PARAGUAY

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I. INTRODUCTION: ARBITRATION IN PARAGUAY – HISTORY AND INFRASTRUCTURE

A. History and Current Legislation on Arbitration

1. Historical evolution of law relating to arbitration

Recently, there has been a reversal of the traditional Latin American hostility towards arbitration. In this line, Paraguay today has an enviable legal framework on the matter, starting with the Constitution, which allows arbitration and the applicability of international principles and transnational law. This is followed by an extensive set of rules contained in treaties and legislation, including an arbitration law which almost entirely replicates the Model Law

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proposed by the United Nations Commission on International Trade Law (UNCITRAL).

The Latin American attitude of hostility towards international arbitration has been in part due to the fact that early legal instruments such as the Treaties of Montevideo of 1889 and 1940, and the Bustamante Code of 1928, did not deal with the matter appropriately. Moreover, the scenario of an historic absence of free trade in the region and the centuries-long held suspicion towards European and North American colonialism, which included even military interventions in defense of their economic interests, contributed to this negative attitude. In response, territorial postures such as the Calvo doctrine in favor of local jurisdiction for disputes with investors,[1] as well as aversion towards international arbitration were commonplace.

Paraguay's situation was rather different. The country was mostly isolated in the nineteenth century, constantly protecting its threatened independence, and the economy was to a large degree self-sufficient. Thus, the hostile spirit of other nations which suffered under trade abuses by developed countries did not exist in Paraguay.

Instead, the country had positive experiences with arbitration. An eloquent example is the *Hayes Award* of 1878, in which U.S. President Rutherford B. Hayes ruled in favor of Paraguay in a dispute over the Chaco region, which comprises the largest portion of its territory. Currently, Asuncion is the seat of the superior arbitral tribunal of the Southern Cone Common Market (MERCOSUR). This tribunal, despite not being properly arbitral in nature, is conceived to be the highest level for institutional MERCOSUR arbitral-related matters.

Arbitration had already been contemplated in nineteenth century Paraguayan's procedural legislation. The former Code of Civil Procedure of 1883 included the figure, whereas the most recent procedural legislation (Law 1337 of the year 1988) deals with arbitration in Book V, which is no longer in effect today. The Code of Judicial Organization (Law 879 of the year 1981), still in force, recognizes arbitration's validity and equates it to judiciary proceedings.

Notwithstanding these legislative efforts, a major shift occurred in 2002, when the country adopted Law 1879, which copied the UNCITRAL Model Arbitration Law of 1985 almost entirely.

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[1] On the Calvo Doctrine and its effect in Latin America, see Horacio A. Grigera Naón, Arbitration and Latin America: Progress and Setbacks, 2004 Freshfields Lecture, Arbitration International, Volume 21 Number 2, pgs. 127-175.

The favorable scenario is supported by the general framework established in the Paraguayan Constitution. Article 248 guarantees arbitration, whereas Article 97 recognizes arbitration as an alternative method of dispute resolution in collective labor agreements. Openness towards supranational or transnational law emerges from the preamble of the Constitution which states that Paraguay is "part of the international community." In turn, Article 143, sub paragraph 4 states that the country accepts the principle of "solidarity and international cooperation" and Article 145 stipulates that Paraguay "admits a supranational legal order."

Paraguay also ratified several international instruments that have either a direct or indirect effect on arbitration. Paraguay's Constitution expressly establishes, in Article 137, that treaties and other international instruments ratified by the country shall prevail over legislation, decrees and other administrative regulations. Additionally, Paraguay ratified the Vienna Convention on Law of Treaties dated 1969 by Law 289 in 1971.

Of utmost importance is Law 948 of the year 1996, which ratified the New York Convention of 1958 on Recognition and Enforcement of Foreign Awards, currently in effect in more than 160 States.

Paraguay also ratified several international instruments adopted by the Organization of American States (OAS) through its Private International Law (CIDIP) Conferences.[2] In general, the codification task of the OAS accomplished the reversal of the negative tendency that reigned in Latin America towards recognition of party autonomy and, arbitration in particular. It has also contributed to the openness towards international usages, principles and equitable solutions to concrete cases.

Paraguay ratified the Inter-American Convention on International Commercial Arbitration (Panama 1975) through Law 611 of 1976 and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo 1979), through Law 889 of 1981.[3] These instruments recognize party autonomy and the legal

[2] The OAS hosts, approximately every four to six years, the Inter-American Specialized Conferences on Private International Law. Known for its acronym in Spanish as CIDIP, these Conferences have produced several widely enacted international instruments (including conventions, protocols, uniform documents and model laws), which shape the Inter-American Private Law framework. (http://www.oas.org/dil/private_international_law.htm).

[3] Paraguay also adopted other CIDIP instruments related—at least partially—to arbitration, such as the Inter-American Convention on Letters

effect of arbitral awards rendered abroad in the same direction as the New York Convention.

The country also ratified via Law 892 of 1981, the Inter-American Convention on General Rules of Private International Law (Montevideo, 1979), which contains general provisions on conflict of laws. Article 9 and its search for equitable solutions (in contrast to rigid or mechanical criteria) deserves special mention. This follows U.S. formulas which target equitable solutions as opposed to the abstract and inflexible system that prevailed before in Latin America.[4] It is well known that this is particularly desirable in international arbitrations.

At a regional level, it is generally accepted that in Private International Law matters, the system that has advanced the most is the one held by the Southern Cone Common Market (MERCOSUR) originally comprised of Argentina, Brazil, Paraguay and Uruguay, with the recent addition of Bolivia and Venezuela as full members. Paraguay ratified several instruments of this common market regarding arbitration such as the MERCOSUR International Commercial

Rogatory (Panama, 1975), adopted via Law 613 of 1976, whereas its additional protocol was incorporated through Law 894 of 1981. Law 890 of 1981, in turn, approved the Inter-American Convention on Execution of Preventive Measures (Montevideo, 1979); Law 612 of 1976, ratified the Inter-American Convention on the taking of Evidence Abroad (Panama, 1975); Law 614 of 1976 incorporated the Inter-American Convention on the Legal Regime of Powers of Attorney to be used abroad (Panama, 1975); and by Law 891 of 1981 the Inter-American Convention on Proof and Information on Foreign Law (Montevideo, 1979) was adopted.

[4] *See* Ronald Herbert and Cecilia Fresnedo de Aguirre, *Flexibilización Teleológica del Derecho Internacional Privado Latinoamericano, en Avances del Derecho Internacional Privado en América Latina*, Liber Amicorum Jürgen Samtleben, Coordinadores: Jan Kleinheisterkamp y Gonzalo A. Lorenzo Idiarte, Editorial Fundación de Cultura Universitaria, Montevideo, 2002, pg. 56.

Arbitration Agreement (*Decisión del Consejo del Mercado Común* No. 3/98), ratified by Law 3303 of 2007,[5] among others.[6]

Regarding investment arbitration, Paraguay joined the International Centre for Settlement of Investment Disputes (ICSID) created in Washington in 1965 by Law 944 of 1982. The country had a positive experience in the first arbitral award affecting it (*Eudoro A. Olguín v. República del Paraguay*).[7] In the other two cases involving Paraguay before ICSID (*Société Générale de Surveillance S.A. (SGS) v. República del Paraguay*[8] and *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. República del Paraguay*[9]) the proceedings concluded with settlement agreements approved by the corresponding arbitral tribunals.

