Survey of Recent Developments in International Arbitration

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Introduction

This article provides information on recent major changes and developments in international arbitration.[1] It is further intended to review the changing dynamics of international arbitration caused by the impact of globalization, the role of technology, and the demand for increasingly expedited solutions.

This article is not intended simply to praise the increasing role of traditional arbitration as a "means by which a dispute can be definitely resolved, pursuant to the parties' voluntary agreement, by a disinterested, non-governmental decision-maker."[2] The author presumes that international arbitration is the most commonly preferred way of resolving disputes in global, multi-party, technically and financially complex, interconnected economies that involve massive documents in a variety of languages, and complex factual settings that may be highly sensitive to the public.

The scope of disputes resolved through international arbitration is broad. [3] A classic example might involve a dispute between a former European shareholder of a commodity trading company and the new shareholders, in which the parties cannot agree on how the price of the sale (*i.e.*, the shares), is calculated under the purchase agreement which provides for a variable price depending on the future performance of the company whose shares are sold. Another example could concern a dispute between the members of an international consortium providing engineering, procurement, and construction of a power plant in Latin America and the owner of the plant. The owner may have imposed multi-million-dollar fines in liquidated damages for delayed completion of the project or because the consortium did not meet the contractual performance guarantees.

First, this article examines Europe's traditional lead in international arbitration and briefly discuss its most important arbitral institutions. Second, the increasing importance of international arbitration in the U.S. and Latin America and the reasons therefore, are addressed. Finally, this article discusses the application of modern technology in international arbitration and how it can work to the parties' advantage by facilitating a tribunal's understanding of the case and expediting the arbitration process.

European Lead in International Arbitration

International arbitration has long been a fine European tradition because Europe has been composed of sovereign nations with independent judicial systems. Thus, the international aspects, *i.e.*, how to resolve international disputes by applying conflicts of the laws principles, have always been important. Not surprisingly, also the most important arbitration institutions are domiciled in Europe and were established decades ago. There is a remarkable plethora of rules and forums available; however, the main international arbitration institutions and most widely used forums are the following:

ICC: The International Chamber of Commerce is domiciled in Paris, France. The ICC, established in 1923, is without a doubt the most commonly utilized institution in international arbitration. The ICC maintains a permanent office and supervises all cases under the auspices of the International Chamber of Commerce. Approximately 500 new cases are filed with the ICC every year, involving approximately 1,300 parties from 120 different countries. Over 50% of the cases exceed an amount of USD1,000,000 or more.[4] The ICC last amended its arbitration rules in 1998.

LCIA: The London Court of International Arbitration, established in 1882. LCIA combines the advantages of a common law foundation with a longstanding tradition in international arbitration.[5] The LCIA maintains a permanent office in London. The LCIA is naturally favored by English speaking parties. It last amended its arbitration rules in 1998.[6]

ZCC: The Zurich Chamber of Commerce was founded in 1873 and has provided the services of an arbitration institution since 1911. The ZCC, and Switzerland in particular, are often favored not only because of Swiss neutrality and the long-standing experience in international dispute resolution, but also because of its important international role as a center for banking, finance, and other professional services.[7]

CCIG: Geneva Chamber of Commerce and Industry of Geneva, Switzerland, established its new arbitration rules in 1992 and amended them on May 1, 2000.[8] Geneva plays an important international role because it is the seat of major international institutions, such as the WTO and GATT. It also plays an important role in sport disputes. Since 1992, the CCIG oversaw more than 100 international disputes.

SCC: Arbitration Institute of the Stockholm Chamber of Commerce[9], Sweden, was established in 1917. The SCC institute was the main institution chosen for agreements involving the former Soviet Union due to its proximity and longstanding historical relations with Sweden. In the 1970's, the United Nations and the Soviet Union recognized the SCC institute as a neutral center for dispute resolution. Nowadays, the institution offers special conferences for Russian lawyers. The SCC Institute administers approximately 130 arbitration proceedings in over 40 countries. SCC last amended its rules in 1999.

