GETTING THE DEAL THROUGH

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Arbitration 2011

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Laws and institutions

1 Multilateral conventions

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Yes, Venezuela is a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was ratified by the Congress on 8 February 1995, and entered into force on 9 May 1995. In accordance with Article 1, and based on reciprocity, Venezuela declared that the Convention would be applicable only for the recognition and enforcement of arbitral awards rendered in the territory of another contracting state. Venezuela also declared that the Convention would be applicable only to differences arising out of legal relationships, whether contractual or not, of a commercial nature under Venezuelan law.

Venezuela has also been a party to the Convention on the Settlement of Investment Disputes between states and nationals of other states (the ICSID Convention) since 1 June 1995 and it is a contracting state to the Inter-American Convention on International Commercial Arbitration (Panama Convention), as of 16 May 1985, the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 15 January 1985 (Montevideo Convention).

2 Bilateral treaties

Do bilateral investment treaties exist with other countries?

Venezuela has signed 30 bilateral investment treaties, of which only 25 are currently in force. According to this information, Venezuela currently has BITs with the following countries: Argentina (1995), Barbados (1995), Belarus (2008), Belgium and Luxembourg (2004), Canada (1998), Chile (1995), Costa Rica (2001), Cuba (2004), Czech Republic (1996), Denmark (1996), Ecuador (1995), France (2004), Germany (1998), Indonesia (2003), Iran (2006), Lithuania (1996), Paraguay (1997), Peru (1997), Portugal (1995), Spain (1997), Sweden (1998), Switzerland (1994), United Kingdom (1996), Uruguay (2002).

On 1 November 2008, the denunciation by Venezuela of the BIT with the Netherlands became effective. As a result of this denunciation, the investments made before 1 October 2008 are protected by the agreement for 15 years. Therefore, investors will be protected until 31 October 2023, while new investments made after 1 November 2008 will not be protected.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

In Venezuela, arbitration has been recognised by the Constitution as a valid mechanism for dispute settlement. Additionally, Venezuela has two main regulations on arbitration, one of them is provided for the Civil Procedural Code 1986 (CPC), and the Commercial Arbitration Act 1998 (CAA). The arbitration proceedings provided for in the CPC are characterised by a high level of intervention of local courts on the arbitral proceedings, while the CAA is based on the UNCITRAL Model Law. It is possible to find other references to arbitration in other pieces of legislation. According to the set of rules that regulate the oil and gas industries, arbitration is allowed in article 34 of the Hydrocarbons Organic Act (2006), and article 24 of the Gaseous Hydrocarbons Organic Act (1999), both of them related to the joint venture agreements and the possible disputes between the parties. Additionally, the Act for the Development of Petrochemical Activities (2009) also makes reference to arbitration as a dispute settlement mechanism for the joint venture agreements incorporated for the exploitation of petrochemical activities. Against this positive trend, the regulation of the Public Procurement Act (2009) provides in article133 that any doubts, disputes and claims that may arise out of a public contract, which are not settled by agreement of the parties, will be decided by the competent courts of the Bolivarian Republic of Venezuela in accordance with its laws, and without any possibilities of foreign claims.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Yes, the CAA is based on the provisions of the UNCITRAL Model Law, although there are some important differences:

- no distinction between national and international arbitration;
- the CAA does not include the possibility for the parties to apply for interim measures of protection before an ordinary tribunal, this situation has been favourably resolved by the Constitutional Chamber of the Supreme Tribunal of Justice;
- challenges to the arbitrators can only be based on the grounds provided for in the CPC, and the proceedings for the challenge are also different;
- the CAA does not make a distinction between interim measures of protection and preliminary orders, and there is no specific proceeding for enforcing interim measures ordered by the arbitral tribunal; and
- the CAA establishes that the time frame for the parties to challenge the award is of five working days.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Yes, there are mandatory provisions of the CAA, with which parties and arbitrators are obliged to comply. For instance, article 27 of the CAA provides that in the arbitral proceedings there is no place for incidences, while article 29 establishes that for the validity of the arbitral award, it would only be required to be signed by the majority of arbitrators as long as there is an statement explaining the reasons of the absence of one or more signatures and the dissenting opinions. Additionally, article 31 establishes that the arbitral award shall be notified to the parties through a copy signed by the arbitrators. It is also mandatory the provision contained in article 32 regarding the correction and completion of the arbitral award, and article 33 that explains the grounds for the arbitral tribunal to seize.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

