is open. Arbitration is not like that; it possesses a certain level of secrecy, and it differs greatly from the traditional justice system model. The proceedings and the decisions do not necessarily have to be published. It is natural that attempting to institute an arbitration system would be met with some suspicion, and we must be aware of that as we go forward. Indeed, most of the initial arbitration cases have come from the north against the south, mainly arising out of bilateral investment agreements. At the present time, we have about 2,500 agreements, whereas before we only had 500. You can imagine the number of cases arising under all of these agreements; each of these agreements may yield more than one-hundred cases. With this great influx of cases, there is the added necessity of a series of regulations and laws to reassure potential investors. We must then balance that against the backdrop of the region; political or economic instability in some countries creates added difficulty, as investors still want to invest in those countries but want additional assurance before they do so. And so, despite the secrecy and other problems, we are seeing a certain amount of transparency being presently created. Companies are sharing information on their websites that they have never shared before; there is an opening now, things are changing.

Although we are talking about investments between businesses, we also need to talk about the public interest whenever there is direct investment. We know that, in Latin America and other places, business transactions are never completely private, because businesses in Latin America often have some sort of tie with the government. If the investment agreement is, therefore, essentially between the investor and the state, what then? Often, investments touch upon aspects of the daily lives of the citizenry; sometimes they touch the basic needs of the people. What responsibilities does this create? This creates an environment where politics enters, where civic movements influence. Especially in countries where the arbitration could have been done directly by the country's courts, there is exposure to a series of such criticisms and problems. When the arbitration deals with the most basic aspects of daily life, this is when political parties, civic organizations, and the culture of the various regions enter into the fray. Despite all of these outside influences, we do not have to lose sight that arbitration is a private action, a single moment when parties simply want a solution to the problem at hand without being subjected to the thinking of a judge who must use the opportunity to guard the public interest.

Regardless of the intrinsic private nature of arbitration, we see that these arbitrations can have a political impact and a national economic impact—especially arbitrations involving large corporations. Such companies, in Latin America, even though they are private, play an important role in that they provide a large number of jobs and generate a great deal of the economy. Whether these companies are part of the state or not, they impact the country in such a way that arbitration with these companies will impact the public interest. When we add secrecy to the process, which is perceived negatively, we start creating a whole ball of problems. On the other hand, there remains a need for arbitration and the desire for investment by companies in order for the resulting benefits to accrue to the region, the country, and the inhabitants. It is necessary, therefore, that any solution balances these interests and concerns.

There are instances where the balancing of interests to create a functioning arbitration system has become a problem. One example is Nicaragua. CAFTA has just recently been approved and become effective, and we already have two problem arbitration cases. These examples really emphasize the need that any project designed to implement such an arbitration system take into account the respective needs and issues of the region, of the countries. One solution would be to create a center, either national or regional, like ICDIC,[3] in order to create a perception of neutrality to counteract these perceptions of secrecy and favoritism. And why not? China has done something like this; there is a Chamber of Arbitration in Beijing, as well as CEMAC (the Centre for Mediation, Arbitration and Conciliation) and several organizations that resolve such disputes and more. They require that the majority of arbitrations take place in China. When investing in China, you know that any arbitration will more likely than not take place in China.

What would such a center do in Latin America? We do not see these issues as problems, but rather as vast areas of opportunity where there is a lot of work to be done. NAFTA and CAFTA have already increased business opportunities, but, naturally, they have also brought about commercial conflicts. This provides an opportunity to resolve these discrepancies, and deal with national, public interests and the need for business investment.

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3. *See generally* International Center for Investment Disputes Resolution (ICIDR); Centro Internacional de Arreglo de Disputas de Inversiones (CIADI); International Center for Settlement of Investment Disputes (ICSID), *available at* http://icsid.worldbank.org/ICSID/Index.jsp (last visited Mar. 21, 2008).

The issue of training is always present: What should the training be? Who should be trained? When starting a project, we can't just say, "we need arbiters," and "let's go and arbitrate!" We need to ask who would be the best arbiters and determine what qualifications are needed for individuals to become good arbiters. We also need to ask what would be necessary to create a private national arbitration center in a particular country, or form a government arbitration agency? The projects need to be designed based on who is going to be trained. The challenge of instituting and promoting an arbitration culture is very great, but it is also important not to forget to strengthen existing institutions as part of the process.

As we all know, there are several arbitration centers in Latin America today. The issue, however, is how strong they are nationally and/or internationally, and what can be done to improve them. Perhaps one center needs additional training in international arbitration; while another center needs a clearer administrative process; while still another only needs for the director of the center to receive additional training. Another issue arises from the influence on or interference with institutional organizations by either the government or the companies themselves. It is easier to give a government example: From the government's perspective, the Minister of Foreign Relations and the Minister of Industry would want to be part of this center in order to monitor human rights and environmental issues and so on. When developing an arbitration system, how can one work effectively and efficiently when all of these organizations and personalities are pushing their own non-arbitration agendas upon the system? The projects and programs start to lack validity.

