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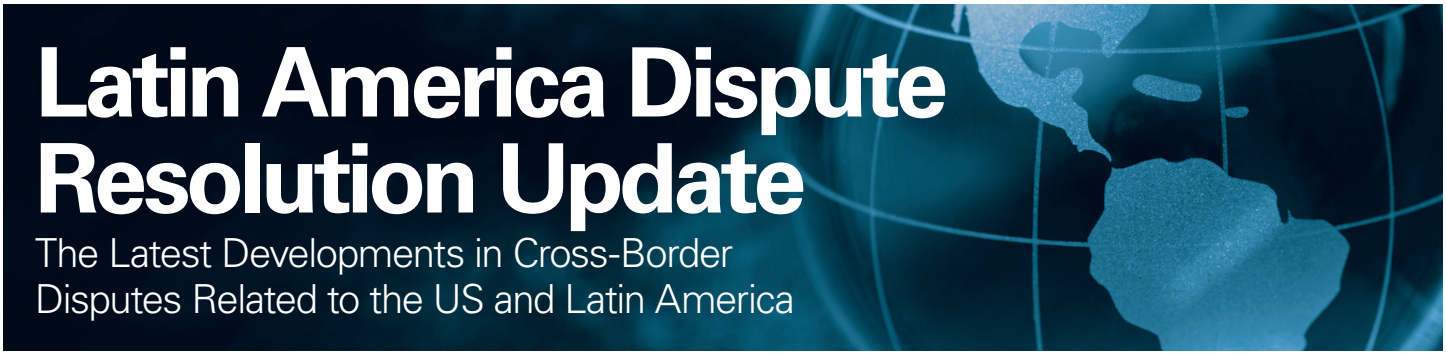
Skadden

Latin America Dispute Resolution Update

The Latest Developments in Cross-Border Disputes Related to the US and Latin America



Contents

US Case Law Update

The U.S. Supreme Court and appellate courts have issued several recent decisions on important topics related to arbitration and the ability to enforce awards and judgments in the United States.

Supreme Court Rules That Lower Court Proceedings Must Be Stayed While Party Appeals Decision Denying Motion To Compel Arbitration

On June 23, 2023, in *Coinbase, Inc. v. Bielski*,[1] the U.S. Supreme Court issued a decision addressing Section 16 of the Federal Arbitration Act (FAA), 9 U.S.C. Section 16(a), which provides that a party that loses a motion to compel arbitration has an immediate right to appeal that decision to a federal appellate court, but which is silent on whether the proceedings in the district court can go ahead in the meantime.

In *Coinbase*, various users of cryptocurrency services sued two providers in the U.S. District Court for the Northern District of California for purportedly operating an allegedly unlawful crypto sweepstakes.[2] Defendant Coinbase moved to compel arbitration of the claims against it, arguing that plaintiffs had signed a user agreement that contained an arbitration provision. The plaintiffs, in opposition, argued that other contracts had rendered the arbitration clause legally inoperative.

In January 2022, a first-instance judge denied Coinbase's motion. Coinbase then brought an interlocutory appeal to the U.S. Court of Appeals for the Ninth Circuit under Section 16 of the FAA and also sought a stay of the lower proceedings. It argued that if the lower court proceedings continued forward absent a stay, this would prejudice an eventual arbitration, if the appeal was successful.

In orders issued in May and July 2022, the Ninth Circuit denied the request for a stay, holding that, under its then-existing precedent in *Britton v. Co-op Banking Grp.*,[3] there was no automatic right to a stay pending interlocutory appeal. The Ninth Circuit further held that Coinbase had failed to make out a case for a discretionary stay of the proceedings pending appeal. Coinbase then petitioned the Supreme Court for review.

On June 23, 2023, by a 5-4 majority, the Supreme Court reversed the Ninth Circuit's decision and held that the proceedings automatically should have been stayed. Writing

[1] No. 22-105, 143 S.Ct. 1915 (June 23, 2023).

[2] *Suski v. Marden-Kane, Inc.*, 2022 WL 103541, at *2-3 (N.D. Cal. Jan. 11, 2022).

