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Arbitration in Latin America: The Experience of the Inter-American Commercial Arbitration Commission

by
Rafael Eyzaguirre†

I.

THE INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION (IACAC)

The Latin American System for Commercial Arbitration was given its first great impulse in 1934, when the Inter-American Commercial Arbitration Commission (hereinafter the Commission or the IACAC) was instituted, as a consequence of a resolution by the Seventh Conference of the Organization of American States (hereinafter OAS) held in Montevideo, Uruguay. The IACAC is a private organization, the purpose of which is to maintain an Inter-American system of conciliation and arbitration for the settlement of international controversies.

The original resolution recommended that the chambers of commerce of the western hemisphere prepare a convention on international arbitration, establishing standards of arbitration procedure. The IACAC was reorganized at meetings held in 1967 and 1968 in Buenos Aires, San Jose de Costa Rica and Rio de Janeiro. Though its bylaws were drafted at a conference held in Mexico City in 1968, their definitive text has only recently been approved at a meeting of the IACAC Council held in Ottawa, Canada, on June 17-18, 1985.

Among the Commission's powers and duties are: 1) to support the establishment of national sections of conciliation and arbitration and to cooperate with them in each of the Latin American countries in order to encourage the best settlement of commercial controversies; 2) to issue rules and standards for international commercial arbitration in the hemisphere; 3) to maintain lists of arbitrators proposed by the national sections; 4) to recommend to OAS members new laws and international agreements on conciliation and arbitration, or the amendment of those already in force; 5) to hold conferences on commercial arbitration; 6) to cooperate with domestic institutions to develop educational programs on commercial arbitration in the American

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countries; 7) to maintain relations with other institutions and organizations interested in international commercial arbitration; 8) to act as an administrative body for the conciliation of commercial differences at the request of interested parties; and 9) to adopt all appropriate measures to improve the Inter-American system for commercial conciliation and arbitration in force at the present time.

The Commission is headquartered in Washington, D.C., in offices provided by the OAS. The principal administrative agencies of the IACAC are the Council and the Executive Committee. The National Sections act as independent agencies that are empowered to issue their own domestic rules. The National Section of the IACAC in the United States is the American Arbitration Association (AAA). Since its reorganization in 1967 and 1968, the Commission has held eight Inter-American conferences of commercial arbitration, in Buenos Aires, Argentina in 1967; Mexico City, Mexico in 1968; Panama in 1970; Guatemala in 1972; Bogota, Colombia in 1974; Rio de Janeiro, Brazil in 1976; Buenos Aires, Argentina in 1981; and Santiago, Chile in 1983. The ninth conference will have been held in Miami just prior to the publication of this journal.

Since the Santiago Conference of 1983, four meetings of the Executive Committee of the Commission have taken place: the first in Panama, on February 8, 1984; the second in Guayaquil, Ecuador, on October 29, 1984; the third in Ottawa, Canada, on June 18, 1985; and the fourth in Acapulco, Mexico, in October, 1985.

In 1978, the Commission adopted, with minor changes, the ad hoc arbitration rules recommended by the United Nations Commission on International Trade Law (hereinafter UNCITRAL).

II.

LEGAL FRAMEWORK OF INTER-AMERICAN ARBITRATION

There are four fundamental conventions on Inter-American arbitration: 1) The Treaty of International Procedural Law of Montevideo of 1889;¹ 2) The Convention on Private International Law (Bustamante Code) of Havana of 1928;² 3) The Treaty of International Procedural Law of Montevideo of 1940;³ and 4) The Inter-American Convention on International Commercial Arbitration,⁴ signed in Panama in 1975. We must also consider a fifth text of a universal nature drafted by the United Nations, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,⁵ signed in

1. *Tratados de Montevideo, 1888-1889 and 1939-1940* (M.A. Vieira ed. 1959).

2. 86 L.N.T.S. 111 (1928).

3. 2 Register of Texts of Conventions and other Instruments Concerning International Trade Law 21 (1973).

4. OAS/Ser. A/20 (SEPF), *reprinted in* 14 I.L.M. 336 (1975).

5. 330 U.N.T.S. 3 (1958).

New York in 1958. This Convention has been ratified by various Latin American countries and the United States.