One of principal goals of these projects is to engender confidence among the participants of the arbitration system. Why? To create confidence and trust in the project, and to have participants "buy into" the wider arbitration system. This requires a movement—a cohesive scheme and a focused plan. To do this, one must realize that the initial project must act as a catalyst to spur wider change and wider acceptance. Today, I am going to share with all of you a model through which to do this. Remember, it is the people, not we, who ultimately need to take ownership of the project. They are the ones who have their local network, who know each other's reputation. Their involvement is necessary for success, to ensure that they eventually own the project. It is imperative for these people to discuss the means by which to realize this arbitration system, in a neutral, respectful space, and arrive at their own solutions. For example, I will share some of the methods that we have used in our own successful projects. One of our methods starts out with a small nucleus of stakeholders who are

then joined by our project members to serve as a catalyst, collect information, generate ideas, and foster action. Another methodology is to provide an incremental ownership of responsibilities, where ownership is accelerated through education and training, then development of a plan, and then implementation of that plan. This is not to say that it this is not a complicated process, but we have developed a logical flow and we tailor projects to the community. To illustrate another method that we use, let us take Ecuador as an example. It is as if the country is a patient with an unknown virus and we are the physicians. We collect information to identify the source of the virus and how it progresses. The difference is that we can also control where and how the contagion moves. Oh, I see that my time is almost up. I would like to conclude that we all know that arbitration is important, nationally and internationally, but there are obstacles to a broader, more successful acceptance, mainly to change the poor perception of arbitration. To improve the international system, it is necessary to educate others and develop tailored initiatives to bring about arbitration in selected regions. I believe that this conference is a part of the process to improve the international arbitration system. And with that, I would like to thank you for your time and turn back it to my colleague.

ANDERSEN: Thank you very much. Now we are going to turn to Licenciado Eduardo Siquerios Twomey.

LICENCIADO EDUARDO SIQUIERIOS TWOMEY: Thank you, Steve, and thanks to all of the presenters. Now, the advantages of arbitration have been mentioned throughout the sessions. Arbitration is seen as a quick, cost-effective method to resolve disputes that is respected by the parties, in which the parties entrust an arbiter who specializes in the relevant subject matter, and in which all parties agree to comply with the decision rendered.

The reality, however, is that arbitration is rarely fast and it is rarely cheap; most of the time, it is much more expensive than it would have been, had the parties used the traditional justice system route. On the other hand, arbitration always maintains the element of specialization as well as the parties' confidence in the resolution reached. Arbitration might not be a fast process if the parties either do not want it to be, or do not allow it to be that fast. I have been part of several arbitration processes where one of the parties (and usually it's only one, but sometimes it could be both parties) start to set up

different obstacles to the process in order to extend what could normally be resolved within six months. Truthfully, nothing is resolved during this period; often attorneys for one side or the other want more time to present their cases, or present more documentation. Attorneys rarely present only one additional piece of evidence; they usually bring forth additional claims and counterclaims. Even if arbiters alone could resolve the dispute in six months, the actions of the attorneys would make that impossible.

Arbitration is becoming more complex; not only in international affairs, but also in domestic affairs. The parties are beginning to transform the process into a judicial proceeding and try to out-evidence the other side with a variety of demonstrations of methods of proof and evidence. Rather than presenting a single witness, a lawyer will try to present a series of witnesses to testify about the evidence. Furthermore, the lawyer will try to subject the other side to new evidentiary schemes previously unknown to the Latin American region. For example, the vast majority of Latin American countries were unfamiliar with the process of "discovery," the process through which parties obtain information to assist their forthcoming case. This evidentiary scheme is now present in arbitrary proceedings.

In the past few years, the number of arbitration cases has exploded. In México, arbitration has grown a fair bit—not exponentially, but substantially. In the seventies, you could count the number of international arbitration cases on one hand. Now you need numerous hands to count the number of arbitration cases in one year. It has been an important growth and the judicial tendency has been favorable towards arbitration, with only a few instances in which the arbitration proceedings have been severely criticized by the judiciary. However, the arbitration trend has persisted, and the Mexican Supreme Court of Justice has not only confirmed the validity of arbitration mediations, the validity of arbitration holdings, and the validity of the structure of arbitration proceedings, but also the capacity of the arbitration tribunal to conduct proceedings in the manner which the tribunal considers convenient, as the UNCITRAL[4] model law provides. This is in contrast to the Commerce Code for México, and other Latin American codes, in which there is a level of formalism that requires the arbitration actions to be conducted by the letter of the law. With the support of the Supreme Court's holding, one is beginning to see the arbitration process become more flexible; the arbitration tribunal can

4. *See generally* United Nations Commission on International Trade Law *available at* http://www.uncitral.org/uncitral/en/index.html; [source for model laws].

now conduct its proceedings without establishing precise rules, providing additional time to the parties to present evidence or present additional arguments as the tribunal sees fit, to give each side an equal opportunity to present its case. There have also been difficulties in the process of enforcing arbitration decisions. The decisions of arbitration tribunals do not have the force of law at the moment they are decided; it is only when a party tries to enforce a decision that a judge analyzes whether the decision is authorized under the law. The Supreme Court of Justice has recognized a limited way in which arbitration decisions are to be analyzed by the judicial courts. The review is only confined to, essentially, whether the arbitration proceeding violates current law, such as principles of public order, and not whether it is a valid decision with respect to the parties and the underlying merits of the case.