Also, by Law 124 of the year 1991, Paraguay ratified the instrument that created the Multilateral Investment Guarantee Agency (MIGA) of Seoul, Korea, which guarantees enforcement in signatory countries of investment arbitration awards dictated in accordance with its rules. Furthermore, the country ratified thirty bilateral instruments on investment promotion and protection, with twenty-eight currently in force.[10]

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[5] Paraguay also ratified the MERCOSUR Agreement on Arbitration with Bolivia and Chile (*Decisión Consejo Mercado Común* No. 4/98), approved by Law 3497 of 2008, not yet in effect as Bolivia and Chile have pending ratifications. Paraguay also adopted the Protocol on Legal Assistance and Cooperation in Civil, Commercial, Labor and Administrative Matters (*Decisión Consejo Mercado Común* No. 5/92, ratified by Law 270 of 1993), which deals with arbitration in Chapter V, Arts. 18 to 20 and 24; and the Protocol of Interim Measures (*Decisión Consejo Mercado Común* No. 27/94, adopted via Law 619 of 1995), which extends its Articles 1, 2 and 6 to arbitration.

[6] The MERCOSUR Protocol on International Jurisdiction in Contract Law Matters (*Decisión del Consejo del Mercado Común* No. 1/94) was ratified in Paraguay by Law 597 of 1995 and allows party autonomy for the selection of a judicial or arbitral forum (Article 4). In the past, Argentina, Paraguay and Uruguay were governed by the Treaty of International Civil Law of Montevideo of 1940. This treaty provided a different solution, and there was no convention with Brazil on the topic.

[7] Case No. ARB/98/5.

[8] Case No. ARB/07/29.

[9] Case No. ARB/07/9.

[10] France, (Law 804/80, Art. 12); United Kingdom and Northern Ireland, (Law 92/91, Art. 9; and Law 798/95, Art. 8); China, (Law 29/92, Art. 6); Switzerland, (Law 17/92, Arts. 9 and 10); United States of America, (Law 155/93, Art. 5); Korea, (Law 225/93, Arts. 12 and 13); Belgium and

Moreover, according to Law 5102 of the year 2014, which regulates public-private partnerships in Paraguay, arbitration is expressly recognized as the last tier of dispute settlement mechanisms (after direct negotiations and submission of the dispute to a technical board) for disputes related to public-private partnership agreements.

The above-referenced legal investment framework contributes to the creation of a cosmopolitan environment in the country.

As seen, at the legislative level, the country adopted Law 1879 of the year 2002 strongly inspired by UNCITRAL's Model Law. With said adoption, as an Appeals Tribunal noted, Paraguay has harmonized its rules with the most modern arbitral practices.[11] The same tribunal also highlighted that Law 1879 is an almost literal adoption of the UNCITRAL Model Law.[12] A similar statement was also advanced by another state tribunal.[13]

Other laws also expressly recognize international commercial arbitration. Law 117 of the year 1991, on Foreign Investments, favors

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Luxembourg, (Law 200/93, Art. 10); The Netherlands, (Law 349/94, Art. 9); Hungary, (Law 467/94, Arts. 9 and 10); Germany, (Law 612/95, Arts. 10 and 11); Austria, (Law 1180/97, Arts. 8 and 9); Spain, (Law 461/94, Arts. 10 and 11); Peru, (Law 468/94, Arts. 8 and 9); Rumania, (Law 527/94, Arts. 8 and 9); Chile, (Law 897/96, Arts. 8 and 9); Venezuela, (Law 1058/97, Arts. 9 and 10); El Salvador, (Law 1316/98, Arts. 9 and 10); Costa Rica, (Law 1319/98, Arts. 10 and 11); Czech Republic, (Law 1472/99, Arts. 9 and 10); Portugal, (Law 1722/01, Arts. 9 and 10); Cuba, (Law 1900/02, Arts. 9 and 10); Italy, (Law 4904/13, Arts. 9 and 10); United Arab Emirates, (Law 6233/18 Art. 9); Qatar, (Law 6271/19, Art. 8); South Africa, (Law 443/74, Arts. 7 and 8); Argentina, (Law 18/68, Art. 2); Brazil, (Decree Law 127/57 Art. 2); Uruguay, (Law 575/76, Arts. 5, 6 and 7); Ecuador, (Law 469/94, Arts. 8 and 9) (currently not in force); and Bolivia, (Law 1891/02, Arts. 9 and 10) (currently not in force).

[11] *Edupca c/ Rosario del Pilar López s/ Indemnización de Daños y Perjuicios por Responsabilidad Extracontractual".* A.I. Nº 150 (April 07, 2014), Tribunal de Apelación en lo Civil y Comercial, 3ª Sala, Asunción, Paraguay.

[12] "*Recurso de Nulidad interpuesto por el Abg. Roberto Moreno en representación de la Procuraduría Gral. de la República c/ proceso arbitral: 'Julio Galiano Morán c/ Estado Pyo*'". Acuerdo y Sentencia Nº 79 (August 28, 2018), Tribunal de Apelación en lo Civil y Comercial, 3ª Sala, Asunción, Paraguay.

[13] "*Recurso de nulidad interpuesto por la Fundación TESAI c/ proceso arbitral caratulado Cesar Luis Puente c/ Fundación TESAI s/ constitución de tribunal arbitral*". Acuerdo y Sentencia Nº 85 (December 22, 2017), Tribunal de Apelación en lo Civil y Comercial, 1ª Sala, Asunción, Paraguay.

arbitration in Article 9; Law 779 of the year 1995, on Petroleum and other Hydrocarbons, envisages arbitration in Article 5; Law 921 of the year 1996, admits arbitration on fiduciary matters, in its Article 44; and Law 1163 of 1997, allows arbitration in matters of commodities exchange market in Article 22.

The scope of Law 194 of 1993 on Agency, Representation and Distributorship, regarding court jurisdiction and arbitration, has been very controversial.

One matter widely discussed in the application of Law 194 is the obligation to submit controversies to the jurisdiction of Paraguayan tribunals (Article 10). In its *Acuerdo y Sentencia* Number 827 of 2001, the Supreme Court held that Article 10: "constitutes a guarantee for the parties so that the matter at stake can be discussed in the place of performance of the contract. Nothing more logical or fair… the State, through this law, intervenes in the relationship by establishing clear rules to which the parties shall adhere."

Article 10 also allows arbitration (and another discussion was held regarding whether it could be conducted in a foreign country) with the possibility that arbitrators might not apply Paraguayan law. The matter was settled by *Acuerdo y Sentencia* 285 of 2006 in the case: "*Accion de Inconstitucionalidad en el juicio: Gunder ICSA c/KIA Motors Corporation s/ indemnización de daños y perjuicios*."[14]

The Supreme Court did not deny that these issues could be submitted to arbitration, but states in its decision that given the mandatory character of Law 194, arbitration should be conducted in Paraguay. This has the obvious objective of allowing a possible later scrutiny by the local Supreme Court regarding whether the award observes the mandatory Paraguayan law.

The *Gunder* case has an additional important factor: the express provision made by the parties that appointed arbitrators should apply Korean law. With this, there was an obvious attempt to fraudulently evade the imperative applicable law. The Paraguayan Supreme Court did not admit this. It must be noted that in an analogue posture, the European Court of Justice in *Ingmar GB Ltd. contra Eaton Leonard Technologies Inc.*, case C-381/98, ruled against a fraudulent evasion of an imperative provision by submitting the contract to another law. In relation to jurisdiction and, specifically, arbitration, precedents in Belgium are along the same lines as what was decided by the Paraguayan Supreme Court (*Decisions No.*

[14] Case started in 2004 – No. 3804.

