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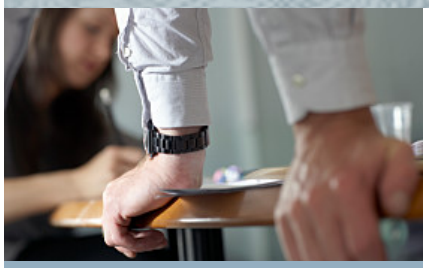

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NEXT EDITION
The next edition of Migalhas on International Arbitration will b published in the spring of 2010.

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

The second issue of Migalhas on International Arbitration picks up where the first issue left off: analyzing distinct issues from around the world in the field of international arbitration.

First, Olexiy Kostromov of Clifford Chance in Ukraine offers an insightful look at the legal and practical challenges facing the enforcement of arbitration agreements and awards in Ukraine. His analysis provides an insider's view of the court system while also providing an overview of some of the issues arising from Ukrainian law.

Second, Fernando Mantilla-Serrano of Shearman & Sterling in Paris ruminates on arbitrator independence in the increasing public forum of arbitral awards. He provides a concise overview of the challenges facing arbitrator independence with suggestions on how to provide greater assurances to arbitration observers on the quality of the arbitrators involved in international arbitral proceedings.

Finally, Richard Lorenzo and Kristen Foslid of Hogan Hartson in Miami chronicle recent developments in the enforcement of arbitration agreements in the Florida courts. For this important arbitration situs, it appears courts are increasingly favoring the enforcement of arbitration clauses, choosing to enforce clauses using the word "may." The authors provide a complete yet brief review of the topic.

This second issue builds on Migalhas' tradition of timely, helpful updates on legal developments, and we encourage readers to contact us with any developments in their home countries. With over 70,000 readers, we trust that the Migalhas network can provide a wide-ranging overview of topics.

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News and Developments in International Arbitration

Recognition and Enforcement of Foreign Arbitral Awards in Ukraine: Existing Problems

By Olexiy Kostromov

With the increasing number of cross-border transactions and liberalization of business and legal environment in Ukraine, many Ukrainian companies and their foreign counterparts more frequently submit their disputes to various institutional and ad hoc arbitral tribunals located outside of Ukraine. By submitting their disputes to foreign arbitral tribunals the parties expect to benefit from the intrinsic values of international commercial arbitration, including its efficiency, impartiality, confidentiality, etc. But above all the parties expect that the award is recognized and enforced in the country, where recognition and enforcement are sought, otherwise the award has little practical value.

At first sight, Ukraine seems to be a friendly legal environment for recognition and enforcement of foreign arbitral awards. Indeed, pursuant to Art. 9 of the Ukrainian Constitution and Art. 19 of the Law "On Treaties," all treaties ratified by Ukrainian Parliament become part of national legislation. Moreover, if the rules contained in a treaty conflicts with the rules of "domestic" laws, the former prevail. Therefore, the fact that Ukraine is a party to the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and the European Convention on Commercial Arbitration, adds confidence in enforceability of foreign arbitral awards. However, in practice, anyone seeking enforcement of an award in Ukraine may face a number of formidable obstacles.

Firstly, Ukrainian law does not specifically define the competent courts for recognition and enforcement of foreign arbitral awards. Before 2005, this issue was settled in the Law "On Recognition and Enforcement in Ukraine of Decisions of Foreign Courts" that explicitly stated that the term "decision of a foreign court" also included foreign arbitral awards, which were subject to recognition and enforcement by appellate courts of general jurisdiction. This law ceased to exist upon adoption of a new Code of Civil Procedure. However, the latter does not touch upon the issue of recognition and enforcement of foreign arbitral awards. This legislative gap led to judicial inconsistency: whilst the majority of Ukrainian courts admitted competence over recognition and enforcement of foreign arbitral awards by relying on previous practice and a broad interpretation of the term "decision of a foreign court," some courts took a rigid approach and refused to recognize foreign arbitral awards invoking a strict interpretation of the relevant provision of the Code of Civil Procedure. Besides, even if the broad interpretation of the Code prevailed, all applications for recognition and enforcement of foreign arbitral awards must be submitted to local courts of general jurisdiction, which, due to the generally low professional qualifications of judges and their enormous workload, are not the most efficient fora for this purpose.