There is no provision in the CAA establishing any kind of guidance for the arbitrators to determine the law applicable to the merits of the dispute. According to the International Private Law Act and the CPC, parties are allowed to choose the law applicable to the dispute. If there is no agreement between the parties, the arbitrators are free to determine the applicable law.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most relevant arbitral institutions in Venezuela are:

Arbitration Centre of the Caracas Chamber (CACC)
Calle Andres Eloy Blanco
Edif Camara de Comercio
Piso 5, Los Caobos
Caracas 1050, Venezuela
Tel: +58 212 571 88 31 / 91 13
Fax: +58 212 578 24 56
www.arbitrajeccc.org

and;

Business Centre of Conciliation and Arbitration (CEDCA)
2da Avenida de Campo Alegre
Torre Credival, Piso 6
Caracas, Venezuela
Tel: +58 212 263 08 33
www.cedca.org.ve

The CACC, last revised its arbitration rules in 2005. The modifications were based on the experience of the former rules and basically focused on the following aspects:

- the parties are allowed to appoint arbitrators who are not in the list of the CACC, including foreign arbitrators, which favours international arbitration cases in Venezuela;
- a reduced the time for the appointment of arbitrators given to the parties from 15 to 10 days;
- the drafting of the Terms of Reference requires a proactive role from the parties, who are required to prepare a draft of this document for the Arbitral Tribunal, which is in charge of the drafting of the final document;
- given the high inflation rates in Venezuela during the last years, the new rules establish the cost of the arbitration in Tax Units, the value of which is yearly updated by the government (this allows the predictability of the costs);
- includes provisions regarding multiparty arbitrations with regards to the appointment of arbitrators and payment of costs.

The Arbitration and Conciliation Rules of CEDCA included some useful provisions with regard to controversial issues that have rendered a positive outcome. The most relevant particularities of the rules are:

- the possibility to grant interim measures of protection before the constitution of the arbitral tribunal by arbitrators specially appointed by the Board of Directors of CEDCA for this particular purpose;
- the arbitration proceedings include a phase where the parties are encouraged to participate in a conciliation hearing in order to analyse if there is a possibility of settlement. If that possibility exists and with the parties' agreement, there will be a conciliator appointed to assist them in the process, which does not paralyse the arbitral proceedings. Actually, 32 per cent of the cases at CEDCA have finalised with a settlement reached through the intervention of a conciliator;
- before the rendering of the award, the arbitrators are obliged to provide the final draft for the consideration of the parties and the Executive Director of CEDCA, who are entitled to make non-binding comments in writing on the merits and on formal aspects of the draft award, which will be also exposed in a special hearing called for that purpose;
- there is also a 'fast proceeding' for those disputes not exceeding US$50,000 and with no more than two individuals or companies acting as claimant and as a respondent, and will also be applicable for other disputes by agreement of the parties.

Both CACC and CEDCA have established the fees of the arbitrators on the basis of the amount in dispute.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The kinds of disputes that are not arbitrable under Venezuelan Arbitration Law are pointed out in article 3 of the CAA, which provides as follows that any kind of dispute suitable to be settled by agreement of the parties is allowed to be submitted to arbitration. The only exceptions are those dispute that:

- contrary to public policy rules or are over criminal matters – with the exception of quantum claims unless already determined in a final judgement;
- matters concerning the powers or functions of the state or public law persons and entities;
- related to the status or legal capacity of individuals;
- deal with issues related to assets or rights of legality disabled individuals without prior court authorisations; and
- have already been resolved by a final judgment, except for the enforcement proceedings related to quantum determination, in so far as they only concern the parties to the proceedings and issues that are not decided in the final judgment.

IP disputes would be arbitrable, with the exception of those matters reserved for the state authorities regarding the registration of IP rights. Regarding antitrust and competition law, the determination of an infringement to the Venezuelan antitrust and competition legislation has to be decided by the Competition Authority. However, if those infringements have caused damages to a third party, the claim for damages could be submitted to arbitration. The securities

transactions and intra-company disputes are also arbitrable under Venezuelan law.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The CAA defines an arbitration agreement as a reciprocal statement of will, whereby the parties submit to arbitration all or any of the controversies that have arisen or that may arise between them with respect to a legal relationship, whether contractual or not.