JC04AF2 of 2004 and *No. JC06BG5_1 of 2006*).[15] This same line was adopted by the Advocate General Mr. Nils Wahl, in his conclusions presented to the European Court of Justice (UNAMAR)[16] on May 15, 2013, in regards to the Directive 86/653/CEE, related to independent commercial agents.

2. Current law

a) Domestic arbitration law

Law 1879 of the year 2002, based on the UNCITRAL Model Law.

b) International arbitration law

Paraguayan law applies to both national and international arbitration (Article 1). Thus, local legislators took advantage of the opportunity to also modernize internal legislation. This—as stated in UNCITRAL's official commentary on the Model Law—can be done by applying the arbitration law to both categories of cases.

Regarding the international nature of arbitration, the Paraguayan law (Article 3(3)) follows the Model Law and its ample criterion.

Paraguayan law does not distinguish between "civil" and "commercial" obligations. Both have been unified in the Paraguayan Civil Code in effect since 1987, which followed two of its main sources, the Swiss and Italian Codes, on this methodology.

[15] It is known that this European country has liberal views towards arbitration. However, this openness does not exist with regard to distribution contracts, because the Belgium law of 1961 presumes—as does the Paraguayan law—that the distributor does not exercise free will due to his particular disadvantageous bargaining position. Consequently, the prevailing interpretation is to allow for arbitration "as long as the arbitrator applies Belgium law." This was decided in the Belgium *Cour de Cassation* in an important decision rendered in 2004. The court stated that if the arbitration clause submits these types of disputes to a foreign law, the Belgium judicial authority can exclude the possibility of arbitration when permitting it would be a violation of its law and legal order. This was confirmed in the 2006 decision.

[16] *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare* (asunto C184/12) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CC0184:ES:HTML.

B. Arbitration Infrastructure and Practice in Paraguay

1. Major arbitration institutions

Paraguay has one sole arbitration institution, the *Centro de Arbitraje y Mediación, Paraguay*, run by the local Chamber of Commerce.

This institution has an efficient administrative structure and has obtained ISO 9001 quality certification through a program sponsored, at that time, by the Inter-American Development Bank (IADB).[17] The local arbitration center also has an agreement with the Inter-American Commercial Arbitration Commission (IACAC).

Moreover, the arbitration rules of the institution (in their latest version as of March 21, 2019) have been updated.

However, it needs an aggressive education and training program for its members as many of them are not acquainted with arbitration particularities.

This task is in part accomplished by CEDEP, an academic institution that conducts high quality programs in Paraguay with leading international organizations and world-wide renowned universities, such as Georgetown, Bologna and Heidelberg.[18] CEDEP has organized arbitration courses and events; among them, the Latin American Arbitration Conferences held once a year since 2009. Nearly forty leading global and regional arbitration practitioners and academics participated in the first event, amongst them, Yves Derains, Alexis Mourre, Alejandro Garro and Diego Fernández Arroyo.[19] In 2019, CEDEP coorganized in Asunción, with the Universidad de Buenos Aires and the Universidad del Rosario Bogota, the twelfth edition of the Moot Competition of International Arbitration,

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[17] *See* the institution's official website: www.camparaguay.com. For further information, *see*: José A. Moreno Rodríguez, *Control de Plazos en el Procedimiento Arbitral*, in: José A. Moreno Rodríguez, *Temas de Contratación Internacional, Inversiones y Arbitraje*, Catena Editores y CEDEP, Asunción (2006). For a general overview given from a Paraguayan perspective, *see also:* Luis A. Breuer, *Una breve introducción al arbitraje comercial internacional*, in José A. Moreno Rodríguez (Coordinator), *Arbitraje y Mediación*, Intercontinental Editora, Asunción, 2003, pgs. 89 and following).

[18] *See* www.cedep.org.py.

[19] *See* www.cedep.org.py/arbitraje. *See also* http://asadip.wordpress.com/2009/06/19/i-conferencia-latinoamericana-de-arbitraje-super-hasta-las-ms-optimistas-expectativas.

2. Development of arbitration compared with litigation

It can be fairly stated that arbitration in Paraguay is still at an embryonic stage. Nonetheless, the legal framework is already in place and some arbitration of certain importance has already been conducted in the country.

As stated previously, the fact that Paraguay is the seat of the head arbitral tribunal of the Southern Common Market (MERCOSUR) (Article 38, *Protocolo de Olivos* of 2002) has a symbolic meaning. This is, technically, not an arbitration court. However, the accomplishment contributes to positioning the country as a sort of "legal seat" of the MERCOSUR. This has even been mentioned in a speech by Brazilian President on the occasion of the inauguration of said tribunal.

Not less relevant, Asuncion is the seat of ASADIP, the American Association of Private International Law, which has among its members leading arbitration practitioners and academics from the Americas and Europe.[20]

It is to be expected that all this may contribute to promoting arbitration in the country.

II. CURRENT LAW AND PRACTICE

A. Arbitration Agreement

1. Types and validity of agreement

a) Clauses and submission agreements

Article 3(a) in fine of the Paraguayan law, following the Model Law, recognizes both: an arbitration clause included in a contract for the case of an eventual dispute, and a submission agreement for an already existing conflict.

There is no particular restriction by the Civil Code regarding arbitration clauses in contracts of adhesion. However, Article 691 contains a general provision which restricts abuses. Therefore, an arbitration clause obtained under these conditions may result, in particular circumstances, unenforceable.

As stated, the Consumer Law (Law 1334 of 1998) prohibits standard contract clauses that impose arbitration, Article 28, d). This is tempered by other provisions (Decree 20572 of 2003, Resolution 147 of

[20] *See* www.asadip.org.

2003 and Decree 21004 of 2003), that state that these clauses would be valid if the consumer voluntarily agrees to them.

b) Form requirements

Regarding the form of the arbitration agreement, inexplicably, Article 10 of the Paraguayan law is more restrictive than article 7 of the Model Law. It requires written agreement, and considers the agreement written when it is contained in a document signed by the parties or in an exchange of letters or special telegrams (*telegramas colacionados*) that contain the agreement.

This is unconceivable, considering the broad criteria of freedom of formalities that arises from the Paraguayan Civil Code (Articles 302, 673, 676, 704, 705 and 703), which is in accordance to the evidentiary openness of the Code of Civil Procedure (Articles 246 and other related provisions). This interpretation is reinforced by the Electronic Commerce Law (Law 4868 of 2013), which grants contracts celebrated through electronic mechanisms the same effects to a written agreement, while also indicating that the Ministry of Industry and Commerce must promote alternative dispute resolution mechanisms[21].