The second problem is the broad, and very often unjustifiable, application of the concept of "public policy" by Ukrainian courts. This presents a real threat to the uniformity and predictability of enforcement procedure since Art. V (2)(b) of the New York Convention provides that recognition and enforcement of an arbitral award may be refused if it would be contrary to the public policy of the country, where recognition and enforcement is sought. Despite the very limited scope of Art. 228 of the Civil Code, which defines those acts contrary to national public policy, in cross-border disputes Ukrainian courts often go far beyond this scope to protect the interests of domestic companies. One of the most notorious cases in this respect was the refusal of a Ukrainian court (subsequently upheld by the Supreme Court) to recognize and enforce the arbitral award issued by a tribunal seated in New York in a dispute arising out of a shareholders' agreement ("SHA") concluded between two

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shareholders of Kyivstar, the leading Ukrainian telecom provider, as being contrary to public policy. It was stated that the rules of corporate governance in companies incorporated in Ukraine are mandatory and constitute national public policy. Therefore, any private agreement (e.g. SHA) concluded between the shareholders of a Ukrainian company contradicting those rules is void and, consequently, any arbitral award, which is based on such agreement, cannot be recognized and enforced in Ukraine.

A further impediment to recognition and enforcement of foreign arbitral awards in Ukraine is the absence of clearly established concept of "domestic disputes." Pursuant to Article I (1) of the New York Convention, it does not apply to arbitral awards, which are considered as domestic awards in the state where their recognition and enforcement are sought. However, neither the New York Convention nor Ukrainian law provide any definition or criteria of a "domestic award." This issue is left to arbitrary interpretation by Ukrainian courts. This issue is of particular importance for foreign investors, who set up their subsidiary companies in Ukraine. Very often they wish to submit disputes arising of contracts concluded between their Ukrainian subsidiaries and other Ukrainian companies to foreign arbitral tribunals. On the one hand, Article 26 (2) of the Ukrainian Law "On Regime of Foreign Investments" allows disputes arising between Ukrainian companies to be submitted to foreign arbitral tribunals if one of these companies is wholly or partially (10% or more of its share/charter capital) owned by a foreign investor. However, in practice, the ambiguous wording of that article allows Ukrainian courts to refuse recognition and enforcement of such arbitral awards by declaring the disputes between Ukrainian companies to be purely domestic. Under the Ukrainian Code of Commercial Procedure, any dispute between Ukrainian companies may always be submitted to a competent Ukrainian commercial court, regardless of an arbitration agreement concluded between the parties. Consequently, even if two Ukrainian companies (subject to the requirement set forth by the Law "On Regime of Foreign Investments") agreed to submit their dispute to a foreign arbitral tribunal, later, one of them may bring the same claim before a local commercial court, thus seriously impeding or even making impossible recognition and enforcement of the relevant arbitral award in Ukraine.

The process of recognition and enforcement of foreign arbitral awards in Ukraine is not for the faint-hearted. However, knowledge of the existing problems makes this process much easier.

The Independence of Arbitrators

By Fernando Mantilla-Serrano

Due to the widespread use of both national and international arbitration and the increasing tendency to make awards publicly available (particularly in the case of investment arbitration awards), the issue of arbitrator independence is coming under increasingly close scrutiny.

When - in times past - recourse to arbitration was the exception rather than the rule, and the range of arbitrators available for appointment was limited to a small group of "gentlemen" of renowned prestige, independence was deemed to be an intrinsic and unquestionable trait of the appointed arbitrator. Moreover, as hardly any awards were made public, it was practically impossible to link any given arbitrator with specific intellectual tendencies or ideologies.

This situation has now changed dramatically. First, there is no longer an "elite caste" of arbitrators. Modern arbitrators hail from a diverse range of professional and cultural backgrounds. Second, arbitration specialists, the legal press and even internet forums vigilantly track the publication of awards in order to speculate on, debate and discuss arbitrators' tendencies.