[3] 916 F.2d 1405 (9th Cir. 1990).

for the majority, Justice Brett Kavanaugh reasoned that "an interlocutory appeal 'divests the district court of its control over those aspects of the case involved in the appeal,'" which reflects a "a longstanding tenet of American procedure."[4] "Because the question on appeal is whether the case belongs in arbitration or instead in the district court, the entire case is essentially 'involved in the appeal.'"[5] Therefore, a mandatory automatic stay pending an appeal of the denial of a motion to compel arbitration is warranted.

Justice Kavanaugh further reasoned that efficiency supported a mandatory stay, and that there was relatively little chance of abuse because the appeals courts possess the means to dismiss frivolous appeals quickly. The Court's decision only applied to one of the cases Coinbase appealed (*Coinbase v. Bielski*), as the companion action (*Coinbase v. Suski*) was dismissed as moot because the Ninth Circuit had already ruled that the dispute in that action was not arbitrable.

This decision is important for defendants in litigation who believe a case is arbitrable, because it means that even if they lose an initial motion to compel arbitration, the claims against them will be stayed while the matter is on appeal. The decision does not reach the underlying issue in the case, *i.e.*, whether the claims are actually arbitrable.

Eleventh Circuit Rules That Federal Arbitration Act, and Not New York Convention, Will Govern *Vacatur* of Arbitral Awards Issued in US or Under US Law

In *Corporación AIC, S.A. v. Hidroeléctrica Santa Rita, S.A.*,[6] the U.S. Court of Appeals for the Eleventh Circuit, which hears appeals from federal district courts in Florida, Georgia and Alabama, joined other U.S. circuits in holding that awards issued in international arbitrations seated in the U.S. or governed by U.S. law can potentially be vacated on the grounds found in Chapter 1, Section 10 of the FAA, 9 U.S.C. Section 1 *et seq*.

The decision overturns a previous Eleventh Circuit precedent holding that international arbitration awards could be vacated only on the grounds for nonrecognition/nonenforcement of awards found in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

The underlying dispute involved two Guatemalan companies — a construction company, Corporación AIC, S.A. (CAIC) and its customer, Hidroeléctrica Santa Rita, S.A. (Hidroeléctrica) — the former of which was building a hydroelectric power plant in Guatemala. When disputes arose as to the amounts that CAIC was entitled to receive under the contract, the issue was referred to arbitration pursuant to the arbitration rules of the International Chamber of Commerce (ICC) in Miami, Florida.

In 2018, an ICC tribunal held, by majority, that CAIC was required to refund over $7 million to Hidroeléctrica. This holding prompted CAIC to petition the U.S. District Court for the Southern District of Florida (S.D. Fla.) to vacate the award, arguing that the ICC tribunal had exceeded its powers by, among other things, creating new joinder requirements, creating a new condition precedent to the contract and refusing to follow Guatemalan law. "Excess of powers" is a *vacatur* ground recognized under Section 10 of the FAA but not found within the New York Convention.

In 2020, the S.D. Fla. rejected the petition on the sole ground that Section 10 of the FAA was not applicable for an arbitration that (as here) was governed by the New York Convention. In May 2022, a three-judge panel affirmed that decision, holding that it was bound by a prior Eleventh Circuit precedent, *Industrial Risk v. M.A.N. Gutehoffnungshutte GmbH*,[7] which held that an arbitral award governed by the New York Convention may only be vacated for the grounds for nonrecognition set out in Article V of the Convention.

It bears emphasis that the grounds for nonrecognition in the New York Convention — which include improper constitution of a tribunal, lack of notice of the arbitral proceedings and that an award is contrary to public policy — are different, and in some instances narrower, than those set forth in Section 10 of the FAA. Moreover, the Eleventh Circuit's approach (per *Industrial Risk*) was different from that of most, if not all, other U.S. circuit courts. As a result, for the last 25 years, the *Industrial Risk* decision has meant that international arbitration awards made by Miami- and Atlanta-based tribunals have been subject to a different, and potentially narrower, set of grounds for *vacatur* when compared with tribunals based in places such as New York.