B. Jurisdiction

1. Competence-competence

Even though Article 19 follows Article 16 of the Model Law in the sense that the arbitral court may decide on its own jurisdiction, it departs from it when stating that the award cannot be rendered until

[21] Other recent Laws regulate electronic commerce. Law 4017/2010 "of the legal validity of the electronic signature, the digital signature, data messages, and the electronic file," and Law 4610/2012 "That Modifies and Amplifies Law 4017/2010 'of the legal validity of the electronic signature, the digital signature, data messages, and the electronic file,'". The mentioned law recognizes the legal validity of the electronic and the digital signatures, data messages and the electronic file, and regulates the utilization of said instruments, the certifying entities, their habilitation and the provision of certification services. Also, Paraguay ratified the United Nations Convention on the Use of Electronic Communications in International Contracts (Law 6055/2018.)

there is a favorable judicial ruling on this point. This is an undesirable provision that could lead to counterproductive delays in the process.[22]

However, the provision is a step forward with regard to the prior normative vacuum which established a negative precedent on this matter of *Kompetenz-Kompetenz*. This was given in the case: "*INDUMAR S.A. c/ Compañía Cervecera Brahma del Paraguay s/indemnización de daños y perjuicios.*"[23] A different solution could have been given in that case if trends in comparative law had been followed, which did not occur. The matter has now been settled in the opposite direction, a solution desirable for arbitration.

2. Interaction of national courts and tribunals

As a general rule, judicial intervention is excluded when arbitration takes place, save in the case of the exceptions authorized by law.

Article 8 of the Paraguayan law on the extent of court intervention in arbitration proceedings, departs subtly from Article 5 of the Model Law, by substituting the expression *this law* for a more generic one: any legal rule to the contrary.

The competent judicial authority for the tasks of assistance and supervision during arbitration will be the Civil and Commercial Judge located where arbitration takes place (Article 9). The provision also establishes that "when the place of the arbitration is outside national territory, the judge who shall recognize and enforce the award shall be the competent Civil and Commercial Judge of the domicile of the enforced party, or, the one of the location of the goods."

Regarding the agreement to arbitrate and the substantive claim before a court, Article 11 is identical to Article 8 of the Model Law in the sense that the judge shall submit the parties to arbitration, except in the cases where its impossibility or ineffectiveness were proven. In an award rendered in the case "Edupca c/Rosario del Pilar López s/indemnización de daños y perjuicios por responsabilidad extracontractual,"[24] an Appeals Court decided that the existence of two contradicting clauses in a contract, -one that provided for

[22] Maximum constraint by judges in these matters has been advocated in favor of arbitration (Diego Zavala*, La autonomía de la cláusula arbitral y la competencia de los árbitros,* in José A. Moreno Rodríguez (Coordinator), *Arbitraje y Mediación*, Intercontinental Editora, Asunción, 2003, pg. 220).

[23] A.I. No. 253, May 4th, 2005, Tribunal de Apelación en lo Civil y Comercial, 2ª Sala.

[24] A.I. No. 150, April 7th, 2014, Tribunal de Apelación en lo Civil y Comercial, 3ª Sala.

arbitration and another one that provided for judicial intervention in case of a conflict- turned the arbitration clause innefective. Invoking Article 11, the Court refused to submit the controversy to arbitration and upheld its competence to judge the case.

The difference between Article 11 of the Paraguayan law and Article 8 of the Model Law lies in the final part, where it says that arbitration proceedings may begin or proceed and an award may be rendered, "as long as the parties desist from requesting judicial intervention before the award is rendered."

This opens the door to the unnecessary blocking or delay of arbitration. Albeit understandable that this has been done to prevent contradictions among judicial and arbitral decisions internally, in the opinion of foreign consultants Fernández Arroyo and Dreyzin, who have evaluated the content of the Paraguayan Law, this addition is clearly discouraging for arbitration.[25]

C. Arbitrability

1. Subjective arbitrability

a) Natural persons

Natural persons or individuals (*personas físicas*) acquire legal capacity (*capacidad de hecho*) in Paraguay at the age of 18, unless there is a case of legal incapacity. A natural person with legal capacity can act freely, only subject to specific restrictions that can be imposed by law given certain situations.

b) Legal persons

Legal entities (*personas jurídicas*) registered in Paraguay, acting according to their bylaws or articles of incorporation are free to submit their conflicts to arbitration.

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[25] Report of the consultants Diego Fernández Arroyo and Adriana Dreyzin de Klor, within the framework of the Consultancy ALADI-CEDEP, *available at*: www.cedep.org.py/informeALADI. Another perspective is Filartiga Lacroix´s, according to whom; "… legislators opted for the health of the legal system, avoiding what could arise from a later judicial resolution that rules contrary to what was resolved in the arbitration process." (Carlos A. Filártiga Lacroix, *Análisis comparativo de la Ley de Arbitraje y Mediación con respecto a la Ley Modelo*, in José A. Moreno Rodríguez (Coordinator), *Arbitraje y Mediación*, Intercontinental Editora, Asunción, 2003, pgs. 344-345).

c) States and state entities

In the past, legislation prohibited, under penalty of annulment, arbitration of matters related to the State and Municipalities. This situation has changed in recent years with several legal enactments.

In the mid nineties, Law 489 (of 1995) authorized the Central Bank to submit certain matters to arbitration (Articles 2 and 19, x). This was later extended to other State entities and subject matters, by two sets of legal rules: Law 1618 of Concession of Public Works and Services, and Law 2051 of 2003 on Public Procurement.

In addition, Arbitration Law 1879 of 2002, in Article 2, authorizes the State and other State entities, as well as Municipalities, to arbitrate their differences with private citizens, subject to the condition that they arise from legal acts or contracts governed by private law.

The two laws (Law 2051 and Law 1618) governing public contracts have slightly different arrangements for arbitration. Even though these two laws have different objectives in principle, they both include procurement of "public works," a situation that could eventually lead to confusion.

According to Law 2051, arbitration is optional, and if it takes place, it is to be governed by Law 1879 (Article 9).[26] In turn, Law 1618 establishes conciliation as the first method of dispute resolution, and if this does not lead to a solution, arbitration. This applies if arbitration has been established as a dispute resolution mechanism in the terms and conditions of the corresponding tender (Article 45).

Regarding choice of law matters, Law 2051 declares Paraguayan law as the applicable law (Article 88, and regulated by Article 125 Decree 21909 of 2003, modified by Decree 5174 of 2005). The provision is not reproduced in Law 1618. Decree 21909, that regulates Law 2051, rejects equity arbitration, and submits the procedure to be

[26] The entities that comprise the public sector, according to Article 1 of Law 2051 are: the entities of the central administration, comprising the Legislative, Executive and Judiciary Branches, the General Comptroller of the Republic, the Ombudsman, the Attorney General's Office, the Public Ministry (Office of the Public Prosecutor/Attorney General), the Council of Judges, the Jury of Magistrates, and other governmental entities of similar nature. Provincial governments, municipalities, national universities, the autonomous, autarchic entities for regulation and supervision, public social security institutions, public enterprises and joint ventures, limited liability companies in which the State is a majority partner, official financial institutions, the State Central Bank, and entities of the decentralized public administration also fall within the scope of the law.

followed in these cases to the "Rules of Arbitration and Mediation of the National Chamber of Commerce and Services of Paraguay" (Article 125).

Law 5102 of the year 2014 which regulates public-private partnership agreements as a specific type of contracts involving the State and particulars, establishes in its article 41 that disputes related to the interpretation, execution, compliance, development or termination of such agreements, which could not be settled through negotiations between the parties, can be submitted to arbitration at law, provided that such disputes relate to private law matters. For these purposes, said article provides that contracts are to regulate aspects such as the corresponding procedural stages, the requirements to be fulfilled in each stage, the composition of the jurisdictional organs, and the effectiveness of the decisions, opinions and awards, notwithstanding those aspects already regulated by the corresponding decree.

