The New Spanish Arbitration Law Reform Act

This post has been written by Miguel Gómez Jene, Senior Lecturer of Private International Law at the UNED (Universidad Nacional de Educación a Distancia)

On May 21st, the Spanish official Gazette (www.boe.es) published the reform of the Arbitration Act. This Act amends certain provisions concerning the Arbitration legislation (2003). From the point of view of international private law, the most significant changes involve the reallocation of competence in arbitration matters. Indeed, after the coming into force of the Reform (twenty days after its publication), the corresponding High Court of each "autonomous community" (Tribunales Superiores de Justicia de las Comunidades Autónomas) shall be competent for exequatur and annulment proceedings and appointment of arbitrators. Although this modification appears desirable, it should be noted that no appeal is possible against the judgment of the High Court resolving the exequatur or annulment proceedings. Therefore the Spanish Supreme Court has no competence to deal with arbitration matters.

The prima facie standard of review for the validity of arbitration agreements has also been affected. Specifically, the amendments concern the period to submit the objection to jurisdiction. This objection to jurisdiction shall be made in the first ten days of period to answer the claim.

The possibility of arbitration in relation to company disputes has been expressly affirmed. However two special requirements have been made. First, the introduction of the arbitration agreement in the by-laws of the company requires two thirds of the votes corresponding to shares or participations. Secondly, arbitration in company disputes must be submitted to institutional arbitration. Incomprehensibly, ad hoc arbitrations are not allowed in these matters.

The Reform introduces a new regulative framework for the relationship between arbitrator and mediator. This regulation states that, unless otherwise agreed, a mediator shall not be able to become the arbitrator in the same dispute between the parties.

The expiration of a temporal limit to render an award shall not affect its validity

any longer. Previously there was a six months period to render the arbitral award. Such period of time led to a contradictory case law in order to its consideration as a ground for setting aside the award. Furthermore the temporal limit was also considered a very short period of time to render an award in an international arbitration.

The reform also provides an important new amendment regarding the scope of rectification and interpretation of the award. In cases where arbitrators have decided upon matters which have not been submitted to their consideration or upon not arbitrable matters, parties may request for a rectification of "partial extra limitation" to the arbitral tribunal.

Finally, it should be noted that the Bankruptcy Act has also been amended in order to maintain the validity of the arbitral agreement in cases of declaration of bankruptcy.

NY Court Grants Pre-Award Attachment in Aid of Foreign Arbitration

In *Sojitz Corp. v. Prithvi Information Solutions Ltd,* the New York Supreme Court (ie an intermediate appellate court) recently agreed to grant a pre-award attachment in aid of an arbitration with a foreign seat (Singapore) and between two foreign parties over which NY courts did not have personal jurisdiction.

In 1982, the New York Court of Appeals (ie the supreme court in the state of NY) had held in *Cooper* that NY courts did not have such power.

See the report of G. Born and T. Snider over at the Kluwer Arbitration Blog.

Illmer on Arbitration and Brussels I Revisited

Martin Illmer (Max Planck Institute for Comparative and PIL) has posted Brussels I and Arbitration Revisited – The European Commission's Proposal COM(2010) 748 final on SSRN. The abstract reads:

> *In December 2010, the European Commission presented its long-awaited proposal for a reformed Brussels I Regulation. One of the cornerstones of the proposal is the interface between the Regulation and arbitration. In the first part, the article sets out the development of the exclusion of arbitration from the Regulation's scope up to the West Tankers and National Navigation cases. In the second, main part, the author, who is a member of the Commission's Expert Group on the arbitration interface, provides a detailed account and evaluation of the new lis pendens-mechanism established by the Commission proposal in order to effectively prevent parallel proceedings in the arbitration context. In the third, final part, the author scrutinizes the Commission proposal against the background of the Commission's Impact Assessment before concluding with a short resumé.*

The paper is forthcoming in the *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*.

Call for Papers for a Conference

Entitled “Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration”

I am pleased to pass on the following call for papers for an excellent conference to be held October 21, 2011 at the University of Missouri School of Law. Please contact Professor Strong at the information below with any questions.

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CALL FOR PAPERS AND PROPOSALS

Gary Born will give the keynote address at a symposium entitled “Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration,” to be convened at the University of Missouri School of Law on October 21, 2011. A works-in-progress conference and a student writing competition is being organized in association with this event, and the University of Missouri School of Law is issuing a call for papers and proposals.