Although the institutions are maintained in particular locations, actual arbitration proceedings using an institution's rules can be performed anywhere in the world, and the parties are not bound to apply the specific laws of the site where the arbitration institution is located. Arbitration can also be *"ad hoc"* instead of institutional. In such cases, the parties simply appoint arbitrator(s), who decide on the dispute without applying the specific rules of an arbitration institution. The United Nations Commission on International Trade Law provides a set of rules for ad hoc arbitration (the "UNCITRAL" rules).[10] In short, European arbitration institutions benefit from established rules and are the most commonly utilized in resolving international out-of-court disputes.

Increasing Importance of the United States in International Arbitration

In the past, parties within the U.S. did not even consider arbitration a viable option. Instead the more powerful U.S. companies would simply compel the application of U.S. law, in particular New York law, even for contracts to be performed internationally.[11] There is also the notion that a U.S. lawyer would not feel comfortable handling a case where *"[d]iscovery is [not] his shower, and deposition is [not] his breakfast."*[12] Recently, however, U.S. companies are deciding to arbitrate their disputes more often. Additionally, international arbitration is becoming better known among American attorneys and the conception that U.S. lawyers cannot be content with a procedural system that does not allow for discovery or deposition is being disproved.

Still, arbitration proceedings infrequently take place in either the U.S. or under the auspices of the American Arbitration Association for the following reasons. First, if the parties agree to arbitration, they chose a venue that is inconvenient for both (or all) parties. Parties look for a neutral place to litigate. Since U.S. companies are often involved in international commercial transactions, the non-U.S. parties usually oppose a U.S. venue for arbitration. Second, arbitration in the U.S. does not have a long-standing tradition. Third, foreign parties fear U.S. style litigation, such as discovery proceedings, massive document productions, or the threat of possible punitive damage awards.[13] In other words, foreign parties fear that the U.S. litigation style could be imported into the arbitration proceedings if performed in the U.S. (e.g., preliminary injunctions rendered by an ordinary judge outside arbitration proceedings). Fourth, U.S. lawyers (as well as their British counterparts) do not usually have a strong command of foreign languages.[14]

At the same time, there are several factors that support the U.S. as a place for international arbitration. First and foremost, English and American law firms have an advantage because international arbitration is usually conducted in English. Moreover, complicated or extremely large cases with a massive amount of documents (often called "fact-heavy" cases) demand not only sophisticated lawyers, but also a firm size that can provide the necessary manpower to handle the work load.[15]

International Arbitration in Latin America

International arbitration necessarily requires additional considerations that are particularly relevant in

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Latin America, such as whether an arbitration award rendered in one part of the world will be recognized and enforced in another. Answers to this question are found in international treaties such as the New York or Panama Conventions. Otherwise, an analysis of the national conflict of laws rules of the country where recognition and enforcement is sought, is required. Such rules may also be found in specific arbitration statutes addressing the recognition and enforcement of awards. A further distinction, however, is whether disputes should or could be arbitrated in the specific country where enforcement is sought. Therefore, one has to look at the national rules governing arbitration.

In the past, Latin America has had little trust in international arbitration, and the international arena has had little trust in investing in Latin America.[16] Prior to the 1980's, many in Latin American did not consider arbitration to be a valid form of dispute resolution, and foreign arbitral awards were not enforceable. The requirement that a dispute had to be resolved before the national courts was described as the "Calvo doctrine."[17] Parties, willing to arbitrate a dispute, would have to specifically sign an agreement after a dispute had arisen submitting itself *expressis verbis* to arbitration (in Spanish known as the *"compromiso"*). Even then, however, a party could easily circumvent an obligation to arbitrate and litigate the case before its national courts. As a consequence, most Latin-American countries did not sign and ratify the New York Convention of 1958, which ensured recognition and enforcement of foreign judgments throughout the world. Only Ecuador in 1962 and Mexico in 1971 signed the New York convention.[18]

In recent years, international arbitration has gained importance in Latin America. An important milestone was achieved in 1975 when Latin American countries ratified the Inter-American Convention on Commercial Arbitration (known as the "Panama Convention").[19] Further, most Latin American countries have now signed the New York convention, except for Brazil. However, Brazil has signed the Panama Convention and the Protocol of Las Leñas that ensures recognition and enforcement of foreign judgments among the Mercosur countries, *i.e.*, Brazil, Argentina, Paraguay, and Uruguay.[20]

In addition to changes in the recognition and enforcement of arbitration awards, a number of Latin American countries recently have enacted new laws governing commercial arbitration. However, despite these positive steps and recent economic developments, neither U.S. nor European parties doing business in that region feel comfortable with the Latin American legal systems, primarily due to the following:

Long duration of the court proceedings. Ordinary Latin American court proceedings seem unreasonably long and very formalistic. Although arbitration proceedings can last for years, one expects arbitration to be fairly fast.