Precisely, Decree 1350 of the year 2014, which regulates Law 5102, stipulates, among other matters, that arbitration is the third tier of dispute settlement mechanisms on public-private partnership agreements. In this regard, it is stipulated that, unless otherwise agreed by the parties, the provisions under Law 1879 shall apply, thus allowing parties to select different arbitration rules, both institutional or ad-hoc, domestic or foreign. It is expressly stipulated, in its article 110, that the choice of the forum based on the regulations or contained in the specific bidding terms and conditions for each agreement, excludes any other forum, jurisdiction or dispute settlement mechanism.

Other special laws also deal with the matter. Telecommunication Services Law 642 of 1995, states in Article 123 that in any court case where the plaintiff or defendant is the Commission of Telecommunications "the courts will have jurisdiction in the capital, unless the Commission agrees to abide by other jurisdictions." In turn, Law 1615 of 2000, regarding the privatization of public enterprises, in Article 34, establishes the exclusive jurisdiction of the courts of Asuncion. It must be noted that there is no current privatization process underway.

The case "Ministerio de Agricultura y Ganadería y Procuraduría General de la RPCA c/ Grupanor Cercampo S.A. s/ nulidad de cláusula contractual y laudo arbitral" is of utmost importance.

In this case, the State presented an ordinary civil action requesting the annulment of an award by an arbitral tribunal seated in Paris

where proceedings were conducted according to the rules of the International Chamber of Commerce.

The conflict arose here from a contract to supply machinery and services for the implementation of a development program related to the dairy and agriculture sector in Paraguay, within the framework of a cooperation project with Spain, ratified by Law 1520 of 1999.

The private company (Grupanor) questioned the jurisdiction of the Paraguayan tribunal, arguing that any appeal should have been brought to courts of the seat of arbitration, something that had not been done.

It must be taken into account that Paraguay voluntarily submitted to this arbitration, and that this situation was even authorized by law. Moreover, the Solicitor General (Procurador General) participated in the arbitration proceedings in Paris and no recourse was presented against the award there.

The Judge for Civil and Commercial Matters of the 8th Chamber (by A.I. No. 1816 of 2007) ruled in favor of the Paraguayan State. This was later reversed in appeal (A.I. No. 6 of 2009, 2nd Chamber) in a decision that upholds the arbitral award.

The appellate ruling noted that, first of all, it was true that the supply agreement in question had characteristic features of an administrative—and not private law—contract. One party was the State, its purpose was a public service intended to meet public needs and the procurement process was subject to public bidding. On the other hand, regarding the interpretation and performance of such contract (which ultimately is a sales agreement) private law governs. Proof of this is—according to the appeals court—that the action was filed before a civil and commercial court and not before an administrative instance. The appeals court made express reference to Article 248 of the Constitution which empowers the State to submit to arbitration matters which fall within the scope of private law.

2. Objective arbitrability

a) Examples of restrictions to objective arbitrability at law

Article 2 of the Paraguayan law is peculiar. It establishes that every matter that can be subject to settlement and "patrimonial" (pecuniary) in content shall be subject to arbitration. This article excludes matters that require intervention of an official authority under the name of *Ministerio Público* (which operates under the head of a figure analogous

to the Attorney General), such as, for example matters related to family law or to minors.

Said article also states that matters regarding State and Public Entities, in private-law issues, shall also be subject to arbitration. This is in line with the provision contained in Article 248 of the Paraguayan Constitution.

An interesting case was presented to the Paraguayan State Courts regarding the abitrability of acts related with corruption. In the case, the Environmental Ministry (*Secretaría del Ambiente)* requested the annulment of an arbitral award, on the grounds of the existence of an alleged illegal act related to the case. The Appeals Tribunal ultimately decided that the allegation of corruption is not sufficient to grant the annulment of the award, considering that the alleged corruption charges were not demonstrated in the proceedings.[27]

D. Arbitral Tribunal

Regarding the appointment, number and qualification of arbitrators, the corresponding articles of the Model Law were incorporated with the slight changes mentioned below.

Article 13 of the Paraguayan Law maintains the same wording of Article 11 of the Model Law relating to the appointment of arbitrators. The change in the first part of the Paraguayan law is that, despite mentioning citizenship as an element that shall not be considered an obstacle for the appointment as arbitrator—as does the Model law—it also mentions domicile.

Moreover, regarding migratory aspects, the Paraguayan law states in sub paragraph a) "for the performance of their duties, foreign arbitrators shall be admitted into the country as foreign non-residents, for the length of six months. This period can be extended for similar periods. The arbitrator must receive retribution for his tasks during his stay in the country."

[27] "*Recurso de nulidad interpuesto por el Abg. Hugo Enrique Cañiza en representación de la Secretaría del Ambiente c/ proceso arbitral caratulado: Taller RC de Crispín Ruffinelli c/ Secretaría Nacional del Ambiente (SEAM)* s*/ cumplimiento de contrato*". Acuerdo y Sentencia Nº 49 (June 6, 2018), Tribunal de Apelación en lo Civil y Comercial, 3ª Sala, Asunción, Paraguay.

1. Challenge and removal

Article 14 of the Paraguayan law follows the Model Law, but reduces the time to raise the petition to the judge from thirty to fifteen days and does not include the phrase that states that notwithstanding this procedure, arbitration shall continue, and the arbitral award can even be rendered.

Foreign consultants have criticized the solution as they consider it can severely interfere with arbitration proceedings.[28]

Article 16 of the Paraguayan law omits Paragraph 2 of Model Law Article 14, which states with regard to the "failure or impossibility to act," if, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

a) Replacement of arbitrators

There is a slight difference between the Paraguayan Law's Article 17 and the Model Law regarding the appointment of substitutes. In this case, according to Article 18, when the arbitrator for any reason ceases and desists from performing his functions, a substitute will be designated following the same mechanism as the original appointment.

Article 19 does not follow the Model Law in the sense that the award cannot be rendered if in the meantime there is a judicial decision pending.

E. Conducting the Arbitration

The Paraguayan Law replicates most provisions of the Model Law concerning arbitral procedure. Article 22 of the nation's law only makes a minor addition to the second paragraph of Article 19 of the source. According to this, if there is no agreement, the court may conduct arbitration as it deems appropriate "subject to the provisions of this Law," to which the Paraguayan Law adds, with "notice to the parties."

There are other minor changes. Article 27 omitted a few lines of Article 24 of the Model Law. Thus, sub paragraph 1), regarding

[28] Report of the consultants Diego Fernández Arroyo and Adriana Dreyzin de Klor, within the framework of the Consultancy ALADI-CEDEP, *available at:* www.cedep.org.py/informeALADI.

"hearings and written proceedings," states that, unless otherwise agreed upon by the parties, the arbitral tribunal shall decide whether to conduct hearings for the presentation of evidence or for oral argument, or if proceedings will be conducted on the basis of documents and other evidence. Additionally, the following paragraph from the Model was deleted: "However, unless the parties have agreed that no hearings will be held, the arbitral tribunal shall conduct such hearings at an appropriate stage of the proceedings at the request of one of the parties."

Regarding Paragraph 3), which refers to information to be transmitted to the other party, such as all statements, documents or other information that one party shall provide the arbitral tribunal, the Paraguayan law removes from the Model the following: "All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties."

Article 28 follows Article 25 of the Model Law, with an addition made to sub paragraph c). It states that the arbitral tribunal may continue the proceedings and render the award based on the evidence available when a party fails to appear at a hearing or to produce documentary evidence, to which it adds, or "does not provide evidence."