In principle, no one doubts or questions that arbitrators, whether party-appointed or nominated by an arbitral institution, are bound by an obligation of independence vis-à-vis the parties involved in the arbitration, including (I might add, especially) the party which appointed them. Once an arbitrator has been appointed, whether as sole arbitrator, as co-arbitrator or as chairman of the tribunal, he must fulfill his mission and duties in relation to all parties involved.

In order fully to emphasize the requirement of independence, some commentators have broken it down into, on the one hand, independence itself, i.e. the objective links between

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the arbitrator and the parties (financial, commercial, etc…) and, on the other, impartiality, which goes to the arbitrator's subjective state of mind.

In theory, independence ought not to be a controversial subject. Nevertheless, in practice, both the independence and the impartiality of arbitrators are often scrutinized by parties and judges, who will not hesitate to set aside an award on the grounds that the arbitrator was partial or biased.

It is important to highlight that issues of arbitrator independence involve much more than mere vulgar bribes or 'monetary favors'. By way of example, one might question the independence of an arbitrator who is always appointed by a specific party for all of its arbitral proceedings, or of an arbitrator who is a member of a law firm with links to another firm which acts as counsel at the arbitration. In the same vein, one might also wonder: what of the arbitrator who belongs to a global law firm with a far-flung office which acts as counsel to a subsidiary of one of the parties? Or the arbitrator who has already stated his position regarding the interpretation of a specific provision of a standard form of contract contained -for example - in a distribution agreement? And what about an arbitrator who, in an interview, has referred in disparaging terms to one of the parties involved in the arbitration?

The above questions can clearly elicit both positive and negative responses from practitioners and courts alike. Readers may wish to refer to the decisions in J&P Avax v/ Tecnimont (Paris Court of Appeals, 1st Chamber, section C, February 12, 2009), and Perenco Ecuador Limited v/ Republic of Ecuador (ICSID Case ARB/08/16, Decision on Challenge, December 8, 2009), which provide vivid illustrations of the complex circumstances referred above.

Does this mean that independence is relative, or subjective, in nature?

Without going as far as stating that the notion of independence is subjective in nature, it is clear that the above issues must be addressed in light of the specific circumstances of each case. As such, it is the parties themselves who are best qualified to analyze the relevance of such circumstances.

It is for this reason that arbitrators are under an obligation not only to be independent, but also to disclose to all parties, prior to accepting any appointment, or as soon as they become aware of them, any circumstance likely to give rise to justifiable doubts as to their independence. Likewise, if a party doubts an arbitrator's independence, it may request the arbitrator to properly disclose the nature of his relationship with a given party. The arbitrator will then have a special obligation to come forward with a candid and complete disclosure. However, disclosure of a specific circumstance will not automatically render said circumstance a ground for a challenge. Nor will disclosure necessarily shield the arbitrator from challenge.

Disclosure has the advantage of permitting a party to be properly informed when deciding whether or not to challenge an arbitrator. Indeed, in many jurisdictions judges may consider that failure to disclose such circumstances, in and of itself, engenders mistrust and could confirm the lack of independence of the arbitrator.

Once the arbitrator has disclosed the relevant circumstances, it is up to the parties to determine whether or not they wish to challenge that arbitrator's independence. A court or an arbitral institution (as the case may be) will then rule in accordance with the criteria set out in the relevant arbitration legislation or rules.

No doubt, personal integrity is the best guarantee of independence (and impartiality). However, users' perception as to the independence of an arbitrator is also an important factor in ensuring the independence of arbitration proceedings. If arbitrators scrupulously comply with their disclosure obligations, arbitral proceedings in general will surely benefit.

Does "May" Mean "Shall" in Arbitration?

By Richard C. Lorenzo & Kristen Foslid[2]

In recent years, an increasing number of U.S. and foreign companies have embraced arbitration as an alternative medium for resolving their business disputes. Arbitration offers numerous real advantages to its users, including cost savings, faster results, a neutral forum, the ability to participate in the choice of decision-maker, and relative finality and enforceability of the award.

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Further, with careful drafting, the parties to a contract can tailor the arbitration process to meet their specific needs and circumstances.