1. *Treaty on International Procedural Law, Montevideo, Uruguay, 1889*

Articles 4, 5 and 7 of the Treaty on International Procedural Law concern the recognition and enforcement of foreign arbitral awards. These Articles establish that judgments or decisions by arbitrators and acts of noncontentious jurisdiction issued in civil or commercial matters in one of the countries which is a party to the agreement shall have the same force in the territory of the others as they have in the issuing country, provided they possess the following requisites:

- (a) That the judgment was rendered by a court which is competent in the internationally accepted meaning of that word;
- (b) That it had the character of a final judgment, considered as *res judicata* in the country in which it was rendered;
- (c) That the party against whom it was rendered was legally served and represented in the suit or else was declared to be in default in accordance with the laws of the country where the action was instituted;
- (d) That it is not contrary to the public policy of the country in which it is to be executed.⁶

The treaty has been ratified by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay. Brazil and Chile have signed but not yet ratified it. The United States has neither signed nor ratified it.

2. *Convention on Private International Law (Bustamante Code), Havana, Cuba, 1928*

The Latin American countries and the United States of America met in Havana in 1928, and promulgated a code of private international law, known as the Bustamante Code. The Convention was signed and ratified by fifteen Latin American countries. The Government of the United States, however, has neither signed nor ratified this treaty.

Articles 423 to 433 of the Bustamante Code deal with the enforcement of foreign arbitral awards. Article 432 refers to awards made by arbitrators or mediators.

Article 423 of the Bustamante Code provides:

Every civil or contentious administrative judgment rendered in one of the contracting States shall have force and may be executed in the others if it meets the following conditions;

- 1) That the judge or court which has rendered it has competence to take cognizance of the matter and to pass judgment upon it, in accordance with the rules of this Code;
- 2) That process was served on the parties either personally or through their legal representative;
- 3) That the judgment does not contravene the public policy or the public laws of the country in which enforcement is sought;

6. Translated from the original Spanish text by the author.

- 4) That it is enforceable in the State in which it was rendered;
- 5) That it be authoritatively translated by an official functionary or interpreter of the State in which it is to be enforced, if the language employed in the latter is different;
- 6) That the judgment rendered fulfills the requirements necessary to be considered a final judicial judgment in the State in which the judgment was rendered, and the requirement for finality of the State in which the execution of the judgment is sought.⁷

On the other hand, article 432 provides:

The procedure and effect governed by the preceding articles shall be applied in the contracting States to awards made in any of them by arbitrators or mediators, whenever the case to which they refer can be the subject of an agreement under the laws of the country in which execution is requested.⁸

3. *Treaty of International Procedural Law, Montevideo, Uruguay, 1940*

This treaty has provisions similar to those of the Montevideo Treaty of 1889. Although it was signed by Argentina, Bolivia, Brazil, Colombia, Paraguay, Peru and Uruguay, it was ratified only by Argentina, Paraguay and Uruguay.

4. *Inter-American Convention on International Commercial Arbitration, Panama, 1975*

The Seventh International Conference of the American States, held in Montevideo in December 1933, adopted a resolution recommending that the chambers of commerce of the western hemisphere draft and sign a convention on arbitration. After several efforts to fulfill the resolution, the IACIC was finally approved in Panama in 1975.

The Draft Convention was prepared by the Inter-American Judicial Committee, an agency of the OAS. The Convention is considered a remarkable improvement in the rules of Inter-American commercial arbitration inasmuch as it resolves in very simple and understandable clauses, the most important juridical problems of international arbitration. Provisions of the Convention include:

- 1) Standards for determining the validity of the agreement submitted by the parties for arbitration of disputes involving commercial transactions;
- 2) Appointment of the arbitrators, who may be nationals of a country involved in the dispute or foreigners. The appointment of the arbitrators may be left to a third party, either a natural or a juridical person;
- 3) Rules of international arbitration procedure. For example, in the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the Rules of Procedure of the IACAC. The IACAC has adopted the Rules of Procedure of UNCITRAL, with some minor changes appropriate for use in the Western Hemisphere;
- 4) Judicial finality to those arbitral decisions and awards that are not appealable under the applicable law or procedural rules; and

7. *Id.*

8. *Id.*

5) Establishment of the grounds for challenging arbitral awards.

The Panama Convention was originally supervised by twelve Latin American countries: Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Uruguay and Venezuela. It was subsequently signed by Mexico and the United States. Eight countries have ratified the Convention: Mexico, El Salvador, Chile, Costa Rica, Honduras, Panama, Paraguay and Uruguay. It appears that the United States and Colombia will ratify the Convention in the near future.

5. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958*

This important Convention, signed in New York on June 10, 1958, is universal in character and has been ratified by various countries of the Inter-American system, including Mexico, Ecuador, Chile, Colombia, Trinidad and Tobago, Cuba and the United States. Argentina, Costa Rica and El Salvador have signed but have not ratified it. The New York Convention originated as a project proposed by the International Chamber of Commerce (ICC) to the United Nations Economic and Social Council (ECOSOC).

The Convention deals with both the recognition and enforcement of foreign arbitral awards in articles 3 to 5 and with the arbitration agreement itself in article 2. Article 1 states that the Convention shall apply to arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought and arising out of differences between both physical and legal persons. Under Paragraph 2, "arbitral award" is defined to include not only awards made by arbitrators appointed to each case, but also those awards made by permanent arbitral bodies. Paragraph 3 of Article 1 concerns reservations and restrictions on the application of the Convention. It states that: a) Any State may, on the basis of reciprocity, restrict the application of the Convention to awards made in another Contracting State, and b) Any State may declare that it will apply the Convention only to differences that are considered commercial under its own national law. Ecuador, the United States and Trinidad and Tobago have made such reservations. Mexico and Chile approved the Convention without reservation.

III.

SIMILARITIES AND DIFFERENCES BETWEEN THE CONVENTIONS OF NEW YORK (1958) AND PANAMA (1975)

Scope of the Treaties

Both the New York Convention and the Panama Convention concern the recognition and enforcement of foreign arbitral awards and the validity of the arbitral agreement. The Panama Convention, however, also deals with

other matters, such as the appointment of arbitrators and the rules of procedure for the arbitration.

Reservations in the Application of the Treaties

While the New York Convention permits the Contracting States to restrict the Treaty's application to awards rendered in the territory of another Contracting State, the Panama Convention contains no such right of reservation. Consequently, in principle, the Panama Convention is broader than the New York Convention. In actuality, however, it is not possible under the Panama Convention to prevent any State from making a reservation to this effect, so the result is the same under either Convention.

Validity of the Arbitration Agreement

Both Conventions are similar in requiring that the arbitration agreement be set forth in writing (public deed, exchange of letters, telegrams, or telex communication); and both Conventions accept arbitration agreements and arbitral clauses in contracts. Nevertheless, there are differences between the Conventions. The New York Convention requires Contracting Parties to apply the Convention to arbitration agreements to resolve differences arising out of "a defined legal relationship, whether contractual or not." On the other hand, the Panama Convention recognizes as valid an arbitral agreement that merely concerns differences arising out of commercial transactions. Consequently, the New York Convention is broader than the Panama Convention in this respect but a Contracting Party may limit its application to differences that are considered commercial under that state's own laws.

In addition, the New York Convention in Article 2 states that the subject matter concerned must be capable of arbitration. The Panama Convention does not so state because commercial transactions are, in general, capable of arbitration. Article 5 of the Panama Convention enumerates the grounds for objecting to the arbitral decision or award.

Appointment of Arbitrators

The 1975 Panama Convention grants the parties the right to choose the arbitrators themselves or delegate selection to a third party. The New York Convention does not mention such a right.

Arbitration Procedure

The Panama Convention grants the parties the right to choose the applicable laws of procedure, and it also states that the IACAC's rules of procedure shall apply in cases where the parties have not expressly agreed upon other rules of procedure.

Recognition of the Arbitral Award

The Panama Convention provides that arbitral awards shall have the force of a final judicial judgment. The New York Convention does not establish this so explicitly; rather, it merely states that each Contracting State shall recognize the awards as binding and requires that States impose no "substantially more onerous" conditions for recognition than are applied to the recognition of domestic arbitral awards.

Challenging the Award

Article 5 of the Panama Convention repeats almost verbatim the language used in Article 5 of the New York Convention concerning the conditions under which a party may object to the enforceability of the award.

IV.

PRESENT STATUS OF INTER-AMERICAN COMMERCIAL ARBITRATION

As stated in the preceding section, there exists a broad legal framework for implementing conciliation and commercial arbitration in Latin America. Although most Latin American codes of civil procedure and some commercial codes deal with arbitration, in truth many of them do not recognize contractual arbitration clauses and only formally recognize the submission agreement, a formal act that has to be agreed upon in writing, and in some cases, through a public deed signed before a Notary. The document or deed must normally include: the names of the parties; the names of the arbitrators; the subject matter that is submitted to arbitration, that is, the subject of the submission agreement; the authority granted to the arbitrators in connection with applicable law; the procedure; the place in which the arbitrators must carry on hearings and make the award; and the term within which the arbitrators must render the award. The arbitrators are also empowered to act as "friendly mediators" (*amiable compositeurs*), that is to say *ex aequo et bono*.