1. Conduct of arbitration

a) Submissions and notifications

Article 5 differs from Article 3 of the Model Law by substituting "mailing address" for "special domicile" (sub paragraph a), thus in accordance with the terminology used by the Civil Code (Article 62). It has been said that it would have been more useful perhaps, adding instead of substituting the expression, as there is no reason "not to accept as valid notifications to a mailing address, or even, an electronic notification, so widely used today globally."[29]

In addition, the following was deleted from the Model Law: "…if none of these can be found, after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or

[29] Filartiga Lacroix, cited, page 340.

mailing address by registered letter or any other means which provides a record of the attempt to deliver it."

In this sense, it has been stated: "It must be admitted that the introducing vague concepts and certainly imprecise ones as "reasonable inquiry" or "attempt to deliver" found in the deleted text, does not seem compatible with our legal uses, even admitting that said formulas are widely used in the Anglo-Saxon legal tradition. In effect, from the perspective of our institutions, what is the extent of a "reasonable inquiry"? Or, what should the requirements be so that an attempted delivery can be considered legally valid? The considerations expressed herein would be justified challenges to the arbitral process, as eventually constitutional warranties such as due process and defense by trial would be affected. This was the criteria of the majority of legislators who finally opted to eliminate the aforementioned paragraph."[30]

Obviously, the arguments raised do coincide with what is going on in international practice and with the normative texts that include these, many of which have been ratified by Paraguay. Not following the Model here, does not, therefore have worthy justifications.

b) Deadlines, and methods for their extension

Article 6 of the Paraguayan Law provides for a rule about calculating time periods that was not considered by the Model law. It establishes that time periods shall begin the day after the notification, note, communication or proposal is received. If that is not a business day in the place of residence or establishment of the businesses of the recipient, the period shall extend until the next first business day. Other holidays in the time period shall be included in counting the period of time.

This rule departs from legislation for ordinary civil and commercial procedures in the country, in which only business days are counted, except in cases where there is a specific rule to the contrary.

Regarding the case "*Recurso de Nulidad contra Fallo Arbitral No. 58181T0029004 JTI Trading S.A. vs. INDUMAR S.A.*," by A.I. Number 509 of 2006, the Second Chamber of the Civil and Commercial Appeals Court, referred, among others, to Article 6 of the arbitration law, according to which the time period shall begin the day after the notification is received. It expressly mentions that official holidays or non-business days shall be included in counting the time period. This

[30] Filartiga Lacroix, quoted, pages 339-340.

was a decisive factor in declaring extemporaneity with regard to the judicial challenge.

2. Interim measures of protection

Paraguayan Law reproduces articles of the Model Law, except for what is stated in Article 9, in the sense that it will not be incompatible with "an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure"

These measures can only be granted at the request of the parties and not *ex officio*.

Article 20 of the Paraguayan law, follows, in its first part, Article 17 of the Model Law, adding: "Interim measures of protection ordered by the arbitral court shall be effective by judicial order adopted without the other party being heard within the third day of being requested by said court. Before the constitution of the arbitral tribunal interim measures of protection shall be requested before the competent Civil and Commercial Judge and shall be decided by the latter. Interim measures of protection granted judicially shall expire within seven days of the constitution of the arbitral tribunal; this tribunal shall be entitled to confirm them or not, or modify them, from the moment of its constitution."

3. Costs

The Paraguayan Law expressly mentions arbitration costs, and by doing so, it goes beyond the Model Law.

In the "definitions," Article 3 establishes as costs: "The legal fees of the arbitral costs; arbitrator travel costs and other expenditures; fees of the expert witness or of any other assistance required by the arbitral court; travel expenses and other expenditures incurred by witnesses, as long as they are approved by the arbitral court; costs of winning party's legal representation and assistance if parties agreed upon the claim of said cost during the arbitral proceeding and only to the extent the arbitral court decides the amount is reasonable; retributions and costs of the institution that appointed arbitrators."

Chapter IX contains another four articles regarding costs. Article 49 refers to the ability of parties to establish rules for arbitration, either by opting directly or by reference to rules of arbitration. In the absence of agreement, rules of title XI, referred to in the following paragraph, shall apply.

Regarding the amount, according to Article 50, it shall be reasonable, taking into account the amount in dispute, the complexity of the matter, the time dedicated by arbitrators and any other applicable circumstances.

Article 51 states that when the court dictates an order of conclusion of the arbitral proceedings or of an award in the terms agreed by parties, it shall establish costs in the text of that order or award.

Finally, Article 52 states that, once constituted, the arbitral court shall require each party to deposit an equal amount for the purpose of covering the fees of the members of the arbitral court.

F. Arbitration Award

On this matter, the Paraguayan Law entirely transcribes the text of the UNCITRAL Model Law.

Regarding the substantive law to be applied by the arbitrators, Article 32 of the Paraguayan Law exactly replicates Article 28 of the Model. This settles the controversy in the country in favor of party autonomy in international contracts, at least regarding to arbitration.[31]

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[31] The problem (still present if the matter is not submitted to arbitration and goes to local courts) emerges due to the lack of clarity of the Civil Code that contains rules of Private International Law and, in particular, regarding choice of law in contracts. There are no judicial precedents and the matter has been addressed by writers. Silva Alonso, one of the members of the National Codification Committee who actively worked on the drafting committee, sustains that the principle is accepted (Ramón Silva Alonso, *Derecho Internacional Privado, Parte Especial*, Intercontinental Editora, Asunción, 1995, pgs. 136-137). Ruiz Díaz Labrano has a similar opinion (Roberto Ruiz Díaz Labrano, *La Ley aplicable y Jurisdicción competente en materia contractual desde la perspectiva del ordenamiento jurídico paraguayo*, in Carlos A. Soto, (Director), *Tratado de la Interpretación del Contrato en América Latina*, T. II, pgs. 1509 and following), as well as Moreno Rodríguez (José A. Moreno Rodríguez, in Carlos Esplugues Mota y Daniel Hargain, Coordinators, *Derecho del Comercio Internacional. MERCOSUR y Unión Europea*, B de F and Reus, Madrid (2005), pgs. 303-305. José A. Moreno Rodríguez, in Carlos Esplugues Mota, Daniel Hargain y Guillermo Palao Moreno, *Derecho de los Contratos Internacionales en Latinoamérica, Portugal y España*, Editoriales EDISOFER SL, Madrid, and B de F, Montevideo and Buenos Aires, 2008, pgs. 570-572. A contrary position is sustained by Díaz Delgado (Rolando Díaz Delgado, *El derecho aplicable al fondo del contrato con cláusula de arbitraje*, in José A. Moreno Rodríguez (Coordinator), *Arbitraje y Mediación*, Intercontinental Editora, Asunción, 2003, pgs. 223 and following; and Beatriz

Article 32 of the Paraguayan Law differs from Article 28 of the Model Law in that, rather than using expressions such as "*ex aequo et bono*" or "amiable composition," it simply uses the words "in equity (*en equidad*)."

1. Settlement

Regarding settlement, there is a slight difference between Article 34 of the Paraguayan Law and Article 30 of the Model Law. The local law states that the arbitral tribunal will render the award by recognizing the settlement agreement to which the parties have arrived.