CAIC set out to change this by filing a motion for *en banc* review of the original three-judge panel's decision, arguing that the Eleventh Circuit needed to revisit the correctness of *Industrial Risk*. On October 5, 2022, this motion was granted, the initial three-judge panel decision was vacated and the entire Eleventh Circuit agreed to re-hear the case *en banc* (*i.e.*, a full rehearing of the appeal before all serving circuit judges).

In an opinion released on April 13, 2023, the Eleventh Circuit unanimously overruled *Industrial Risk*. Citing the text of the

[4] *Coinbase*, 143 S.Ct. at 1919.

[5] *Id.*

[6] Case 20-13039, 66 F.4th 876 (11th Cir. Apr. 13, 2023).

[7] 141 F.3d 1434 (11th Cir. 1998).

New York Convention and various arbitration commentators, the Eleventh Circuit explained that the New York Convention draws a distinction between:

- primary jurisdictions (the country that is the legal seat of the arbitration or whose law governs the conduct of the arbitration), where an award from such an arbitration can be vacated based on domestic law grounds; and
- secondary jurisdictions, which can only decide whether to recognize and enforce an arbitral award under the bases set forth in Article V of the New York Convention.

The Eleventh Circuit further held that the New York Convention does not purport to establish grounds for *vacatur* in the primary jurisdiction, which is a matter of domestic arbitral law. That law, in the United States, is set out in Section 10 of the FAA. Having re-set the standards for *vacatur*, the Eleventh Circuit vacated the S.D. Fla.'s 2020 decision and remanded the case so that the S.D. Fla. can now decide the case in conformity with Section 10 of the FAA.

As a result of *Corporación AIC, S.A.,* the Eleventh Circuit's *vacatur* standards (and, as a result, the *vacatur* standards applicable for awards emanating from Miami or Atlanta) are now aligned with the Second, Third, Fifth and Seventh Circuits, in that all of them hold that the bases for *vacatur* in Chapter 1 of the FAA apply to domestic and nondomestic awards issued in arbitrations seated in the United States.

The *Corporación AIC, S.A*. decision still leaves some questions about *vacatur* standards unaddressed. For example, although some U.S. federal circuit courts permit a "manifest disregard of the law" challenge to arbitral awards, the Eleventh Circuit has held that because Section 10 of the FAA does not mention such a ground, "manifest disregard of the law" is not a proper basis for seeking to vacate an award. In this respect, it remains to be seen whether the Eleventh Circuit will continue to take a different approach to *vacatur* standards.

US Courts Continue To Limit Ability To Obtain Discovery From Them in Support of Arbitration Proceedings

In the United States, 28 U.S.C. Section 1782 allows U.S. courts to assist foreign tribunals and litigants by ordering the production of evidence otherwise unavailable in foreign proceedings, including documentary and testimonial evidence from certain third parties. Prior to 2022, U.S. courts were divided over whether that statute (Section 1782) permitted discovery in aid of private commercial arbitrations and/or investor-state arbitrations, as we have previously discussed here and here.

In June 2022, the U.S. Supreme Court in *ZF Automotive US v. Luxshare*[8] held that Section 1782 discovery was not available in connection with foreign commercial or treaty arbitrations. The Court unanimously held that private commercial arbitrations and at least some investor-state arbitrations (at issue, an *ad hoc* arbitral tribunal constituted under UNCITRAL rules, as provided for in numerous bilateral investment treaties) do not constitute "foreign or international tribunal[s]" for purposes of the U.S. statute. Rather, the Supreme Court held, a "foreign or international tribunal" only includes a governmental or intergovernmental adjudicatory body.

This holding appeared to close the door on most Section 1782 applications connected with arbitration. Nevertheless, *ZF Automotive* did not explicitly address the status of arbitral tribunals constituted under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), which creates a purpose-built, self-contained ICSID arbitration system for investor-state disputes and is often used in treaty arbitration.

Some contended that ICSID tribunals were distinct from the *ad hoc* UNCITRAL tribunal at issue in ZF Automotive because the ICSID Convention is a multilateral investment treaty that creates a permanent intergovernmental institution, ICSID, to administer investor-state arbitrations. In that sense, an ICSID tribunal might be argued to create an "intergovernmental" adjudicatory body of the kind described in *ZF Automotive*.