Difficulties with recognition and enforcement of foreign court decisions. One of the major advantages of arbitration is the ease in enforcing awards in over 120 countries. Foreign court decisions, however, may be attacked more easily in the country where the decision is being enforced, in particular because such proceedings are usually not consensual.

Judges may not understand complex cases. Contrary to arbitration, in litigation the parties cannot select the judge that will decide the parties' dispute.[21] This can obviously be contrary to the parties' interest if the dispute involves multi-parties, various jurisdictions and applicable laws, documents in foreign languages and witnesses speaking different languages. In addition, the parties may want to choose an arbitrator that has expertise in a specific field, *e.g.*, an expert in telecommunications.

No closed door proceedings. Proceedings before ordinary courts and the courts' decisions are public. International parties, however, usually prefer closed-door proceedings, in particular if the disputed matter involves highly sensitive information.[22]

Preferential treatment of local or national parties and risk of corruption. Arbitrators are well-paid experts in their respective field of expertise, therefore, any risk of preferential treatment or bribery almost always can be excluded in international arbitration.[23]

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Arbitration by and large avoids the aforementioned problems encountered in ordinary court proceedings. In particular the parties' rights to choose the arbitrators, the law applicable, the place of arbitration, and the arbitration institution, give more certainty and predictability to the parties. Furthermore, new arbitration laws have been enacted in Latin America, adopting basic principles of international arbitration, i.e., no right of appeal on the merits, separability of the arbitration clause (no invalidity of the arbitration clause because of the invalidity of other clause(s) in the same agreement). [24] Despite revisions to arbitration laws, it can be assumed that, internationally, investors will still opt for one of the established arbitration institutions.

The Use of Modern Technology in International Arbitration

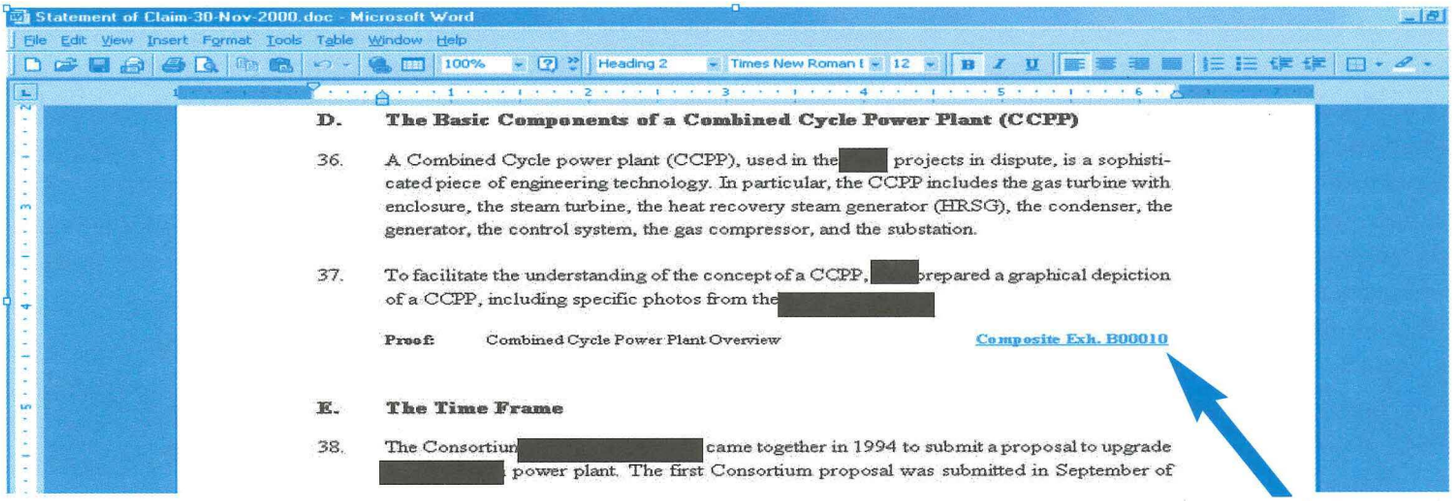
Advances in technology facilitate arbitration proceedings and are well-suited for the growing arbitration arena. Arbitration already allows parties to freely select the situs for arbitration anywhere in the world. International arbitration could be characterized as out-of-courtroom litigation. Likewise, meetings and hearings may be held anywhere the parties select and regardless of the seat of the arbitration institution or the place of arbitration. At the same time, the cases in international arbitration have become more complex. Computerization of the work environment in combination with the Internet has facilitated this border-less environment by allowing the parties and the arbitrator to electronically exchange information as easily as if the parties, witnesses, and evidence all resided in the same location. The amount of information, *i.e.*, messages, reports, opinions, has increased notably. For example, procedural or witness hearings and the presentation of the case itself are now usually video taped, with transcripts of the videotape depositions made at a later stage in the proceedings. Inspections of evidence may be videotaped and/or digitized on site at low cost, avoiding the need to have the tribunal on-site.