To the final part of Article 30 of the Model Law, the Paraguayan law adds to the wording of the Model Law that the settlement agreements homologated by the tribunal will be *res judicata*.

Article 35 of the Paraguayan law innovates with respect to the Model Law by stating that parties have the right, at any moment before the award is rendered, to agree to suspend arbitral proceedings for a certain period of time.

Regarding the conclusion of the proceedings, Article 37 of the Paraguayan law adds to the text of Article 32 of the Model Law that in case of withdrawal, said termination will impede the plaintiff from initiating an arbitral proceeding regarding the same matter in the future.

G. Challenge and Other Actions against the Award

1. Setting aside

Article 40 of the Paraguayan law copies the text of Article 34 of the Model Law almost entirely. Other paragraphs of the Model Law are distributed among Articles 41 and 43 of the former.

The first paragraph of Article 40 states that the annulment proceedings can only be upheld before the competent Court of Appeals in Civil and Commercial matters of the place where the award would have been dictated. It discards scrutiny through an appeal procedure. Moreover, when dealing with arbitral awards constitutionality-related issues, the Supreme Court's Constitutional Chamber has ruled

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Pisano, *La autonomía de la voluntad en el Derecho Internacional Privado Paraguayo*, in Revista Jurídica La Ley Paraguaya, Año 32, No. 1, Febrero 2009, pgs. 1 and following).

that they cannot be challenged through this mechanism, as annulment proceedings are the only available means.[32]

Article 41 in turn establishes a time limit of fifteen days from the date of notification of the award for an eventual challenge and this has already been applied by tribunals.

In the case "*Recurso de Nulidad contra Fallo Arbitral No. 58181T0029004 JTI Trading S.A. vs. INDUMAR S.A.*," the annulment proceeding against an arbitral award was rejected *in limine* for extemporaneity, and Article 41 was invoked to this effect (A.I. No. 509 de 2006, *Cámara de Apelaciones en lo Civil y Comercial, 2ª Sala*).

An important change with respect to the Model Law was introduced in Section b), of Article 40, stating as cause for annulment, if the tribunal's verification shows that: "according to Paraguayan law the subject of the controversy cannot be subject to arbitration or that the award is contrary to international public policy or the *public policy of the Paraguayan State.*"

This same formula (international public policy or public policy of the Paraguayan State) is used in Article 46, sub paragraph b) regarding the enforcement of the award in a State that is not the one where it was rendered.

These provisions depart from the Model Law, which only refers to public policy. This merits an evaluation with regard to the general framework of the Paraguayan legal system.

In comparative law, the problem of public policy and mandatory rules, in general, is the subject of unsettled controversy. In part, this is due to a terminological problem, a matter that has been influenced reciprocally by Anglo-Saxon and continental European civil law which each have their nomenclature. Divergences existent within the different national legal systems add to this ongoing debate.

It is well known that there are usually two aspects of public policy in the transnational setting. A negative one, which constitutes its application as a corrective means to "indirect" or conflict rules in case

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[32] *Acción de Inconstitucionalidad en el Juicio: "Consorcio Trinidad MM S.A., Servicio Ybu, Ing. Julio Gorostiaga y M&T S.A. c/ Servicio Nacional de Saneamiento Ambiental (SENASA) dependiente del Ministerio de Salud Pública y Bienestar Social s/ Fórmula de Reajuste a ser aplicada en los Contratos Nº 16/2008, Nº 17/2008, Nº 18/2008, Nº 19/2008 y Nº 20/2008, para la licitación pública nacional, LPN Nº 02/2008 – JBIC Construcción de Sistema de Abastecimiento de Agua Potable en 81 Localidades*", Año 2010 – Nº 995. Acuerdo y Sentencia Nº 211 (April 17, 2018), Sala Constitucional de la Corte Suprema de Justicia.

the emergent solution violates essential postulates of the judging forum. The positive one is represented by "direct" norms in each legal system, which in the first instance does not allow the application of another law different from their own. In this sense, it coincides with mandatory rules.[33]

An example of a direct or mandatory rule is given by Law 194 of 1993 regarding International Representation, Agency and Distributorship, which states in Article 9 that the parties may exercise their free will in these contracts, subject to the mandatory rules of the Civil Code. Without using the terminology of "mandatory rules" but rather "public policy," the Paraguayan Supreme Court has made this rule prevail over the agreement of the parties *(Acuerdo y Sentencia N° 827 de la Corte Suprema de Justicia, Sala Constitucional*, *caso* "*Electra Amambay SRL vs. Compañía Antartica Paulista Ind. Brasileira de Bebidas,*" November 12, 2001).

In turn, the Civil Code has other provisions such the one given by Article 669 that uses the terms mandatory rules (*reglas imperativas*), whereas Article 9 uses other expressions such as "public policy" and "good customs." Article 22 refers to the respect owed to "political institutions" and "moral." Article 299, related to legal acts, also mentions moral and good customs.

All these terms refer indistinctively to the general interest that should prevail over any other contractual stipulation of the parties which require a flexible evaluation to be performed on a case-by-case

[33] There are other terms that are used with regard to this last point, such as "police laws." For the French, they are the direct application ones, different from public policy, constituting an exception after the conflicting mechanism rendered foreign law applicable. "Police laws" are concrete regulations applicable to the case, and not general principles extracted from the system, as are those of public policy. The notion of "laws of immediate application" is—for those who adopt them—close to police law, in the sense that it is about material or substantive rules whose main purpose constitutes direct application to international transactions. They would differ by the fact that they are not originally local norms that in specific cases require extraterritorial application, but rather rules destined to direct application in international cases (on these distinctions and other problems that arise regarding this entire issue, refer to: José Antonio Moreno Rodríguez, *Orden Público y Arbitraje: Algunos Llamativos Pronunciamientos Recientes en el MERCOSUR y la Unión Europea,* Carlos Soto, Director (Lima, 2008); and José Antonio Moreno Rodríguez, *Orden Público y Arbitraje*, in Revista Foro de Derecho Mercantil, No. 20 (Bogotá, 2008).

basis. Therefore, this is the sense given by Paraguayan Law to the expression "public policy."

The scope of the expression "international public policy" introduced in Paraguay by the Arbitration Law 1879 of 2002 is yet to be seen.

First, in the nineteenth century, Private International Law jurists used the terms public policy, but it was not until later that the word "international" was added.

This expression, public international policy, is today widely used in doctrine and received in the legislation of some countries, but is not present in any normative text of Paraguay, except in the arbitration law.

Yet, the terms are used in other conventions ratified by the country such as the New York Convention (Art. V, 2 b), and the Inter-American Convention (Art. 5.2.b). Other instruments more recently ratified by Paraguay include the terms, but add the adjective "manifestly" (when referring to contraventions to public policy). With this, they implicitly accept the notion of international public policy.[34]

Arbitration has consolidated with the recognition of party autonomy and of a transnational or supranational legal order as a framework, manifested not only through normative instruments of the state of origin, but through usages, customs, and principles, which are many times institutionalized by private or intergovernmental entities.

In Paraguay, these even have constitutional status, since—as previously seen—the Constitution recognizes a supranational legal order (Art. 145), out of which, in addition to duly ratified international instruments, usages, custom and principles of international law arise. Furthermore, Article 143 of the Constitution states that the country accepts principles of international law such as equality among states, solidarity and international cooperation, etc.