To date, this argument has not succeeded. In October 2022, a judge of the U.S. District Court for the Eastern District of New York (EDNY) held that an ICSID tribunal constituted under the China-Malta bilateral investment treaty (BIT) was not a "foreign or international tribunal" under Section 1782.[9] Then, in December 2022, a judge of the U.S. District Court for the Southern District of New York (SDNY) reached the same conclusion, that an ICSID tribunal constituted under the Italy-Panama BIT did not qualify as a "foreign or international tribunal."[10] The latter case is now being appealed to the U.S. Court of Appeals for the Second Circuit (which handles appeals from federal district courts in New York, Connecticut and Vermont).

Federal district court decisions such as these are not binding precedent for other courts, though they may be persuasive. The Second Circuit decision, which is expected sometime in 2024, likely will clarify the law in this area for matters brought in that circuit's lower courts. It remains to be seen how and whether other U.S. appellate courts will address this matter.

[8] No. 21-401, 142 S.Ct. 2078 (2022).

[9] *In re Alpene*, No. 21-mc-2547 (MKB) (RML), 2022 WL 15497008 (Oct. 27, 2022).

[10] *In re Webuild S.p.A.*, No. 22-mc-140 (LAK), 2022 WL 17807321 (Dec. 19, 2022).

US RICO Statute Is Potentially Available Where Parties Conspire To Frustrate Arbitral Award Enforcement

The U.S. Supreme Court has confirmed in *Yegiazaryan v. Smagin*[11] that the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964 — which prohibits certain kinds of repetitive criminal conduct and provides civil remedies against those responsible for such conduct — is potentially available where U.S.-based parties illegally conspire to use improper means to frustrate enforcement of valid arbitral award.

The underlying dispute in this case involved a Russian national, Vitaly Smagin, who was awarded $84 million in a London-based arbitration conducted under the rules of the London Court of International Arbitration (LCIA). The award was rendered against another Russian national, Ashot Yegiazaryan, for the misappropriation of their joint real estate investment.

- In 2014, Smagin commenced proceedings in the U.S. District Court for the Central District of California (C.D. Cal.), which covers the greater Los Angeles area where Yegiazaryan was then living, to enforce the LCIA award. In *Smagin v. Yegiazaryan*,[12] the district court granted the confirmation motion and entered the LCIA award as a judgment of the court. However, Yegiazaryan did not pay the award.
- Unsuccessful in obtaining payment, in 2020, Smagin commenced new civil proceedings in the C.D. Cal. against Yegiazaryan and others, alleging that they had, as part of an "enterprise," been engaged in a pattern of unlawful criminal conduct by diverting proceeds Yegiazaryan received from another, unrelated award, in order to avoid paying Smagin the value of the LCIA Award/C.D. Cal. judgment. Smagin alleged that these actions rose to the level of "racketeering" for purposes of RICO and entitled Smagin to civil damages against all involved in the alleged "enterprise."
- In May 2021, the C.D. Cal. dismissed Smagin's RICO complaint on the ground that Smagin had failed to plead a domestic (*i.e.*, U.S.-based) injury. Because Smagin was a resident and citizen of Russia, the C.D. Cal. held that he experienced the loss in Russia from his inability to collect on the judgment.[13] On appeal, the Ninth Circuit disagreed, adopting a "'context-specific' approach to the domestic-injury inquiry" and concluding that Smagin had pleaded a domestic injury because he had alleged that his efforts to execute on a California judgment in California against a California resident were foiled by a pattern of racketeering activity that largely "occurred in, or was targeted at, California" and was "designed to subvert" enforcement of the judgment in California.[14]
- In October 2022, Yegiazaryan filed a petition for *certiorari* before the Supreme Court, arguing that the Ninth Circuit had misapprehended the Supreme Court's past authorities concerning extraterritorial application of RICO. In January 2023, the court granted *certiorari*.