This is good news for those who want to see a successful arbitration system in Latin America. Despite this, some things are a cause for concern. One of the principal aspects of arbitration is the power of the arbiter to decide whether they are competent to hear the action, and the power of the arbiter to decide whether they have jurisdiction to hear the action. It is possible that poor decisions reached by incompetent arbiters will be beyond review. I have not seen a case in México, at least, in which courts have not acknowledged that arbitral courts do have jurisdiction over their cases. A recent federal court case in México, however, confirms that although the arbitral court can determine subject matter competency and subject matter jurisdiction independently, the parties can resort to judicial courts to resolve whether the arbitration clause is valid, and whether the arbitration clause gives the arbiter the required jurisdiction to resolve the issue. This is a danger not only of delay of the process but also, perhaps, of creating an appearance of undue influence on the judicial decision.

There have been several cases in which an arbiter has withdrawn from the proceedings; this is not unusual, because the arbiter should excuse himself if there is a showing of conflict of interest. When a conflict of interest is shown, it is customary for the conflicted arbiter to recuse himself before a formal request for recusal is presented by the parties. A problem has appeared in recent cases where this "gentleman's recusal" has been tested. Arbitrating parties have submitted to an arbitration code, such as the ICDR,[5] the ICC,[6] or the LCIA,[7] whose procedural rules establish that the arbitration

5. International Centre for Dispute Resolution.

6. *See generally* International Chamber of Commerce, http://www.iccwbo.org/court/arbitration (last visited Mar. 28, 2008).

7. *See generally* London Court of International Arbitration, http://www.lcia-arbitration.com (last visited Mar. 28, 2008).

administration is the proper party to judge whether an arbiter should continue, or withdraw due to a valid recusal reason. When an arbiter recuses himself without the benefit of having the administration review the validity of the cause, the party that is dissatisfied with the result can access the Mexican federal court, charging invalid arbitration procedures. This procedural appeal can go to extremes: A recent case took more than two years to determine whether the arbiter was appropriate, even though the underlying arbitration had been resolved earlier. That the process allows for such deviation vitiates one of the core principles of arbitration. How can parties rely on such a system where such volatility is the norm?

Despite these dark spots, arbitration has had increasing importance in México. The courts have reinforced the process through their recognition of the validity of arbitration, and parties have followed through with decisions. It is necessary to say that, in terms of the international arbitration process, many of these cases have been presented before the International Chamber of Commerce, where PEMEX, the state-owned oil company, has been a party in several cases and has complied in one way or another in all cases except one. Arbitration works, and arbitration should continue to be fostered in México. Arbitrations are enforced in México despite the difficulties with the transition to this new way of adjudicating disputes. We will eventually complete this transition process by having the Mexican courts fully recognize the principles held in other countries to improve the reliability of and confidence in our arbitral system. Thank you.

ANDERSEN: Thank you. Now we are going to pass the floor to Doctora Beatriz Roxana Martorello.

DRA. BEATRIZ ROXANA MARTORELLO: Thank you very much, Steve. I would also like to thank LexisNexis for the invitation to speak.

They asked me to talk about the status of Argentine jurisprudence with regards to how arbitration decisions are implemented. To begin this topic, the first thing I would like to say is that Argentina, unfortunately, does not have any arbitration laws. It has been many years since the legislature has even considered enacting the UNCITRAL model laws, unlike México, as Mr. Siquieros has discussed, which does have an arbitration act based on the UNCITRAL model laws. In Argentina, we have regulated arbitration under the

National Civil Procedure and Commercial Code[8] as well as under the Provincial Civil Procedure Code because we are under a federal republic government. I am mainly going to refer to the national code; specifically two articles under the code.

All arbitration decisions arising from the national arbitration tribunals are to be considered as if they were rendered by a national court with judicial powers. Under Article 758,[9] appeals of arbitration decisions are possible at the request of one of the parties, and the parties can renounce such appeals. The legislature wished to limit such autonomy by the parties: Articles 760[10] and 761[11] state that it is impossible to renounce causes of action to clarify or to nullify an arbitral decision. This introduction allows me to refer later to some international arbitrations that are fairly well-known, such as Cartellone v. Hidronor,[12] and a more recent case, National Grid of the United

8. *See generally* Codigo Procesal Civil Y Comercial De La Nacion (Arg.), *available at* http://www.justiniano.com/codigos_juridicos/codigos_argentina.htm (last visited Mar. 28, 2008).

9. *Id.* at Art. 758. ("RECURSOS - Contra la sentencia arbitral podrán interponerse los recursos admisibles respecto de las sentencias de los jueces, si no hubiesen sido renunciados en el compromiso.").

10. *Id.* at Art. 760:

> RENUNCIA DE RECURSOS. ACLARATORIA. NULIDAD - Si los recursos hubieren sido renunciados, se denegarán sin sustanciación alguna. La renuncia de los recursos no obstará, sin embargo, a la admisibilidad del de aclaratoria y de nulidad, fundado en falta esencial del procedimiento, en haber fallado los árbitros fuera del plazo, o sobre puntos no comprometidos. En este último caso, la nulidad será parcial si el pronunciamiento fuere divisible. Este recurso se resolverá sin sustanciación alguna, con la sola vista del expediente.

