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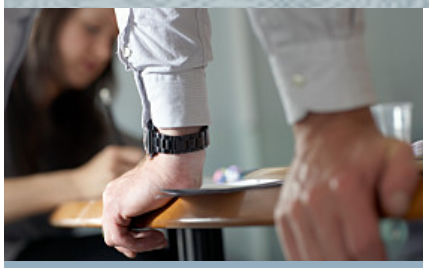

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The next edition of Migalhas on International Arbitration will b published in the winter of 2010.

INTERNATIONAL ARBITRATION EXPRESS
Follow the breaking news and developments in the Migalhas International newsletter.

Edited by Mauricio Gomm Santos and Quinn Smith

Migalhas on International Arbitration

In a new feature of Migalhas International, we have collected comments from around the world on distinct arbitration topics. These comments are noteworthy for their unique, and they should enlighten both experts and novices in the field of arbitration. We hope you find these comments interesting and look forward to your feedback.

As practitioners in the field, at Smith International Legal Consultants we believe it is important to keep up with recent developments. Our practice includes years of experience in international arbitration, and our professionals have served as both advocates and arbitrators in disputes handled by some of the major arbitral institutions in the world. In addition to our work, we routinely publish articles, speak at conferences, and engage in academic initiatives and professional groups on topics related to international arbitration. We look forward to sharing with you some of the thoughts from commentators around the world, and if you would like to learn more about our firm, feel free to visit our website at www.smintlaw.com.

This first edition presents a number of timely topics. Following up on the ICC Conference in Miami, Manuela de la Helguera presents an overview of confidentiality in arbitration in Latin America, drawing on her recently completed thesis on the topic. Natasa Lalatovic provides another example of a country that has adopted the UNCITRAL Model Law on International Commercial Arbitration, commenting on the new Arbitration Act in Serbia and its affects on arbitration in that country. Finally, we include a brief note on a growing change in employment arbitration in the United States to find claims non-arbitrable.

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News and Developments in International Arbitration

Confidentiality in Arbitration: Still a "Myth" in Latin America?

By Manuela de la Helguera

For many years, confidentiality has been considered to be an inherent feature of arbitration and a major reason for parties to choose arbitral proceedings. However, recent developments have proven that confidentiality is not as universal or absolute and its application depends on the particular circumstances of each case. For example, confidentiality is subject to numerous exceptions, such as the public interest. And also, the substance of the obligation may depend on the nature of the information or documents at issue. Nowadays, it can be asserted that confidentiality has become one of the most unsettled and uncertain topics in international arbitration. The only indisputable statement, here, is that there is a definite lack of consensus regarding such matter.

The fact that arbitration is private does not mean that it is confidential. Each country has addressed the question of confidentiality in a variety of different ways, to a degree that we can find lack of consistency in the decisions. Many national jurisdictions have not even addressed the issue at all. For all this, there have always been voices echoing the need for incorporating a confidentiality agreement in the arbitration clause.

Confidentiality is subject to different treatment in the different jurisdictions of Latin America. For instance, the new Peruvian Arbitration Law is one of the few jurisdictions that include a more detailed confidentiality provision. Such provision (Article 51) determines that, unless agreed by the parties, the arbitrators, the secretary of the tribunal, the institution, and any third party intervening in the proceeding, e.g. witnesses and expert witnesses, are obliged to keep confidential the proceedings, including the award, and any other information coming to their knowledge in the course of arbitration. Even more, the parties, their representatives, and their lawyers are also bound by this obligation, except when the law requires the publicity of the proceeding or, where appropriate, of the award, in order to protect or enforce any right or to challenge or enforce the award in the courts. The Arbitration Law of Peru also establishes that in cases where the State is involved, the proceedings will be confidential, but the award will be public once the arbitration has finished. This constitutes a progressive feature of the law, which tends to protect public interest and promote more transparency in arbitrations involving states.

Other countries like Mexico, Guatemala, and Chile have adopted the UNCITRAL Model Law, in which there is no explicit mention of confidentiality. More interestingly, Venezuela has a legal duty of confidentiality in article 42 of its Arbitration Law, but this obligation is only for the arbitrators, being silent about the other participants. Some countries like Bolivia, Costa Rica, and El Salvador have established confidentiality as a guiding principle of the process, but they do not give any details of who is bound, its exceptions or its scope.