In an opinion issued on June 22, 2023, the Supreme Court held, by a 6-3 majority, that the Ninth Circuit's approach was correct and that Smagin had properly identified a "domestic injury" that would qualify under RICO. Writing for the majority, Justice Sonia Sotomayor wrote that "'determining whether a plaintiff has alleged a domestic injury is a context-specific inquiry that turns largely on the particular facts alleged in a complaint."[15] U.S. federal courts thus should look to all the circumstances surrounding the alleged injury to assess whether it arose in the United States.

Justice Sotomayor stressed, however, that "[b]ecause of the contextual nature of the inquiry, no set of factors can capture the relevant considerations for all cases."[16] Applying its approach to this case, Justice Sotomayor held that because Smagin's interests in his California judgment against Yegiazaryan — a California resident — were directly injured by racketeering activity either taken in California or directed from California, with the aim and effect of subverting Smagin's rights to execute on that judgment in California, those allegations sufficed to allege a domestic injury.

The *Smagin* decision has been praised in some quarters as reaffirming, or perhaps expanding, civil remedies to certain parties that have not yet been paid their awards. Yet, as Justice Sotomayor stressed, the application of civil RICO in any one case is extremely fact-specific. Moreover, the Supreme Court's decision in *Smagin* did not address all of the elements of civil RICO, which remain complex and are often difficult to sustain, even at the initial pleadings stage. Still, the decision remains an interesting illustration of how, in certain cases involving especially stark misconduct, judgment or award creditors can seek further redress.

[11] No. 22-381, 143 S.Ct. 1900 (June 22, 2023).

[12] 2016 WL 10704874 (C.D. Cal. Mar. 17, 2016).

[13] *Smagin v. Compagnie Monegasque De Banque*, 2021 WL 2124254, at *4-5 (C.D. Cal. May 5, 2021).

[14] *Smagin v. Yegiazaryan*, 37 F.4th 562, 567-68 (9th Cir. 2022).

[15] *Yegiazaryan*, 143 S.Ct. at 1909.

[16] *Id.* at 1910.

Creditors' Efforts To Enforce Judgments Against Venezuela Remain on Hold

As an update to our prior article regarding creditors' efforts to enforce arbitration awards against Venezuela in the United States, in July 2023, the U.S. Court of Appeals for the Third Circuit once again affirmed attempts by additional creditors of Venezuela to seek to attach shares in a U.S. subsidiary of Petróleos de Venezuela, S.A. (PDVSA), PDV Holding, Inc. (PDV Holding, which owns Citgo), to satisfy debts owed by Venezuela and PDVSA. In 2019, the Third Circuit affirmed an order allowing Crystallex International Corporation (Crystallex) to register a writ of attachment against PDV Holding as an alter ego of Venezuela to satisfy Crystallex's judgment against Venezuela.[17]

Following suit, several additional creditors requested conditional[18] writs of attachment against PDV Holding under the alter ego theory. PDVSA, under control of the opposition government led by Juan Guaidó, argued that the prior decision finding PDVSA to be the "alter ego" of the Republic of Venezuela — and that such awards against Venezuela could be enforced against PDVSA's assets — were no longer valid in light of changed circumstances of government control in Venezuela and at PDVSA.

The Third Circuit analyzed the actions of both the Maduro and Guaidó governments and upheld the district court's conclusion that PDVSA remains an alter ego of Venezuela. On August 14, 2023, the Venezuelan parties petitioned the Supreme Court for *certiorari* to review the Third Circuit's ruling; that petition is still pending.

Meanwhile, the judicial sale process of PDV Holding continues in the U.S. District Court for the District of Delaware (D. Del.). The D. Del. appointed a special master to oversee the bidding and sale process, which is expected to begin in October 2023 and conclude in July 2024. The D. Del. solicited statements by August 14, 2023, from any parties with potential claims against Venezuela and established rules for determining the priority of such claims. As of August 2023, approximately 20 purported creditors had been filed such statements with the D. Del., representing in aggregate over $20 billion of alleged judgments against Venezuela.

[17] *Crystallex Int'l Corp. v. Bolivarian Rep. of Venez.*, 932 F.3d 126 (3d Cir. 2019).

[18] Because of current Office of Foreign Assets Control (OFAC) sanctions established after Crystallex's writ was issued, writs against assets of Venezuela (such as PDV Holding) are conditional unless and until approved by OFAC.