11. Id. at Art. 761:

> LAUDO NULO - Será nulo el laudo que contuviere en la parte dispositiva decisiones incompatibles entre sí. Se aplicarán subsidiariamente las disposiciones sobre nulidades establecidas por este Código. Si el proceso se hubiese sustanciado regularmente y la nulidad fuese únicamente del laudo, a petición de parte, el juez pronunciará sentencia, que será recurrible por aplicación de las normas comunes.

12. José Cartellone Construcciones Civiles S.A. v. Hidronor S.A. case, rendered in June 2004. Supreme Court of Argentina.

Kingdom v. Republic of Argentina,[13] decided July 13, 2007. Unlike Cartellone, which was a purely national arbitration, National Grid was an international case. The fourth chamber of the contentious federal administration has continued with the criteria used under Cartellone.

While Mr. Siquieros has referred to some dark spots in the status of arbitration in México, in Argentina we see only dark clouds due to Cartellone and National Grid. For example, Article 760 states that the nullification cause of action cannot be renounced if one of the parties tries to plead a problem with the procedure used in deciding the case. Hence, the arbitration nullification cause of action can be advanced when there is a pleading of the failure of fundamental procedural processes, outside of the underlying contested subject matter. A clarification cause of action resulting from Article 761 can also be pled when there are contradictory parts in the dispositive portion of the arbitration holding. This treatment of the use of the nullity cause of action and the procedural review of the availability of the nullity cause of action, has led to contradictory jurisprudence throughout the Argentinean court system all the way to the Argentinean Supreme Court. This contradictory jurisprudence has been fomented, not only because we do not have established arbitration law, not only because we certainly do not have clear rules or guidelines, not only because we may have bad standards, but because we have confused norms, which is worse. Furthermore, our judges often have no knowledge of the relevant material, and lawyers often take advantage of that. In one clear example of this, one judge was not aware that the Republic of Argentina had ratified both the New York Convention of 1958[14] and the Panama Convention of 1975,[15] when applying these laws to the recognition and execution of arbitration decisions.

With respect to national, or domestic arbitration, the Supreme Court, in March 2000, in the Natelco case set forth the doctrine that the Court may revise all decisions that the Court determines to be arbitrary. This is absolutely different from the supposed nullification cause of action discussed earlier. In the case of Cartelone S.A. v. Hidronor,[16] decided June 1, 2004, the Court, in an unfortunate holding, nullified a domestic arbitration case, stating that the Court could always do so

13. National Grid Plc V. República Argentina, UN 7949, LCIA (UK) July 13, 2007.

14. International Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

15. Inter-American Convention on International Commercial Arbitration.

16. Jose Cartellone Construcciones Civiles S.A. v. Hidroelectrica Norpatagonica S.A., La Ley [L.L.] (Causa J-87, XXXVII RO.) (Arg.), *available at* http://www.csjn.gov.ar/documentos/cfal3/toc_fallos.jsp.

when it considers a decision irrational, illegal, or unconstitutional, thereby exceeding the only statutory bases through which a cause of nullification could be sustained.

As the previous panel discussed, the question arises: How broad are the possible reasons for nullification of domestic arbitration agreements? So far, the reasons the Court has listed are that the actions that are irrational, illegal, or unconstitutional. Similar to Article 758 as mentioned earlier, the Court said that, with respect to Article 872 of the Civil Code,[17] it is impossible to renounce rights granted in the public interest. However, we do not understand how this case has anything to do with the public interest, since the public interest does not seem to exist in this case. The court also stated that it is not possible to renounce the appealing matters that relate to the public order. We are not talking about Article 5 of the Panama Convention, or the New York Convention, because this is a domestic arbitration. Those of us who have had a chance to discuss this have come to the conclusion that Article 760 can be interpreted in a narrow manner to accommodate national arbitrations. But what will happen when the Court tries to interpret international arbitration situations? I think, despite some inconsistencies in the developing doctrine, that neither Article 760 nor 761 can be applied to oppose decisions in international arbitrations. I consider that the 1822 National Convention of Argentina, and international treaties, such as the Panama Convention and the New York Convention, particularly Article 75, give superior legal authority to international treaties over domestic law due to their flexibility. International law must supersede local law, as shown in the Supreme Court's interpretation of Article 27 of the Vienna Convention on Trade.[18]

The following is a case of international arbitration that has been discussed extensively.[19] The company Reef Exploration, Inc., a Texas company, won an arbitration proceeding for $154 million in

17. CÓD. CIV. arts. 758, 872 (Arg.), *available at* http://www.redetel.gov.ar/Normativa/Archivos%20de%20Normas/CodigoCivil.htm.

18. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18 (1980), *reprinted in* 19. I.L.M. 668 (1980).

19. For a more detailed explanation of the case by the panel participant, see Beatriz Roxana Martorello, Cuestiones Relativas Al Reconocimiento Y Ejecución De Laudos Arbitrales Domésticos E Internacionales En La República Argentina, 5 IBLA (2007), *available at* http://www.iaba.org/Law%20Review_Vol%205/LawReview_5_BMartorello.htm (last visited Mar 28, 2008).