However, most practitioners in Latin America consider the process as confidential and protect the information generated in the arbitration. Even when the law is not so clear, in practice, it is generally accepted by the arbitration community that the proceedings and the award cannot be made public. This is taken not as a statutory obligation, but as a moral duty of the arbitrators and the parties not to disclose any information generated in the proceedings. In other words, there is no public access to information of any stage of the proceedings, and its publication would be considered as a violation to an implied duty of "loyalty" between the parties and originated by the parties' expectations and conduct.

Despite such common practice, the fact that some parties and practitioners value confidentiality does not mean that there is

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a legal duty combined with legal sanctions. It seems that confidentiality will remain a "myth" in many countries of Latin America, until each jurisdiction decides to solve the issue. National jurisdictions have to make the rules clearer in their domestic law so that parties know what to expect. Meanwhile, if parties want to keep the arbitration confidential, the best thing they can do is to reach a confidentiality agreement.

The Adoption of a New Arbitration Act and Recent Developments in Serbia

By: Natasa Lalatovic

Arbitration, as a today's dominant way of resolving international commercial disputes, is not new to the Serbian legal system and practice. However, in recent years, arbitration occupied the attention of the legislature and leading Serbian scholars and practitioners much more that it did before. The main reasons for this are the adoption of the new Arbitration Act in 2006, and the Belgrade Arbitration Conference held in March 2009, which hosted some of the most renowned academics and practitioners from the field of arbitration in the world.

The new Arbitration Act was a result of a desire to promote arbitration as preferable commercial dispute resolution method. The Serbian law on arbitration is now for the first time organized in one single act. Up until 2006 this subject matter was contained in the Law on Civil Procedure and the Serbian Act on Conflict of Laws. The new Arbitration Act is based on UNCITRAL Model Law on International Commercial Arbitration as adopted in 1985 ("Model Law"). Actually, there are very few changes from the text of the Model Law.

Awards rendered in internal (disputes without foreign element) and international (disputes with international element) in the Republic of Serbia are considered as domestic arbitration awards, and they have the force of the final judgement of the domestic court. As such, there is no need to seek confirmation of the awards prior to enforcement proceedings.

A foreign arbitral award has the force of a final judgement of the domestic court after being recognized by the competent court in Serbia. Grounds for refusing recognition and enforcement are the ones that are widely accepted in the world, since Serbia is a signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("NYC").

Furthermore, since the text of the new Arbitration Act is completely in accordance with the regime established by the NYC, it made Serbia's two reservations to the NYC upon ratification almost irrelevant. The first reservation was that Serbia would recognize and enforce only awards made in the territory of another contracting State. With 144 contracting states, even without the text of the new Arbitration Act, this reservation lost much of its practical value. The second reservation was that Serbian Courts would only recognize and enforce awards relating to disputes that qualify as "commercial" under the Serbian law.

As for the type of the arbitration, both ad hoc and institutional arbitrations are available. Should the parties opt for institutional arbitration in Serbia, they can agree on the jurisdiction of The Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce. This is a permanent arbitration body, established more then sixty years ago that provides for conciliation and for settlement by arbitration of disputes of an international business character. Arbitral proceedings are conducted according to the The Rules of Foreign Trade Court of Arbitration.

Legal reform which is still in progress in Serbia aims to create a modern and reliable legal environment which will be attractive for foreign investments and trade. Recent legislative changes in the field of arbitration certainly put Serbia in the group of countries which are particularly favorable to arbitration.

The Limits of an Arbitral Clause: The Fifth Circuit Draws a Bright Line in Employment Arbitration

Continuing to struggle with issues arising out of employment arbitration, the Fifth Circuit recently drew a bright line rule of cases falling outside a broad arbitration clause. In Jones v. Halliburton, the court faced a difficult factual scenario, and in response it decided to expand on a line of reasoning used in

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recent cases. While many practitioners may argue the decision applies largely to the employment context, the court's reasoning is noteworthy and could portend a deepening unease with certain kinds of arbitration.

Jones presents the kind of facts challenging to most courts. According to the complaint, the plaintiff signed an employment agreement to work for a Halliburton subsidiary in the "Green Zone" in Iraq. The agreement contained a broad arbitration clause, requiring arbitration of "any and all claims that you might have against Employer related to your employment." Once in Iraq, the plaintiff complained of sexual harassment and asked to be moved from the company provided barracks where the ratio of men to women was 200:1. Her employer refused to honor the request, and the plaintiff was later gang raped in her room by her fellow male employees after a company sponsored social function. The plaintiff alleged she was drugged by her assailants and awoke to see one of them sleeping in her room. This individual admitted to the incident. The plaintiff claims her employer tried to prevent her from contacting her family after the assault but eventually returned to the United States with Congressional help, where she had plastic surgery to repair her torn pectoral muscles.