The parties are free to choose the procedures for arbitration as long as they are not contrary to the specific requirements of the laws in force at the place of arbitration. Local requirements, however, differ considerably, and international agreements often give little guidance. The Montevideo Treaties of 1889 and 1940, as well as the Bustamante Code, refer only to recognition and enforcement of foreign arbitral awards. They do not deal with the arbitral agreement, the arbitrators or the procedure. Thus, each of these quite important issues of international arbitration is governed by domestic regulations of diverse extent and content. For example, some states allow only their own nationals to be arbitrators, while others fail to recognize institutional arbitration by allowing only "physical persons" to be arbitrators. Finally, as stated above, several jurisdictions fail to recognize the "submission clause" as a source of arbitration, referring instead only to the "submission agreement".

The additional fact that only six countries ratified the 1889 Montevideo Treaty and three the 1940 Montevideo Treaty reveals why the development of commercial arbitration in Latin America has been delayed, or rather, stopped. Moreover, though fifteen countries ratified the Bustamante Code, many of them did so with the reservation that the provisions of the code should not prevail over rules of national procedural law or other provisions of public law. This has made it difficult, not to say impossible, to achieve the integral and practical application of Articles 423 to 433 of the Bustamante Code, complicating the granting of "exequatur" or "authorization" by the judicial courts and, consequently, discouraging the rapid and efficient execution of foreign arbitral awards.

If, however, more Latin American countries take steps to ratify the 1958 New York Convention and the 1975 Panama Convention, arbitration practice will be enhanced and simplified. Both texts recognize: 1) that the arbitral clause is valid; 2) that the arbitral agreement may be in the form of either a contractual arbitration clause or a written agreement; 3) that although the arbitration agreement must be in writing, modern forms of "agreement" such as the exchange of letters, telegrams or telex communications are acceptable; 4) that the arbitrators may be nationals or foreigners, and physical or juridical persons; and 5) that the arbitration may be ad hoc or institutional. In addition, though the rules of procedure are subject to party autonomy, the 1975 Panama Convention expressly states that in the absence of party autonomy, the rules of procedure of the IACAC shall apply, which, as stated above, are the UNCITRAL rules adopted in 1976.

It is especially unfortunate that only seven countries have ratified the 1958 New York Convention, and only eight countries have ratified the Panama Convention. Only Mexico and Chile have ratified both Conventions, although it is possible that the United States and Colombia may also ratify both Conventions soon. In my opinion, United States ratification of the 1975 Panama Convention will open the door to further ratifications. This will help eliminate the obstacles arising out of inconsistent domestic legislation which I have briefly described above.

The primary purpose of the IACAC is to facilitate accession of more Latin American countries to the 1958 and 1975 Conventions. At each of its meetings, the IACAC devotes a significant part of its work to planning seminars and working groups in Latin American countries which encourage local chambers of commerce to conform their arbitral systems and to establish arbitration centers that will help familiarize local businesspeople and lawyers with the arbitral system. Several countries, including Mexico, Panama, Colombia, Peru and Chile have either already established or are in the process of organizing arbitration centers. Moreover, in October 1984, the IACAC and the Association of Ibero-American Chambers of Commerce (AICO), held a joint meeting in Guayaquil, Ecuador, where they signed an agreement of cooperation. This agreement should greatly encourage the use of international

commercial arbitration to resolve commercial disputes in the western hemisphere. In the future, the chambers of commerce that are members of AICO will likely become the national sections for the IACA in many Latin American countries and, hence, will be better able to administer arbitration in their respective countries.

The IACAC is now acting on a request from the Inter-American Economic and Social Council for a compendium of the laws and jurisprudence in Latin America relating to international arbitration.

Both the OAS and the Inter-American Development Bank (IABD) make use of the IACAC clause in appropriate contracts. The IACAC, as I already mentioned, has its Washington office in the Secretariat Building of the OAS. In the last few months, the IACAC has received a request from the IABD to discuss a technical cooperation contract.

Finally, we have several important IACAC arbitration cases under way. I hope that the differences and controversies which currently exist under the IACAC conciliation and arbitration system will be minimized in the near future, especially after the signing of the AICO cooperation protocol in Guayaquil, Ecuador in 1984.