Texas under the standards of the American Arbitration Association.[20] The Argentine company CGC (Compañía General de Combustibles) and Reef Exploration named the arbitration tribunal and the president of the tribunal. The Argentine company did not oppose the competency of the tribunal—what the doctor in the previous panel called "competenz-competenz." Rather, CGC asked the Argentine commercial court to intervene in the arbitration process and requested that the court order the arbitration tribunal in Texas to vacate its jurisdiction and remit the case to Argentina.

The Argentinean justice system intervened on the substantive issues of the case; Reef Exploration lost on this first action, as the Argentinean court decided on favor of CGC, and requested that the arbitration tribunal let go of the case. [21] The arbitration tribunal in Dallas refused the request and decided in favor of Reef. When Reef attempted to enforce the arbitration decision, CGC pretended that the arbitration decision did not exist. Eventually, Reef won on appeal.[22] This decision by the Argentine court completely disrespected the arbitration tribunal process by attempting to stop the ongoing arbitration proceeding and having the expedients forwarded to its court. Only when CGC lost the arbitration proceeding and the Texan company was set to execute the decision according to international conventions did CGC pretend not to recognize the authority of the arbitration decision. This was a much talked about case. I have taught classes on process rights for about eighteen years now, and it was not clear whether this was the appropriate step for the handling of international issues, that is, to apply domestic norms, but the imagination of lawyers is great. CGC won on the first instance. The court, which had no understanding of international rights, grounded its opinion on Articles 517 and 519 of the Procedural Code and forgot that Argentina had ratified both the Panama and New York Conventions. In the court where Reef won,[23] the court followed the "competenz-competenz" doctrine and accepted Reef's contention that Argentinean courts should reject their jurisdictional competency, injecting fresh breath into the rules that we are trying to respect. So, facing the arbitration ruling and the court's ruling rejecting Argentinean review jurisdiction, CGC had some serious problems. So what did CGC do? It

20. Reef Exploration Inc. v. Compañía General de Combustibles S.A., CNCom., sala B, 23/09/99, JA 2001-III, 53, *available at* http://fallosdipr.blogspot.com/2007/05/compaa-general-de-combustible-sa.html (Arg.) (last visited Mar 28, 2008).

21. *Id.*

22. *Id.*

23. The Court of Appeals in Commercial Matters (CNCom), Section D.

declared bankruptcy and managed to pay much less than the full price of the arbitration ruling.

To end, I only have two more things. Recently, on July 3, 2007, the Argentine Court of Appeals in Administrative Matters, 4th Section, dictated an injunction measure in an arbitration proceeding that involved the British firm National Grid Transcot against the government of Argentina, applying the international arbitration doctrine found in Cartelone.[24] The court overturned the decision to remove the arbiter (who had been recused, as explained before the International Chamber of CSI), finding that the tribunal had no right to order the recusal, thereby impugning the Argentine justice system. Two months have passed since this decision that ordered the arbitration tribunal to stop the arbitration process, to suspend it, and to make sure that the companies do not take any impulsive, unnecessary actions. This case reiterates that Argentina's justice system has taken the position that it can revise all acts, all arbitration decisions, so long as the decisions are illegal, unconstitutional, or irrational. This appears to be a step backward. Another thing for all of you to think about is that, if nullification is as unwaivable as it appears to be by statute, could the parties nonetheless agree to limit nullification and take the substantive reach of the national courts and back into the powers of the arbitration tribunal? We may have hope for a more predictable process, but the dark clouds are seemingly always present. There seem to be two possible ways to solve some of these issues. Article 763[25] is the first of these possibilities, and it appears to place appeals of the arbitration tribunal beyond the reach of the traditional court. It seems that when it comes to appeals of arbitration proceedings, there might be a way to create a distinct jurisdiction away from the traditional courts. The second possibility comes from Law 24/353, which was approved by the Washington Convention of 1965 creating the CIADI[26] and may be a sensible option for Argentina. After all, how is it that we bring cases to tribunals on an ad hoc basis, to special commissions, and take them away from the traditional courts at the same time, without providing the ability to circumvent nullification rules when it comes to international

24. EN-Procuración del Tesoro v Cámara de Comercio Internacional, CNCAF, Lexis No 35010977 (July 3, 2007).

25. COD. CIV. Y COM. art. 763. (Arg.) ("RECURSOS - Conocerá de los recursos el tribunal jerárquicamente superior al juez a quien habría correspondido conocer si la cuestión no se hubiera sometido a árbitros, salvo que el compromiso estableciera la competencia de otros árbitros para entender en dichos recursos.").

26. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (CIADI) (Wash., D.C., 1965).

arbitration agreements? Okay, thank you very much and with that, I am finished.

ANDERSEN: Thank you very much. Now I want to introduce our next speaker, Alejandro Mier Hernández.

ALEJANDRO MIER HERNÁNDEZ: Thank you, Steve. I want to express my gratitude to LexisNexis for inviting the Mexican National Bar Association. I am honored to be representing the College today.

Since the topic is economic development, its relation to the rule of law in Latin America, and the role of arbitration, I would like to use the short amount of time I have to talk, basically, on two topics. How can a law college support and foster the need for reform so that the rule of law is followed and respected? I have observed that in México and Argentina, we suffer from the same problems related to judges. If I have the time, I would like to talk about the effect of arbitral sites upon judgments and the execution of arbitration decisions.