The arbitration agreement can be contained in a clause that is part of a larger document and can also arise out of a separate arbitration agreement. Nonetheless, the arbitration agreement must be evidenced in writing in any document or set of documents that demonstrate that express consent of the parties to resort to arbitration. The reference made in a contract to a document that contains an arbitration clause will be considered as an arbitration agreement if the agreement was made in writing, and the reference entails that the clause is part of the contract.

When one of parties is a state-owned company or a subsidiary, article 4 of the CAA requires for the approval of the arbitration agreement by the corporate government body and the authorisation in writing by the ministry to which the state-owned company is attached to. In these cases, the arbitration agreements must specify the kind of arbitration and the number of arbitrators, which cannot be fewer than threee.

Additionaly, the Attorney General's Office Act, 2008 (AGOA) establishes that any public officer that enters into an arbitration agreement directly related with the rights, assets, and interests of the republic, must request a previous opinion from the attorney general's office.

Furthermore, any contract to be executed by the republic establishing arbitration agreements must be submitted to the attorney general's office, in order to obtain a previous opinion on the arbitration agreement. To this end, article 13 of the AGOA provides that the contract must be sent to the attorney general's office jointly, with the corresponding file and the opinion of the in-house counsel of the state entity.

The lack of a formal requirements in a private contract could be cured if the party who could raise an objection does not object, and expressly declares having agreed to the arbitration clause at the relevant time. By the same token, if both parties agree to resort to arbitration post-dispute, they may also do so. In the case of arbitration agreements with a State-owned company or its subsidiary, the lack of fulfilment of the formalities established in article 4 of the CAA would render the arbitration agreement null and void.

The lack of compliance with the requirements established in the AGOA will give rise to personal liability of the public officer, but would not affect the validity of the arbitration agreement.

Arbitration agreements contained in general terms and conditions would be valid as long as there is a clear evidence of the consent of both parties.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The arbitration agreement will be enforceable unless it is declared null, void, inoperative or incapable of being performed.

As a consequence of the separability of the arbitration agreement, provided for in article 7 of the CAA, the avoidance, rescission or termination of the main contract may not necessarily affect the existence and validity of the arbitration agreement.

In the case of insolvency, death and legal incapacity, the arbitration agreement could survive as it could be transferred to the person that acquires the right and undertakes the obligations derived from the document that contains the arbitration agreement.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

In general terms, there is no possibility for third parties that are not a party to the arbitration agreement to be bound by it. However, where there has been a legal transfer of rights, it is possible for the party that is the new holder of the transferred right to be considered as a party to the arbitration agreement, in particular, this would be the criterion applicable to an assignment, a succession, and in some cases, insolvency. However, this will not be the case with agents, who cannot be bound by an arbitration agreement to which they did not consent personally, but on behalf of their principal.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

No, there are no provisions in the Venezuelan CAA with respect to third-party participation in arbitration. The only parties entitled to participate in the arbitration proceedings are those that have mutually consented to do so.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The 'group of companies' doctrine is not applicable in Venezuela.

Courts and arbitral tribunals will not extend an arbitration agreement to a non-signatory parent or subsidiary company of a signatory company on the basis of a participation of the parent or subsidiary in the conclusion, performance or termination of the contract in dispute. The position would be different if there is an express acceptance of the parent or subsidiary company of the arbitration clause, which must be expressed in writing and unequivocally to demonstrate the intention to submit the dispute to arbitration.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

Since there is no special provision in regard to multiparty arbitration agreements, the requirements for the validity of such would be the same applicable to ordinary arbitration agreements. However, the rules of arbitration of CEDCA provide in article 23 the possibility of multiparty proceedings and the mechanism for the appointment of arbitrators. Additionally, article 40 of the Rules of Arbitration of the CACC also provides the way of the appointment of arbitrators in multiparty arbitration cases.

Constitution of arbitral tribunal

15 Appointment of arbitrators

Are there any restrictions as to who may act as an arbitrator?

There are no restrictions as to who may act as an arbitrator. However, because of the laws regulating the judiciary, judges may not act as arbitrators since they are not allowed to engage in economic activities other than teaching while serving in office.

According to the Rules of Arbitration of the CACC and CEDCA, they have adopted their corresponding lists of arbitrators, but parties are not forbidden to choose arbitrators that are not included in those lists.