Because of this trend towards arbitration, courts are routinely asked to determine whether arbitration is compulsory under a given contract. One question that often arises is whether arbitration is mandatory where the arbitration provision provides that the parties "may" resolve their dispute through arbitration. While federal courts uniformly answer this question in the affirmative, finding that the presence of the term may does not render an arbitration clause permissive, there is conflicting authority among the Florida District Courts of Appeal. The better analysis, however, is that recently adopted by the U.S. District Court for the Middle District of Florida in Conax Florida Corp. v. Astrium Ltd., 499 F. Supp. 2d 1287 (M.D. Fla. 2007).

In Conax, the parties' arbitration clause provided that "a controversy or claim arising out of or relating to this Subcontract may be finally settled by arbitration." (Emphasis added.) Given the presence of the word may, the plaintiff argued that the arbitration clause was merely permissive, and that the parties could resolve their dispute by arbitration only upon their joint agreement. The plaintiff found support for this argument in a decision rendered by the Fourth District Court of Appeal, wherein the Appellate Court stated, without analysis, that "the arbitration clause . . . is permissive, not mandatory. It provides that either party may seek to arbitrate any dispute." Young v. Dharamdass, 695 So. 2d 828 (Fla. 4th DCA 1997). The plaintiff further relied upon Florida cases construing forum selection clauses as permissive based on a lack of words of exclusivity, such as the terms shall or must.

After considering both parties' arguments, the Conax Court held that contrary to plaintiff's contention, the word may does not give one party the right to avoid arbitration under Florida law. Rather, citing to Ziegler v. Knuck, 419 So. 2d 818 (Fla. 3rd DCA 1982), the Court found that once a party insists upon arbitration, the other party cannot avoid its contractual agreement to arbitrate. According to the Court, a contrary interpretation would render the arbitration provision illusory, as parties can always agree to arbitrate, even in the absence of a contractual provision. Further, the Court found that even if the word "may" did create an ambiguity in the arbitration provision, any uncertainty would be overcome by the principle that ambiguities are to be construed in favor of arbitration.

While the Florida Supreme Court has not ruled on this issue, the Conax analysis will likely become the prevailing view in Florida. Consistent with federal case law, use of the term "may" suggests that if a dispute arises, and one party elects arbitration, arbitration is mandatory. Indeed, as the Conax Court recognized, an alternative construction would strain common sense as the parties would not negotiate for a right they already had – to jointly agree to arbitration.

In addition, contrary to the Fourth District Court of Appeal's Young decision, the Conax Court recognized the strong public policy in favor of resolving disputes through arbitration. Indeed, under both Florida and federal law, arbitration clauses are to be given the broadest possible interpretation in order to accomplish the purpose of resolving controversies outside of the courts. See Hirshenson v. Spaccio, 800 So. 2d 670, 674 (Fla. 5th DCA 2001); Moses H. Cone v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983). Likewise, although the Conax plaintiff relied upon Florida cases interpreting forum selection clauses, the Court recognized that the reasoning contained in that line of cases is inapposite, as forum selection clauses do not enjoy the same presumption of enforceability granted to arbitration clauses. See Conax Florida Corp., 499 F. Supp. 2d at 1297, n.10. Accordingly, when it comes to arbitration clauses, the term "may" means "shall" in Florida.

References

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5 Originally published in the Florida Bar's International Law Quarterly, Winter 2008.

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7 See e.g. Allis-Chalmers Corp v. Lueck, 471 U.S. 202, 204 n.1 (1985) ("The use of the permissive 'may' is not sufficient to overcome the presumption that parties are not free to avoid the contract's arbitration procedures."); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 879 (4th Cir. 1996) (same); Am. Italian Pasta Co. v. Austin Co., 914 F.2d 1103, 1104 (8th Cir. 1990) (same); Local 771, IATSE, AFL-CIO v. RKO Gen., Inc., WOR Div., 546 F.2d 1107, 1115-16 (2nd Cir. 1977) (same); Nemitz v. Norfolk & W. Ry. Co., 436 F.2d 841, 849 (6th Cir. 1971) (same); Deaton Truck Line, Inc. v. Local Union 612, 314 F.2d 418 (5th Cir. 1962) (same).

8 See also United Cmty. Ins. Co. v. Lewis, 642 So. 2d 59, 60 (Fla. 3rd DCA 1994) (same).