UN Adopts Code of Conduct for Arbitrators in Investment Disputes

During its 56th annual session in Vienna in July 2023, the United Nations Commission on International Trade Law (UNCITRAL) formally adopted a Code of Conduct for Arbitrators in International Investment Dispute Resolution, as part of a joint effort with the International Centre for Settlement of Investment Disputes (ICSID). The adoption of the Code of Conduct caps off six years of discussion and debate.

The Code of Conduct seeks to create a standard of conduct for arbitrators in investment arbitrations, including in areas that have been the subject of recent challenges to investment treaty awards, such as arbitrator independence, impartiality and duty of disclosure. It will apply to arbitration proceedings by consent of the parties or as provided in any applicable treaty, contract or legislation. ICSID will now begin a process of consultation with its member states to determine the means and mechanisms for applying the Code of Conduct in ICSID proceedings.

Among other things, the Code of Conduct lists specific disclosure obligations for arbitrators, including:

- any financial, business, professional or close personal relationship in the past five years with any disputing party, the legal representatives of a disputing party, other arbitrators and expert witnesses in the proceeding, and any person identified as having a direct or indirect interest in the outcome of the proceeding, including a third-party funder;
- any financial or personal interest in the outcome of the proceeding, in any other proceedings involving the same measure and in any other proceedings involving a disputed party or related person or entity;
- involvement in all international investment disputes and directly related international or domestic proceedings (such as a set-aside or enforcement proceeding) in the past five years as either an arbitrator, legal representative or expert witness; and
- any appointment as arbitrator, legal representative or expert witness by one of the disputing parties or their legal representatives in all international investment disputes and any other proceedings in the past five years. Where bound by confidentiality obligations, arbitrators should disclose as much information required by the Code of Conduct as possible. For example, although arbitrators should redact sensitive information, they should still strive to disclose the region where the claimant or respondent is located, the relevant sector or industry, the applicable rules and the binding confidentiality obligations. The Code of Conduct advises an arbitrator to decline the appointment if he or she cannot disclose circumstances that are likely to give rise to justifiable doubt of impartiality.

In addition, the Code of Conduct expressly regulates the controversial practice of so-called "double-hatting": arbitrators appearing as party representatives or experts in other cases. The Code prohibits arbitrators from acting as counsel or an expert witness in any international investment dispute or directly related proceeding involving: (a) the same government measure(s) or the same or related parties for three years after serving as an arbitrator, and (b) proceedings arising under the same provision of the same instrument of consent (*i.e.*, the treaty, contract or legislation containing the state's consent to arbitration) for one year after serving as an arbitrator.

Arbitrators cannot act concurrently as counsel or expert witness in any other proceeding involving the same governmental measure, the same or related parties, or the same provision of the same instrument of consent. Parties can choose to vary or waive these limitations by express agreement of all disputing parties.

Of note, the Code of Conduct does not explicitly address so-called "issue conflicts,"[19] which some commentators define as arising when an arbitrator arguably can be seen as having "pre-judged" an issue based on her prior awards, publications, positions or statements. The point was considered at length by the working group; as late as the last published draft before finalization, the "double-hatting" restrictions above extended to "legal issues which are substantially so similar that accepting such a role would be in breach of [the duty of independence and impartiality]." Such text was ultimately excised, and the point is not covered in the Code of Conduct.

Arbitrators and practitioners would be well served to explore the potential for issue conflicts as part of their due diligence at the start of the matter and arbitrator disclosures.

[19] Prohibiting double-hatting resolves many such issue conflicts, so the topic is not entirely unaddressed.

Developments in Brazil Arbitration

Brazilian Law on Arbitrator Conflict of Interest Faces Change by Supreme Court and Congress

Political players in Brazil have recently taken aim at existing rules on arbitrator conflict of interest, arguing that those laws have repeatedly failed to ensure that arbitrators remain impartial and independent, thereby eroding the public's trust in arbitration. The existing Brazilian legal framework, which is a federal matter, is a fairly standard set of rules governing arbitrator conflict of interest, borrowed heavily from the UNCITRAL Model Law on International Commercial Arbitration. That system relies on voluntary disclosures and self-regulation by the arbitrators, parties and institutions involved in an arbitration.