To take the first point, we have observed that in Latin America, we have problems with the judicial system, and that these problems have been exacerbated by the political process; frequently, judges become the hostages of politicians in these fruitless and unsuccessful incursions against the judicial system. Meanwhile, businesspeople are looking to place their investments and to ensure that their investments can be recouped in due time. If judges are going to be involved in arbitration proceedings, where judges are going to be constrained or inhibited in their practice, where questions are being raised about the propriety of arbitration, we are going to have problems. Investors will be hesitant to put money in a country where the rule of law is nebulous and turned upside down; investment will shut down.

We have observed that Chile, for example, has tried to change its justice system to increase stability, and has made progress. In México, its National Bar Association has worked to ensure that the rule of law is fully and profoundly respected. We have been given the mandate to create oral proceedings, not only in criminal and sentencing matters, but in all branches of law. The majority of the conference attendants know that México has a written word tradition in its judicial processes. But this quality tends to diminish transparency, especially when a judge declines to enforce an arbitration decision, alleging that the parties are incapable or that they are incompetent to execute the arbitration ruling. In some cases, this is terrible, because after going through an entire process, we get to the enforcement stage, we present

all the documentation, and then the judge says, "You know what? Not really."

That is when the problems begin. I would imagine that it is the same in Argentina. Due to these transparency problems, the Mexican National Bar Association is working with the Mexican president to reform the judicial system, especially by setting up oral proceedings where the judge will be required to truly preside over the sentencing. We need to eliminate this lack of transparency where the judge is merely the secretary, where the sentencing judge simply rubberstamps someone else's decision. This needs to change. This needs to change, when an arbitration decision arrives at the court, and the winning side presents the judgment to the judge, and the judge then starts going around and asking, "Why?" This situation arises because the judge does not have any training in arbitration proceedings. He goes around and asks questions to other magistrates, or goes to see his friends at the federal tribunals or whatever other authority might have any experience in the subject. The judge sometimes dictates rulings that raise the hair on my chin. The issue that the National Bar is going to tackle is this lack of transparency and capacity of the judges. The National Bar will have to help in this transformation, just as it helps Congress in its present matters, since sometimes Congress or the Members of Parliament get paralyzed in the subject matter or start dealing with topics that are not very important to society, and just raise topics for their own self-interests.

The administration of justice is a very sensitive topic for society at large, so bar associations need to step in and help. And how do they help? It is a very simple but strong response: they simply send initiatives to Congress for them to adopt. The National Bar has succeeded in influencing the legal sections of the National Development Plan.[27] This plan was recently published in the Official Newspaper of the Mexican Government. As part of this all-encompassing plan, there will be a push to professionalize the legal profession; there will be a mandatory requirement for joining the legal professional bar association.[28] Returning to the subject of arbitration and the process of executing an arbitration ruling, there are a number of current lawyers who have a great deal of imagination, who are violating ethics codes, and who are promoting questions and issues that they should not be promoting. Now that we are in the midst of introducing the National Development Plan, the National Bar is taking the initiative to go further and to ensure that Congress passes laws to change the

27. Plan Nacional de Desarollo 2007-2012 (2007) (Mex.)
28. *Id.*, Strategy 11.2.

current Mexican legal system and require bar affiliation to practice law. That allows the bar to examine the conduct of lawyers and limit those lawyers that try to push ethical boundaries with their vivid imaginations. I will leave you with a number of things that should happen in the legal profession here in México. We need to effectively train judges and magistrates because, as the previous speaker said, some of these judges know absolutely nothing about international arbitration, and the execution of arbitration decisions suffers because of this lack of knowledge. With luck, the national bar associations can become the principal agents for bringing about a return to the rule of law, so that Latin America does not get stuck, is not left hanging without advancement.

In this respect, México started its evolution in the rule of law in May, 1996 and from that point on, a number of laws were changed and will continue to be changed. There is a great deal of work to be done in reforming the court system in Latin America; México has a particular problem because we have one of the largest court systems in the world. Last year, it resolved more than 216,000 cases, which is too many, and I do not believe that there are many judges that really read all the involved documents. We have the system that we have, and we plan reform in spite of it. If we can train judges to concentrate on the parts of the cases in which the parties have not reached an understanding, the time commitment can be minimized and the quality of judgments can improve. Whether the underlying case was a conciliation, a mediation, a national arbitration, or an international arbitration, the judge can rule in a competent manner. Any why? Because practice tell us that in México, a judge has about two-hundred dockets in his case load and he has to rule on twenty of them every week. When each docket has around three-hundred pages, one has to wonder how that can be done. Thus, the law bars need to participate fully in this transformation of the rule of law because they are the voice that represents those professionals who will have to work within this rule of law, to ensure that they themselves respect this transformed rule of law.

I would also like to talk briefly about arbitration sites and equitable relief measures; both are complicated issues and I would have liked to spend more time on them. Why is an arbitration site that important? A site is important because that is where all the arbitration will occur. However, I have always said that, especially in México, if we are going to use a given arbitration site, we must take into consideration where the arbitration ruling is going to be executed, the place where any judicial review would occur. At least in México, when judges receive an arbitration ruling, they start their judicial review by

examining whether the ruling is in the interest of the public, as mandated by Mexican norms. However, while doing this kind of review, judges seem to forget the nature of the review and the points of the arbitration itself, and often lack a good understanding of the broader context of international laws in international disputes. In many occasions, we have gotten a beautiful arbitration ruling that we could not execute. And why not? The state laws work do not permit it, the judges start to ask questions that they should not really worry about, the judges do not understand the points and features of international rights, or the judges do not receive the proper training.