The plaintiff brought a number of actions. She pursued her claims through an administrative system and then filed for arbitration. She later stopped the arbitration, changed counsel, and filed suit in the federal district courts in Texas. After decisions on some procedural issues, the judge faced Halliburton/KBR's argument that the entire dispute was arbitrable. Ruling on the motion to compel, the district court compelled arbitration of some claims but refused to compel arbitration of some of the tort claims. Specifically, the court refused to compel arbitration of the tort claims for assault and battery; intentional infliction of emotion distress arising from the assault; negligent hiring, retention, and supervision of the employees involved in the assault; and false imprisonment. The district court stayed litigation of those claims until arbitration of the other claims finished. Halliburton and its affiliated companies appealed the decision.

Despite a variety of arguments by Jones to sustain the decision, the court's opinion turned on the issue of scope. In other words, did the alleged torts fall within the language of the arbitration clause? After duly citing the federal policy in favor of arbitration, the court laid down its standard: the dispute must "touch matters covered by the arbitration agreement" and have a "significant relationship to the contract." It then applied these elements to the issue at hand.

The court found the sexual assault did not relate to the arbitral clause because it did not touch matters within the clause's scope. The court looked at the facts alleged by Jones and relied on the location and time of the assault. Because the tort claims arose out of an after-hours incident occurring in Jones' bedroom, the court found these claims did not relate to her employment. Rather, the court argued these claims had little to do with Jones' actual work and more do with an event occurring as a result of her employment. Then the court went even further, laying down a bright line rule. It ruled Jones' bedroom should not be considered the "workplace," even if the arbitration agreement included any dispute "in or about" the workplace.

To arrive at its conclusion, the court had to overcome an earlier, remarkably similar case. In 2008, the Southern District of Texas found that tort claims arising out of a sexual assault in a plaintiff's bedroom were arbitrable under the identical arbitration clause. The plaintiff in this prior case even asserted some of the same causes of action, and the plaintiff named Halliburton as one of the defendants. To distinguish this decision, the Fifth Circuit looked at the nature of the claims, noting that Jones' claims included an action for vicarious liability, not merely other tort claims. But the court largely relied on its power to reject a prior decision of an inferior court. Without explicitly overruling the earlier decision, the Fifth Circuit chose to follow the district court in Jones, choosing to affirm its ruling.

Jones presents a number of challenges for clients, attorneys, and courts faced with similar situations, and its reasoning may provide a fertile ground for a growing restriction of the scope of the arbitral clause. Of particular interest to those familiar with international arbitration, the Fifth Circuit chose to apply only chapter 1 of the Federal Arbitration Act, ignoring the possible application of the New York Convention. Other circuits have applied the New York Convention to the employment context, and these circuits may take a different approach. For example, based on the Eleventh Circuit's decision in Thomas v. Carnival, a

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court could apply the public policy restriction in Article V of the New York Convention to invalidate this clause.

Within the language of the Jones decision, there are other considerations. Although the court goes out of its way to indicate the decision hinges on a fact-specific inquiry, it uses a generally applicable standard to decide the case. The two elements of touching matters governed by the clause and having a substantial relationship to the contract could find broader application.

In the context of employment arbitration, Jones could have a particularly strong effect. With the Fifth Circuit's decision, there is now a bright line rule defining the scope of the arbitration clause. Furthermore, the court engaged in a lengthy comparative analysis of matters potentially governed by an arbitration clause and those falling with the workers' compensation scheme. According to the court, a claim can qualify as being within the workplace to claim workers' compensation but not "related to" an individual's employment sufficient to compel arbitration. Such a discussion is outside the scope of this brief summary, but practitioners in the field should find it useful.

Finally, the decision could provide further grounds to shrink the scope of the arbitration clause. The court placed few limits on its two prong test requiring the dispute "touch matters" covered by the arbitration clause and have a "substantial connection" to the contract. While it may create a bright line rule in a sexual assault case, there is little to limit its expansion. Practitioners within the Fifth Circuit and other professionals may find this standard helpful for future arguments on the scope of the arbitration clause.

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4 For further guidance on confidentiality agreements see J. Paulsson & N. Rawding 'The trouble with confidentiality' (1994) 5:1 ICC ICArb. Bull 48; (1995) 11:3 Arbitration International (special issue on confidentiality).