Well, it is precisely from all this that in international transactions, notions such as public policy and the question of mandatory rules in general must be interpreted under a cosmopolitan and not a closed domestic perspective.[35]

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[34] The Inter-American Convention on Extraterritorial Validity of Foreign Judicial Decisions and Awards, Montevideo (article 2.h); the Inter-American Convention about Letters Rogatory (Article 17), the Protocol on Cooperation and Jurisdictional Assistance in Civil, Commercial, Labor and Administrative matters (Article 17), and the Inter-American Convention on General Rules of Private International Law (Article 4).

[35] Another issue: within the cosmopolitan framework in which arbitration evolves in Paraguay, the derivations that might arise from the norm

a) Procedure

As an innovation, Article 42 of the Paraguayan law describes annulment proceedings, under the following terms: "Whoever invokes an annulment shall do so on a well-founded basis and concretely on facts and on the law, and offer all the evidence. Documentary evidence shall accompany the presentation, and if not available, it must be listed mentioning its content, location, archive, and the public office of the person in whose possession it is. The court shall serve notice of the presentation to the parties for five days; these shall, at the moment of response, offer evidence, serving the documents in the manner established before. Notification shall be served within the third day of issuance of the writ that ordered it. Once the time has expired, with or without response, the court shall open the recourse to evidence, for no more than ten days, if the nullity refers to matters of fact. Otherwise, it shall resolve within ten days. Expert evidence, if deemed applicable, will be given by a court-appointed expert. A maximum of three witnesses per party shall be allowed, and statements will not be received outside the seat of the court, notwithstanding the witnesses' business addresses. Once the petition has been answered or if the time has expired and neither party offered evidence, or if evidence was received, the court shall decide on the nullity recourse, with no further delay, within ten days. No recourse shall proceed against resolutions of procedure or substance rendered by the court within the framework of the annulment proceedings.".[36]

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contained in Article 46, sub paragraph 5, b) about challenging the award in execution stage in a different country from where it has been rendered is yet to be seen. The measure copies its source, the New York Convention, without establishing the faculty to enforce an award (as for example in France, for having been anulled or suspended in the country of origin), but at the same time it maintains discretional authorization in favor of Paraguayan judges, establishing that they "could" deny recognition or execution of foreign awards. Thus, the judge, using that discretion, could eventually decide to enforce it given certain situations. This has been sustained in Paraguay by Roberto Moreno Rodríguez Alcalá (*Deslocalización, la lex loci arbitri y la nueva Ley de Arbitraje y Mediación*, in José A. Moreno Rodríguez (Coordinator), *Arbitraje y Mediación*, Intercontinental Editora, Asunción, 2003, pg. 177). The situation, which has already arisen in other countries, has not yet been subject to judicial review in Paraguay.

[36] An Appeals Tribunal decided that it is not within its jurisdiction to order the parties to go back to the Arbitral Tribunal to obtain a new decision regarding the anulled sections of the award. On this matter, the Appeals Tribunal clarified that

III. RECOGNITION AND ENFORCEMENT OF AWARDS

A. Foreign Awards

1. Various regulatory regimes

a) Domestic rules

With respect to the recognition and enforcement of awards, Article 44 of the Paraguayan law adds the following to the model: "Foreign awards shall be recognized and enforced in the country, according to the treaties ratified by the Republic of Paraguay on recognition and enforcement of awards. If more than one international treaty is applicable, except agreement on the contrary between parties, the treaty most favorable to the party requesting recognition and enforcement of an arbitration agreement and award shall apply. If no international treaty or convention is applicable, foreign awards shall be recognized and enforced in the Republic according to the rules of this law and the specific provisions of this chapter."

Article 45 corresponds to Article 35 of the Model Law, with the following changes: The first paragraph allows a choice between two jurisdictions, by stating that: "Either the competent Civil and Commercial Judge of the domicile of the person against whom the award is intended to be enforced, or where the goods are located, shall be competent, by option of the party that requests the recognition and enforcement of the award."

The second paragraph is in line with the proposal for modification of the Model Law introduced by UNCITRAL in its 39th period of sessions, held in 2006. The Paraguayan stipulation states that the party invoking an award or demanding its enforcement must present the original award or copy thereof. If the award is not drafted in the official language of the State, the invoking party shall present an official translation into said language.

At the end of Chapter VIII (on recognition and enforcement of awards), the Paraguayan law in Article 49 includes a description of

due to the voluntary nature of arbitration, the interested party must go to the arbitral forum to request a new decision on the annuled section of the award. "*Recurso de Nulidad interpuesto por el Abg. Roberto Moreno en representación de la Procuraduría Gral. de la República c/ proceso arbitral: 'Julio Galiano Morán c/ Estado Pyo'".* Acuerdo y Sentencia Nº 79 (August 28, 2018, Tribunal de Apelación en lo Civil y Comercial, 3ª Sala, Asunción, Paraguay.

the procedure for this (not included in the Model Law). It does so in the following terms: "Once the recognition or enforcement of an award is posed, the judge shall notify the losing party, for a period of five days, by official notice of a cause of action. The losing party will only be able to oppose the enforcement based on the causes established in Article 46, and offering all the evidence by which he/she aspires to abide. Documentary evidence shall accompany the presentation; in their absence, a listing thereof, indicating: content, place, archive, public office or person in whose possession they are, must be presented. If none of those causes arise, the judge, within five days, shall dictate resolution deciding the enforcement, ordering summons of the obliged and seizure of goods, if applicable. In case of opposition, the rules for motions for dismissal or exceptions established in the Civil Procedure Code shall apply. The decision on the recognition and enforcement of the award shall not be subject to any recourse. If the enforcement of the award was requested, this shall be done according to the legal provisions on enforcement of national judicial decisions established in the Civil Procedure Code."

On this matter, the case "Recurso de Nulidad Interpuesto por la firma Carnicas Villacuenca S.A. c/ Proceso Arbitral Caratulado Yvu Poty S.A. c/ PABENSA S.A. y Carnicas Villacuenca S.A. s/ Incumplimiento de Contrato", in which the Court of Appeals granted the annulment of an arbitral award, was brought to the attention of the Supreme Court of Justice. In the mentioned dispute, one of the members of the Court of Appeals issued a dissenting vote, sustaining that none of the grounds for annullment of the Paraguayan law were proven by the requesting party.[37] The Constitutional Chamber of the Supreme Court has ruled that the grounds of annulment provided by the Civil Code of Procedure cannot be extended to arbitral awards, since arbitral awards have their own, taxative grounds for annulment.[38]

[37] Acuerdo y Sentencia No. 111, December 29th, 2016, Appeals Court in Civil and Commercial Matters, 1st Chamber.

[38] *Acción de Inconstitucionalidad en el juicio: "Recurso de Nulidad interpuesto por la firma Cárnicas Villacuenca S.A. c/ Proceso Arbitral caratulado Yvu Poty S.A. c/ Pabensa S.A. y Cárnicas Villacuenca S.A. s/ Incumplimiento de Contrato*". Acuerdo y Sentencia Nº 156 (March 28, 2019) de la Sala Constitucional de la Corte Suprema de Justicia.

IV. APPENDICES AND RELEVANT INSTRUMENTS

A. National Legislation (See the Appendices at https://arbitrationlaw.com/books/world-arbitration-reporter-war-second-edition.)

Law of Arbitration and Mediation No. 1879/ 2002

B. Major Arbitration Institutions

Centro de Arbitraje y Mediación, Paraguay
Estrella 540
Asunción – Paraguay
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