16 Appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

If there is no agreement of the parties in regard to appointment of arbitrators, the CAA provides for each party to appoint one arbitrator, and these two will select the third that will be the chairman of the arbitral tribunal. This procedure is followed by the Rules of Arbitration of the CACC.

In CEDCA, the method for the selection of arbitrators consists in a list of possible arbitrators prepared by each party in order of preferences. The parties have the right to reduce up to 30 per cent of the candidates included in the list of the other without being required to give any particular reason. The selection of the arbitrators will be under the following rules:

- in those cases where the coincidence exceeds more than three prospective arbitrators, the parties will choose the members of the tribunal by mutual agreement;
- if the coincidence occurs with three candidates, they will compose the arbitral tribunal;
- when there are only two coincidences, those candidates will be appointed and will appoint the third arbitrator;
- if only one of the candidates is coincident, he or she will be appointed and the parties will choose the other two arbitrators from the list of the other; and
- in those cases where there are no coincidences, each of the parties will appoint one of the candidates included in the list of the other party, and the appointed arbitrators will designate the third member of the tribunal.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement and the procedure, including challenge in court.

Arbitrators can be challenged and can disqualify themselves pursuant to the general grounds provided for judges in the Civil Procedural Code. These grounds include family relationships, close friendships or evident personal confrontation, bias, and anticipation of opinion about the issues in dispute.

In the ad hoc proceedings provided for in the CAA, arbitrators appointed by agreement of the parties may not be subsequently challenged for reasons that were known by the challenging party at the time of the designation. Arbitrators appointed by judges or third parties may be challenged within five days after the date of the constitution of the arbitral tribunal.

The CAA provides that in cases of illness, death, resignation or disqualification of an arbitrator, the designation of the new arbitrator will be made following the same rules applied for the original appointment.

As per the CACC rules, arbitrators can be challenged for lack of impartiality and on any further grounds. For their part, the CEDCA rules only provide that arbitrators can be challenged on the basis of lack of impartiality, and party-appointed arbitrators cannot be challenged for reasons that were known by the challenging party at the time of the designation.

Both the CACC and CEDCA rules require the challenge to be made in writing, and to be motivated and presented before the secretariat. It can be presented within five days (CEDCA arbitrations) and 10 days (CACC arbitrations) after the notification of the appointment or after the challenging party becomes aware of the facts that justify the challenge. The centre's executive committee will decide whether or not the challenge is founded.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses and liability of arbitrators.

The relationship between the parties and arbitrators in ad hoc arbitral proceedings is regulated by the CAA. It requires party-appointed arbitrators to maintain neutrality, impartiality and confidentiality, unless the parties otherwise agree. Additionally, arbitrators have the obligation to attend the hearings, and more than one unjustified absence is sufficient grounds to have an arbitrator disqualified. For their part, the parties have the obligation to pay arbitrators the agreed fees and expenses.

The contractual relationship between the parties and the arbitrators in institutional arbitrations is regulated by the centre's rules. The CACC rules provide guidance as to the maximum amount of fees that arbitrators can charge. In addition, the rules impose obligations on arbitrators related to ethics, confidentiality and impartiality. Failure to comply with the rules could mean the exclusion of the arbitrator from the centre's list. Similarly, the CEDCA rules also establish the maximum fees for arbitrators, and contain provisions on ethics that must be observed by arbitrators. Upon notification of appointment, arbitrators must subscribe a declaration of impartiality and independence, and must also disclose in writing any relevant information that could affect their impartiality or independence.

Jurisdiction

19 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If court proceedings are initiated despite an existing arbitration agreement, the interested party may challenge the jurisdiction of the court pursuant to the existence of the arbitration agreement. Once the claim has been filed with the court and service of the process has been properly effected on the defendant a time period of 20 days will start running for the presentation of defence submissions. Within this period, the defendant can challenge the jurisdiction of the court and does not have to present a plea on the merits until a decision on jurisdiction is rendered by the court. The court should render a decision on the challenge within the next five days following the elapsing of the 20 days mentioned before. In practice, the courts may take months to render a decision on this matter.

20 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The CAA incorporated the Kompetenz-Kompetenz principle, according to which the arbitral tribunal can decide over its own jurisdiction. In CAA ad hoc arbitral proceedings, the time limit for jurisdictional objections is five days after the first hearing. Once this time period has elapsed the parties are precluded from raising jurisdictional objections.