Not only can the tribunal come closer to the locus of the case through technological advances, but, the case can now come closer to the arbitral tribunal, as illustrated by a recent case before an ICC tribunal in Paris in which the parties, from the U.S. and Europe, disputed claims that involved a large project in Latin America. Swiss law was applied to the case. The number of documents relevant to the case was massive, and the briefs filed were some 500 pages long. Supporting documents filled almost twenty large binders and included digital video footage of a failure that occurred during the completion of the project, a CD-ROM, several Power Point presentations, and numerous photographs.

To facilitate the work of the tribunal, one of the parties shipped laptops to each of the arbitrators containing its brief and the complete set of documents and other supporting evidence, i.e., over three gigabytes of information, including video presentations, charts, photographs, facsimile, oversized spreadsheets, and diagrams.[25] To upload the documents on the computer and to have such evidence in the correct electronic format, the entire set of supporting documents was computer imaged. The supporting documents consisted not only of e-mails, which were easily imported into the electronic database, but also copies of signed facsimiles, handwritten notes, drawings, and photos not taken with a digital camera.

The universe of such electronic files were uploaded onto the laptops and electronically linked, i.e., hyper-linked, so that the tribunal had access to any exhibit cited in the brief. By mouse-click on the hyper-link, the respective exhibit appeared automatically on the arbitrator's screen of the laptop, thus automating an otherwise arduous task. The benefits of using technology in this manner are that an arbitrator is in a position to view all relevant documents at any point in time.

Further, the arbitrator is able to view photographs, video clips, and power point presentations without screening thousand of documents in hardcopy and without installing any further device or software. The amount of time thereby saved is notable because it is not necessary to endlessly search through a forest of thousands of documents. Moreover, the parties and the tribunal are able to use the laptops for the respective meetings and hearings. Thus, everyone has the same information. As a word of caution, however, although arbitrators are quite often experienced lawyers, they do not necessarily have a good command of computers. Any electronic brief with the



tribunal should, therefore, not require the arbitrator to have advanced computer knowledge.

As an alternative to laptops housing an entire exhibit database, another way of accessing massive sets of documents is via computerized document imaging and remote access via the Internet. Not only can the party pull up any desired document during a hearing at any point in time, but so can co-counsel, the tribunal, or the client, from any location. This set-up, however, requires fast speed connection to the server from which the data is ordered. Thus far the systems works fairly well even though internationally, remote access may be slow depending on the speed of the connection.

Conclusion

International arbitration is a growing field of law. Countries that used to be adverse to arbitration have discovered its benefits. Most importantly, arbitration seems to have become the preferred dispute resolution mechanism for parties investing in developing economies. Additionally, parties prefer to resolve disputes through arbitration for complex and international projects. International arbitration further allows the use of modern technology, because its procedural rules are broad and flexible. This saves a notable amount of time, shortens the duration of litigation, and therefore lowers the costs of resolving a dispute. In short, international arbitration has kept pace with the changes taking place in the international business environment.

ENDNOTES

The author is a Swiss lawyer admitted to the Zurich bar and presently Of Counsel in the international litigation and arbitration group with Steel Hector & Davis LLP in Miami, Florida. The author gratefully thanks Robert W. Pittman, Esq., for his assistance with the article.