I see that my time is ending, and so I leave you three main points. First, ask whether the bar associations work, as the collective voice of attorneys, to restore and strengthen the rule of law. We have seen these bar associations work in México and achieve some change to the law, and judges now have a somewhat better idea of equitable relief necessary to preserve stability and predictability. The second issue is to figure out a way for Mexican judges to understand the nature of equitable relief, because this is a problem in practice. I commented to one of my colleagues about a problem that just arose in one of my cases: The judge just issued a ruling that set aside equitable relief because he believed that the Mexican judicial system did not allow for equitable relief. This kind of thinking really frightens me. This also makes investors—my clients—nervous, because we have told them that arbitration is the way to go, but all of a sudden a judge enters and says that equitable relief cannot be enforced because the international aspects of equitable relief were not anticipated in domestic law. And then my client says, "What country are we in? What am I doing in this country, you good-for-nothing lawyer? You convinced me that arbitration was the best way to solve our problems—and now what?" And that is when we get problems. The first concern is which country's laws will govern the proceeding, but often the primary issue, at least here, does not arise until the dispute has been resolved and enforcement is needed. This does not reassure investors. The third point I wanted to put in your minds is the issue of the arbitration site. We must take this into account, especially in drafting terms of reference looking ahead from the perspective of the execution of the arbitration ruling.

ANDERSEN: Thank you. Your comments have been excellent and you have given us a sense of how arbitration works and how we can improve the process and better utilize it.

In the context of these comments, we, as an institution,[29] have seen how arbitration has grown. In the previous six years, we have handled around six-hundred international cases every year, more than any other international institution. We have been able to make agreements with other institutions in the Americas, and these agreements are very important for us. For example, last year we made an agreement with CANACO[30] to open an office in México, where we develop the arbitration services of CANACO for national cases, and where we develop our own services for international cases. We have also worked with FIA[31] in developing arbitration systems throughout the Americas as well. And finally, we have worked with an organization called CIAC.[32] This organization was formed under the Panama Convention. I would therefore like to ask my panelists: Who thinks we should use the Panama Convention instead of the New York Convention, or what ideas do you have on this issue?

MIER HERNÁNDEZ: Well, here, and I think at least regarding my country, we have a problem with applying these agreements, these treaties. We have to recognize this to proceed forward; sometimes there is the need to view the issues from a purely practical perspective. The laws exist; treaties signed by México are considered laws in pre-eminence just below that of the Méxican Constitution. The problem is that judges do not respect the New York Convention. That is a problem, not just with that treaty but also with all treaties. Investors get concerned; they come to us and say, "You assured us that we were going to have a quick, inexpensive resolution, and now you are telling me that a judge is saying that he is only going to be applying local law." This is a problem with all treaties in México, not just with the New York and Panama Conventions.

29. *Editor's Note:* The speaker referred to the institution to which he belongs, the International Centre for Dispute Resolution.

30. Cámara Nacional de Comercio de la Ciudad de México; http://www.ccmexico.com.mx (last visited Mar. 28, 2008).

31. Federacion International de Abogados (Inter-American Bar Federation), http://www.iaba.org/index.htm (last visited Mar. 28, 2008).

32. Comisión Interamericana de Arbitraje Comercial (Inter-American Commercial Arbitration Commission); for a brief history of the commission, see La Comisión Interamericana de Arbitraje Comercial (CIAC), *available at* http://www.servilex.com.pe/arbitraje/colaboraciones/historiaciac.html (last visited Mar. 28, 2008).

ANDERSEN: Great. I would like to take this time for the panel to hear questions. Tell us your name and ask your question, thank you.

AUDIENCE MEMBER: Good afternoon. My name is Enrique Presburger and I am an alumnus of the Technology Institute of Monterrey. My question is: what is the role of arbitration in delicate international issues, such as we have seen agriculture in previous years, and now we see intellectual property? Can arbitration effectively mediate these subjects between, for example, México and the United States?

TAMAYO CALABRESE: Great, thank you. I see arbitration as playing a very important role with future issues as it has with other business concerns. I think arbitration will always be important and useful in any commercial exchange, whether in agriculture or intellectual property. We are going to see the same problems that have been encountered in current arbitration subject matters.

ROXANA MARTORELLO: I think that it is going to be important, definitely important. I agree with Macarena that arbitration will be important, but then I believe that all alternative methods of resolving disputes will have a great impact in the future. The traditional justice system is not without its problems, but the desire for litigation is increasing in all societies and I do not think the traditional system, because of endogenous and exogenous reasons, will be able to adequately meet the demand. Justice delayed is justice denied. I think our current training for lawyers in alternative dispute resolution methods in the law school curriculum is lacking. We need to not only improve training, but we need to educate the public as well, demystifying these alternative methods. The public should be aware that these methods might be faster and cheaper.