- Proposals for the works-in-progress conference are due by May 20, 2011, with responses anticipated in mid-June. The works-in-progress conference will be held at the University of Missouri on October 20, 2011, the day before the symposium itself.
- Papers for the student writing competition are due August 15, 2011, with the winning paper announced at the symposium. The winner will receive a $300 prize sponsored by the Chartered Institute of Arbitrators (CIArb) North American Branch and may have his or her paper published in the *Journal of Dispute Resolution* as part of the symposium edition.

The symposium brings speakers from Canada, Austria, Switzerland, the United Kingdom and the United States together to discuss complex issues relating to international dispute resolution. Submissions for the works-in-progress conference and student writing competition should therefore bear some relationship to international commercial arbitration, transnational litigation or the

connection between the two.

More information about the works-in-progress conference, the student writing competition and the submission process is available at the symposium website, located at: http://www.law.missouri.edu/csdr/symposium/2011/. Submissions and questions should be directed to Professor S.I. Strong at strongsi@missouri.edu. Registration for the symposium itself will open shortly.

The University of Missouri's award-winning program in dispute resolution consistently ranks as one of the best in the nation. The University of Missouri is the only law school in the United States to have received Recognized Course Provider status from CIArb for courses offered during the regular academic year. London-based CIArb was founded in 1915 and offers training courses and competency assessment courses in international commercial arbitration all over the world.

Keynote speaker Gary Born was awarded *Global Arbitration Review*'s inaugural "Advocate of the Year" prize on 3 March 2011 at the annual *GAR* awards dinner in Seoul, Korea. Mr. Born is the author of a number of leading publications on international arbitration and litigation, including *International Commercial Arbitration* (Kluwer 2009), *International Forum Selection and Arbitration Agreements: Drafting and Enforcing* (Kluwer 2010), *International Arbitration: Cases and Materials* (Aspen 2011), and *International Civil Litigation in US Courts* (Aspen 2007).

Arbitration Academy: Summer Courses 2011

An International Academy for Arbitration Law will be launched in Paris in July 2011.

The Academy is an initiative of the French Arbitration Committee (Comité Français de l'Arbitrage (CFA)) and is presided by Professor Emmanuel Gaillard.

The Board of Directors is composed of the Academy's President, Alexandre Hory and Yas Banifatemi as co- Secretary Generals, Jean-Georges Betto as Treasurer, Professor Marie- Elodie Ancel and Professor Jean-Baptiste Racine as members of the Selection Committee, and Maitre Philippe Leboulanger as Chair of the CFA. The Academy also has a Board of Advisors which includes Professor George Abi-Saab (Egypt), Professor Liza Chen (China), Professor Eros Grau (Brazil), Professor Horacio Grigera Naon (Argentina), Judge Gilbert Guillaume (France), Professor Gabrielle Kaufmann-Kohler (Switzerland), Professor Alexander Komarov (Russian Federation), Professor Pierre Mayer (France), Professor Michael Reisman (USA), Professor Dorothé Sossa (Benin), Professor Christoph Schreuer (Austria), and V.V. Veeder QC (UK).

The Academy will offer three-week Summer Courses to students and young practitioners interested in the field, covering both international commercial arbitration and international investment arbitration. The Summer Courses will be given in Paris from 4 July to 22 July 2011, and will be offered in English. They will include a General Course, Special Courses, Workshops on institutional arbitration, an Inaugural Lecture and The Berthold Goldman Lecture on historic arbitration stories.

For the first Session of the Academy in 2011, the General Course will be taught by Professor Christoph Schreuer. The Special Courses will be taught by Professor George Bermann, Professor Pierre- Marie Dupuy, Professor Diego Fernandez Arroyo, Professor François Knoepfler, Professor Pierre Mayer, Dr. Klaus Sachs, and Maître Michael Schneider. The 2011 Workshops will be offered by ICSID, ICC , and the PCA. The Inaugural Lecture will be delivered by Professor Pierre Lalive on the topic "Is Arbitration a Form of International Justice?". The Berthold Goldman Lecture on historic arbitration stories will be given by V.V. Veeder QC on the Lena Goldfield arbitration.

Interested students and young practitioners are invited to apply to the Academy by April 30, 2011. The Application Form and the complete Program can be viewed on the Academy's Website at www.arbitrationacademy.org.

Many thanks to Marie-Élodie Ancel.

New French Law of Arbitration

A new law of arbitration was adopted yesterday in France. The Décret n° 2011-48 of 13 January 2011 *portant réforme de l'arbitrage* amends the French Code of Civil Procedure accordingly. The old provisions of the Code on arbitration dated back to 1980 and 1981. The reform is concerned with both domestic and international arbitration.

The new provisions are available here. An explanatory report can be found here.