In May 2023, União Brasil, one of the largest political parties in Brazil, lodged a complaint with the Brazilian Supreme Court ("Supremo Tribunal Federal"), alleging that self-regulation of the duty of disclosure has proven insufficient and that courts have been applying different standards to factually similar cases. The complaint therefore seeks a constitutional remedy and requests that the Supreme Court establish binding interpretations that, *inter alia*:

- Arbitrators have an unqualified duty to disclose any information that parties request.
- Parties have no duty to investigate potential conflicts.
- Failure to disclose is a sufficient ground for removal of an arbitrator, regardless of actual bias.
- Parties may challenge an arbitrator's independence and impartiality at any moment, in any forum.

These standards would apply to all arbitrations seated in Brazil. Prominent bar associations, arbitral institutions and law institutes have filed *amicus* briefs largely opposing, but in some cases supporting, the relief requested. The Supreme Court has agreed to hear the case, but there is currently no indication as to when a decision can be expected.

In parallel, the House of Representatives ("Câmara dos Deputados") presses on with bill number 3,293/2021, which proposes amendments to the Brazilian arbitration law seeking to introduce for arbitrations seated in Brazil:

- A broader duty on arbitrators to disclose any circumstances that may suggest the "slightest" doubt as to his or her independence and impartiality.
- A limit on the number of cases an arbitrator can concurrently hear.

- A prohibition barring two arbitrators from sitting on more than one panel at the same time.
- A prohibition barring members of an arbitral institution's board of directors from serving as arbitrators in cases administered by said institution.
- The creation of a public database containing — for any given case — the names of the arbitrators, the amount in dispute of each case they heard, the award rendered and any challenges to the award.

As with the complaint filed with the Supreme Court, bar associations, arbitral institutions and law institutes have largely opposed the bill. The House Judiciary Committee recently dismissed a request to fast-track its voting and is now organizing a public hearing to discuss the proposed changes.

Continued Efforts in Support of Class Arbitration in Brazil

Discussions on expanding the rights of shareholders to bring collective actions against Brazilian corporations in litigation and arbitration continue in Brazil. As we previously reported, class arbitration is being tested in the country as certain groups of minority shareholders have commenced arbitrations seeking redress as a class against major Brazilian corporations.

Two new developments on this matter are also underway.

New rules for collective arbitration proceedings. Two Brazilian arbitral institutions have developed rules for collective arbitration proceedings.[20] Although the rules of each institution contemplate different collective arbitration structures, both sets of rules establish:

- Procedures for notifying absent parties.
- The options available to absent parties.
- The consequences of joining or not joining as a party in different stages of the arbitration.
- Rules for consolidating multiple proceedings.

While these developments are significant, it is worth noting that the Market Arbitration Chamber ("Câmara de Arbitragem do Mercado"), which continues to be the mandatory arbitral institution for disputes involving companies listed in certain special segments of the Brazilian Stock Exchange, has not yet issued a set of class or collective arbitration rules.

Bill proposal. In the legislative sphere, Brazil's current federal administration proposed a bill in June 2023 to regulate the "system of private enforcement of investors' rights in the securities exchange market,"[21] among other matters. The bill confers standing upon certain shareholders to file judicial class actions against publicly traded corporations. This is notable because only the Public Prosecutors' Office ("Ministério Público") and the Brazilian Securities and Exchange Commission ("Comissão de Valores Mobiliários") currently have standing to file class actions related to the stock market. The bill also provides that such class actions may be brought in arbitration when authorized by corporate bylaws or analogous documents (*e.g.*, issuance deeds and indenture agreements).

[20] In April 2023, the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada ("Centro de Arbitragem e Mediação da Câmara de Comércio Brasil-Canadá"), one of Brazil's most in-demand institutions, published its Corporate Arbitration Rules ("Regulamento de Arbitragem Societária"). The Mediation and Arbitration Center of the Portuguese Chamber of Commerce in Brazil ("Centro de Mediação e Arbitragem da Câmara Portuguesa de Comércio no Brasil") issued its Supplemental Rules for Collective Arbitration ("Regulamento Suplementar para Arbitragens Coletivas") in April 2021.