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7 Available at: <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf>.

8 Arbitration Act – Article 64

9 Contrast this position with the United States where the court must first either confirm or recognize the award before a party can seek post-judgment remedies.

10 Id.

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12 G. Knezevic, V. Pavic, Arbitraza i ADR, (1. izdanje, Pravni fakultet Univerziteta u Beogradu, Beograd, 2009), 173,174

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16 Official Gazette of the Republic of Serbia No. 52/07 of June 8, 2007, text available at: <http://eng.komora.net/LinkClick.aspx?fileticket=FBMu4VYIJUE%3d&tabid=1029&mid= 2441>.

17 U.S. Federal Appellate Court for the states of Mississippi, Louisiana and Texas.

18 "Bright line rule" is a rule that must be followed regardless of the situation. Such "bright line rules" are

rarely drawn because of the possibility of future cases and facts that can change the rule.

19 See --- F.3d ---, No. 08-20380, 2009 WL 2940061 (S.D. Tex. Sept. 15, 2009).

20 There is a widely used saying the United States: "bad facts make bad law." Bad facts are normally those facts that reveal the difficulty of the human condition, and sometimes bad facts can lead a judge or a court to create a new or different decision. Whether the decision is "bad" may be up to others to determine, but it is at least noteworthy to track cases with bad facts to see if they change the law.

21 For the purpose of deciding most appeals of preliminary, procedural matters, the appellate court will assume the facts in the complaint are true. The appellate court does no fact finding. As such, this summary will refer to the "facts" as those included in the plaintiff's initial document, or her "complaint," and are assumed to be true.

22 This is likely familiar to most readers, but the Green Zone is a heavily fortified area in Baghdad that is the home for many Iraqi ministries and the major buildings of the United Nations, the United States, and other countries.

23 This administrative system is the Equal Employment Opportunity Commission. It is a federally administered body created to resolve claims arising from the workplace and pertaining to certain federal statutes. One of the most notable areas it serves is the area of "workmen's compensation." This is a statutory scheme to provide compensation for some on-the-job accidents and other incidents.

24 The case is unclear, but the decision ultimately ended in the Southern District of Texas, which notably includes the Houston area and corporate offices of Halliburton. As a general note, the federal district courts in Texas fall into four districts: Northern, Southern, Eastern, and Western. And these district courts are part of the Fifth Circuit Court of Appeals.

25 KBR was a subsidiary of the oil field services provider Halliburton until 2007. KBR is now a standalone company, but it was one of the many named defendants in this lawsuit and a subsidiary of Halliburton at the time the incidents in the lawsuit occurred.

26 Unlike other jurisdictions where arbitration statutes call for dismissal of litigation where a valid arbitration clause is present, in the U.S. a judge normally stays litigation.

27 Within the general notion of stare decisis, earlier decisions on the same facts by the same court are binding on future courts. This idea provides one of the cornerstones of the common law system. As applied by the federal courts, only those decisions by the circuit courts of appeal have a stare decisis effect on the district courts within a district. The district courts do not have to follow each others' decisions as a matter of stare decisis. As such, in this case, the district court had no duty to follow a prior decision by a sister court. But the common law also requires decisions be based on reason, and courts find it important to overcome the reasoning of similar decisions, especially those in the same district. That is the case in Jones.

28 Vicarious liability refers to the liability an employer or principal has for the actions of its employee or agent.

29 The FAA contains three chapters. Chapter 1 includes the Federal Arbitration Act and controls domestic arbitrations as well as filling gaps in international arbitrations. Chapter 2 incorporates the New York Convention, and Chapter 3 adopts the Panama Convention.

30 This is the administrative scheme referred to above.

Mark This case has become a politically charged issue. The plaintiff has testified in front of Congress, and her story attracted national media attention. See "Victim: Gang Rape Cover-Up by U.S., Halliburton/KBR," available at <http://abcnews.go.com/Blotter/Story?id= 3977702&page=1>, last viewed October 13, 2009. In response, the Senate recently passed an amendment to the annual funding of the Pentagon. The amendment prohibits mandatory arbitration of civil rights claims and tort claims arising out of sexual assault and harassment. The prohibition only applies where a contractor uses money from the funding bill for any existing or future federal contract. It is widely expected the President will sign the funding bill. See U.S. Senate Roll Call Votes, available at <http://senate.gov/legislative/LIS/roll_call_lists/ roll_call_vote_cfm.cfm?congress=111&session=1&vote=00308>, last viewed on October 13, 2009.