Update: London Arbitration Feast

Further to my post of last week, just to note that the start time of next week's BIICL seminar on the Supreme Court has been moved 15 minutes earlier to 5:15pm on Wednesday 24 November. This is to enable those attending to continue their arbitration themed evening by making the short journey to the LSE to hear Professor Jan Paulsson and Alexis Mourre discuss the subject of "Unilaterally Appointed Arbitrators – A Good Idea?" from 7:15pm.

European Parliament Committee on Arbitration and Brussels I

On June 28th, the Committee on Legal Affairs of the European Parliament issued a report on the Implementation and Review of Regulation 44/2001.

On the exclusion of arbitration from the scope of the Regulation, the Committee expressed the following view:

> *Whereas the various national procedural devices developed to protect arbitral jurisdiction (anti-suit injunctions so long as they are in conformity with free movement of persons and fundamental rights,….) must continue to be available and the effect of such procedures … must be left to the law of those Member States as was the position prior to the judgment in West Tankers.*

On the proposal to grant exclusive jurisdiction to the court of the seat of the arbitration, the report provides:

> *Exclusive jurisdiction could give rise to considerable perturbations It appears from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States that the Member States have not reached a common position thereon and that it would be counterproductive, having regard to world competition in this area, to try to force their hand.*

See the report of Hans Van Houtte over at the Kluwer Arbitration Blog.

Limitation Period for Enforcing Foreign Arbitration Award

In *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19 (available here) the Supreme Court of Canada has upheld the decision of two lower courts that the plaintiff's claim to enforce a Russian arbitration award was brought after the expiry of the applicable provincial limitation period.

Following a contractual dispute, Yugraneft commenced arbitration proceedings before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. The arbitral tribunal issued

its final award on September 6, 2002, ordering Rexx to pay US$952,614.43 in damages to Yugraneft. Yugraneft applied to the Alberta Court of Queen's Bench for recognition and enforcement of the award on January 27, 2006, more than three years after the award was rendered.

The court was required to interpret article 3 of the New York Convention, which provides that recognition and enforcement shall be "in accordance with the rules of procedure of the territory where the award is relied upon". This raised an issue in Canadian litigation since the Supreme Court of Canada has held (in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022) that limitation periods are substantive and not procedural. The court rightly concludes that this does not mean that the forum's limitation period cannot be applied to the enforcement action (paras. 18-29).

The remainder of the decision deals with what the limitation period is under Alberta law. The plaintiff attempted to convince the court to apply a ten-year period, applicable to a "claim based on a judgment or order for the payment of money" (para. 43). The court, based on the clear wording of the statute, had to conclude that an arbitration award did not fall within this language (para. 44). As a result, the claim was governed by the general two-year period and so was, on the facts, time barred (para. 63).

The court does suggest that the two-year time period will not start to run until the plaintiff discovers, or should have discovered, that the defendant has assets in the place where enforcement is sought (para. 49). This fact is not strictly part of the cause of action. Still, this statement, if accepted as correct, should provide some comfort in the face of the relatively short two-year period. However, this statement draws in part on the specific language of s. 3(1)(a)(iii) of the Alberta limitation statute, which deals with knowing whether a proceeding is "warranted" (see para. 61). If so, the analysis could be different under a statute that did not have this specific language as part of the test of discoverability (see for example the language in s. 5(1)(a)(iv) of the Ontario limitation statute).

This area would benefit from a clear legislative solution, namely a provision containing an express limitation period for claims on foreign arbitration awards. Such a period should, in recognition of the issues involved, be longer than the province's general limitation period.

ASADIP (American Association of Private International Law) and CEDEP co-organize the 2nd conference on Arbitration in Latin America

CLA – CONFERENCIA LATINOAMERICANA DE ARBITRAJE – 10 – 11 de junio de 2010 – Asunción, Paraguay

On the 10th and 11th of June, the II Latin American Conference on Arbitration will be held in the city of Asunción, organized by the CEDEP with the support of the American Association of Private International Law.

Following, on June 12th, at noon, a meeting will take place, regarding "Contemporary Management Issues in International Arbitration and Dispute Resolutions Practices", organized in association with The Law Firm Management Committee of the International Bar Association, and whose agenda and direction will be in charge of Norman Clark, Head of the Law Firm Management Committee of the IBA.

Likewise, on Saturday 12 a "pre-moot" will be held, for Latin American students, organized jointly with the Moot Madrid 2010, with the support of the Willem C. Vis International Commercial Arbitration Moot of Vienna.

In this year's Conference themes regarding commercial and investment arbitration will be addressed, for the purpose of updating concepts, regulations and arbitral practices and bring them to discussion to the hands of arbitrators, academics and lawyers with experience on international arbitration.