Many of the conflicts we have discussed today could have been resolved in less time and with less resource expenditure if they had gone through arbitration or effective negotiation, but I do not think that all the issues that go to arbitration should go through that process. For instance, the mediation clause should be used more often, that is, where the parties agree to go first to mediation, and only if mediation fails, does the process go to arbitration. It is a shame because mediation is a system that does not break the ties between the parties so much; first, because the issues are resolved from within, in an endogenous

manner—the solutions are self generated; second, because parties have a better tendency to listen to the other side and to what the other side really needs. On the other hand, arbitration, although resolved by a third party, leaves some positions unresolved, whereas in mediation, all the issues that are important are brought up by the parties, and a party can better visualize the other party's interests. The long-term relationships are upset less, and mediation permits for better interactions between the parties post-event. Bar associations and law faculty will need to place greater emphasis on preparing lawyers for these alternative methods. Now that the scope of alternative methods is both domestic and international, it will demand greater efforts in teaching and learning for everyone.

ANDERSEN: Any other questions?

AUDIENCE MEMBER: Yes, my name is José Manuel Paisa from Miami. I have two questions, one for Dra. Calabrese, and the other for Dra. Martorello. Dra. Calabrese, you were explaining in your presentation the difficulty of exporting the "arbitration culture" because many of the problems with arbitration concern the expectations of the parties; that is, if I name an arbiter, I expect the arbiter to work for me. I am not sure if this is so much a cultural problem or if it is just a result of the adversarial culture of the legal profession in the United States. Are you suggesting that we reduce such expectations as other countries go forward with their arbitration programs? And my question for Dra. Martorello—I completely agree with what she said about mediation. But the lawyers in mediations also have an adversarial bent; would we, lawyers, really be best suited to oversee mediations?

TAMAYO CALABRESE: With regards to what you said about the United States and this idea that arbitration is neither independent or neutral, I think it is important to mention a couple of things. It is not as if the United States does not have those problems, but I think it is a smaller issue in scope. Most of the arbiters are lawyers as well and must adhere to a code of professional ethics; lawyers in the United States face serious consequences if they appear and are not entirely neutral. Lawyers face very serious personal consequences such as sanctions, and even the loss of their professional licenses. With that in mind, such thoughts of arbitration partiality can be headed off from the first instance if there is an understanding that lawyers, as arbiters, value

their own self-preservation and so remain neutral. Another tool is the need for arbiters to undergo continuing legal education, which allows the arbiter to focus on the subject matter closely and hopefully promotes a culture around the necessity to remain neutral. Moreover, many arbiters used to be judges and the idea of remaining neutral is integral in their professional lives. These are all excellent methods to maintain neutrality; whether they are easily translated to other countries in Latin America is another question altogether.

ROXANA MARTORELLO: Thank you. I would like to see if I understood the question. I think José asked whether lawyers could be the best arbiters in arbitration. I think there are lawyers for everything. Some lawyers operate better—feel more comfortable—with conflict, and really love the adversarial process. I also think there are lawyers who feel much more comfortable with the calmer processes of mediation or negotiation. I learned in a litigious setting; alternative methods there were not available and they are not available for me today. After having been resistant to alternative methods for many years, I am a converted person. One converts and becomes a fanatic of the topic. After many years of teaching process rights and all the possible strategies for conflict, I got a post-graduate degree in alternative resolution methods, where I interacted with many people. It not only opened up my mind; I also found many people who are much more comfortable and, therefore, more efficient as mediators than as litigant lawyers. I know it is not for everyone, but we still need to know the tools for all conflict methods; we need to be aware of all hats, for one lawyer may need to be a litigator, then a mediator, even an arbitrator. The conflicts are the same, the methods to resolve them differ; we need to figure out which method to apply to each conflict. Each conflict has a different resolution solution, but if we do not have the range of tools, our solution set is limited. When you are a hammer, everything looks like a nail. If I only know how to handle tweezers I will only try to use tweezers as my solution, even if I have a screwdriver in my tool chest. We need to have all the tools at our disposal, and we need to have enough continuous training to use all these tools effectively. Another issue that needs to be looked at is the feasibility in Latin America for a practitioner to dedicate his practice exclusively to alternative resolution methods. On the other hand, the lawyer that dedicates his career to being a mediator or arbiter does not need to remain an advocate.

ANDERSEN: Thank you.

AUDIENCE MEMBER: Good afternoon, I introduced myself a moment ago to Mr. Alejandro. Something that caught my attention was the idea that judges have a technical limit, like in México. You talked about how difficult it has been for arbiters to reach agreements. The last panel asked about the relationship between the execution of arbitration decisions and the lack of capability of judges in reviewing the decisions. What experience, or training, is necessary to execute arbitration decisions within the federal justice system?

MIER HERNANDEZ: Okay, we have to say this: I have always said that we can look to the future to execute a decision. The experience in México is that judges receive all the documentation that was presented. Usually, the first issue is the admission of the evidence; judges often differ from arbiters as to what can be admitted. Despite the arbitration result, the judge reviews everything from the beginning, looking at the impact on individuals. This process can take a while, and it is not even the parties fighting each other anymore; rather, we are fighting the judge to even execute the initial arbitration decision. Occasionally, the cases go to a federal judge in a higher-level court, who does the work that the lower court should have done, but could not because of overcrowding. This is only my experience in México, however.

ANDERSEN: Great, thank you very much. I think now it is time to end this session.