[21] Bill No. 2925/2023, proposed by the federal administration on June 2, 2023.

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French Court Holds That Timing of Investments Does Not Deprive an Investment Treaty Tribunal of Jurisdiction

In February 2023, in *Agarwal v. Uruguay*,[22] the Court of Appeal of Paris ("Paris Cour d'Appel") annulled an investment treaty arbitral award in which the arbitral tribunal had declined jurisdiction on the basis of the timing of the claimant's investment, holding that the arbitral tribunal was not deprived of jurisdiction and should have heard the case.

In or around 2006, Pramod Agarwal, a British national, invested $365 million in the $3 billion Valentines iron ore mine project, the largest such mining project in Uruguayan history. Separately, Agarwal established a trust based in the Cayman Islands for the benefit of his three children and provided that some of the proceeds from the Uruguayan mining project would flow to that trust, and eventually, to his children. At the time the trust was established in or around 2008, his children were "discretionary" beneficiaries of that trust.

Although Agarwal and Uruguay dispute the reasons why, the mining projects struggled in the years following Agarwal's investment. In 2013, Uruguay passed legislation that imposed tighter restrictions on mining projects that were on the scale of Agarwal's investments. Agarwal withdrew from the project, claiming that Uruguay had retroactively altered the legal regime concerning his investment.

In 2016, two months before the Agarwal children filed a notice of dispute under the U.K.-Uruguay BIT, the status of Agarwal's children as beneficiaries under the Cayman Island trust was changed from "discretionary" to "fixed," making them beneficial owners of all of the assets related to the Valentines project held by the trust. The Agarwal children then commenced an UNCITRAL arbitration seated in Paris and administered by the Permanent Court of Arbitration, claiming that Uruguay had failed to fulfill its obligations of fair and equitable treatment of protected investments and had expropriated the investment.

Uruguay challenged the jurisdiction of the UNCITRAL tribunal on various grounds, including that the Agarwal children did not own the investment at the time Uruguay passed the legislation in question because the trust was controlled by others and the Agarwal children were merely discretionary beneficiaries of that trust. The arbitral tribunal agreed, holding (among other things) that the claimants had only acquired a protected investment under the BIT a few months before the arbitration was commenced and well after the dispute against Uruguay had already arisen. The tribunal then interpreted the dispute settlement clause of the BIT — which expressly excluded disputes predating the entry into force of the treaty — as also precluding disputes that predate the investment itself. Accordingly, it declined jurisdiction.

The claimants sought annulment of the award before the Paris Cour d'Appel, which has the power under its Code of Civil Procedure to vacate arbitral tribunals' decisions for lack of jurisdiction. The Cour d'Appel disagreed with the interpretation the tribunal made of the BIT to rule on its jurisdiction and provided its own interpretation.

- First, it found that the BIT contained a broad definition of "investment" that did not require ownership to involve "active" conduct or direction by the Agarwal children as trust beneficiaries.
- Second, it found that the treaty indicated that it covered all investments, whenever made, and excluded only those disputes predating its entry into force. That the BIT could not apply before the making of the investment, as Uruguay had contended, was a substantive — rather than jurisdictional — question and therefore outside the scope of review by the annulment court.

The Cour d'Appel vacated the award and ordered Uruguay to pay the procedural costs the Agarwals incurred before the Cour d'Appel, plus €150,000 in legal fees. The court was not asked to and did not adjudicate the merits of the Agarwal's claim or of Uruguay's defenses. Counsel for Uruguay has indicated that it intends to appeal.

The Cour d'Appel decision is significant because it declines to give deference to the tribunal's reasoning to rule on its jurisdiction and provides its own interpretation of the BIT. If, as indicated by counsel for Uruguay, an appeal is filed, the decision will be reviewed by the French Supreme Court for civil and criminal cases ("Cour de Cassation"), which, together with the Paris Cour d'Appel, plays a central role in the development of international investment law in France.

[22] Paris Cour d'Appel, Decision n° RG 20/13899 (Feb. 21, 2023).

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