The CACC rules also allow the arbitral tribunal to decide over its own jurisdiction, and also on the existence or validity of the arbitration agreement. The issue of the lack of jurisdiction of the arbitral

tribunal can be raised at any time before the constitution of the arbitral tribunal. Once the arbitral tribunal has been constituted, parties are precluded from raising jurisdictional objections.

The CEDCA rules do not contain any special provisions on disputes over jurisdiction, so that the rules of the CAA discussed above would apply, unless the parties had otherwise agreed.

Arbitral proceedings

21 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The parties can freely choose the place and language of the arbitration. Should they fail to do so, the CAC ad hoc arbitral tribunal would consider the particular circumstances of the case and decide on the language and venue. The same procedure is followed in the CEDCA rules, which also require the arbitral tribunal to pay special attention to the particularities of the matter, such as the language of the contract.

As for the CACC rules, the default place of the arbitration is the offices of the CACC in Caracas. As regards the language, this would be determined by the arbitral tribunal, failing prior agreement of the parties.

22 Commencement of arbitration

How are arbitral proceedings initiated?

In CAA ad hoc proceedings, as soon as the appointed arbitrators have accepted their designation, the arbitral tribunal will be constituted, and notifications delivered to the parties. The arbitral tribunal should issue a notice for arbitration, and should also schedule the first hearing. The CAC is silent as to any formal requirements of this notice.

Nonetheless, during the first hearing, the arbitral tribunal must: read to the parties the document that contains the arbitration agreement; mention the disputes submitted to them; and detail the parties' requests and the value of the claims. The parties may subsequently present their cases together with any supporting documents.

The CACC rules provide that the arbitral proceedings are initiated by a written request for arbitration delivered by the requesting party to the centre's secretariat. The same is provided for in the Rules of Arbitration of CEDCA.

23 Hearing

Is a hearing required and what rules apply?

The CAA requires a hearing for ad hoc arbitration proceedings, and so do the CACC and CEDCA rules. The arbitral tribunal is obliged to send a written notification to the parties or their representatives with the date, time and place of the hearing. Generally, in the ad hoc arbitration proceedings provided for in the CAA, the first hearing will be used for the organisation of the arbitration, and according to article 24 of the CAA, the document containing the arbitration agreement will be read, and the positions and claims of the parties will be expressed jointly with an estimation of the quantum. During the first hearing, the parties may produce any relevant documentation or refer to them and other evidence to be produced during the proceedings.

24 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Generally speaking, arbitral tribunals are bound to establish the facts of the case in line with the evidence presented to them by the parties. All types of evidence will be allowed unless contrary to public policy rules.

Witness evidence, experts (both party and tribunal appointed), documents, inspections by the arbitral tribunal, and party evidence (including the testimonies of party officers) are all commonplace. There is a 'control of evidence' principle in Venezuela, according to which a party has the right to control the evidence produced by the other. For example, a party has the right to cross-examine a witness brought by the other side.

The IBA Rules on the Taking of Evidence in International Commercial Arbitration are widely known in Venezuela. Arbitral tribunals are, nonetheless, not obliged to apply them or seek guidance from them, and therefore are more likely to resort to them when the parties have agree on its application.

25 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Broadly speaking, there is minimal intervention by local courts in arbitral proceedings. Nonetheless, local courts can provide assistance to arbitral tribunals with certain procedural matters. For instance, the arbitral tribunal or any of the parties (with the approval of the tribunal) can request assistance from local courts for the furnishing of evidence and the enforcement of precautionary measures.

Additionally, in CAA ad hoc proceedings first instance courts might intervene upon the parties' request when they cannot agree on the appointment of an arbitrator. Recently, a judgment rendered by the Constitutional Chamber of the Supreme Tribunal established the possibility of resorting to local courts seeking interim relief before the constitution of the arbitral tribunal, and even afterwards, without being deemed as a waiver to the arbitration agreement (Astivenca case, 3 November 2010).

26 Confidentiality

Is confidentiality ensured?

The CAA expressly impose to the arbitrators the duty to keep the confidentiality of the dispute, the arbitral proceedings (including the award), any materials submitted by the parties, any information disclosed during the proceedings, and generally anything related to the proceedings. This confidentiality right may, nonetheless, be waived by the parties.

Similarly, the CACC and CEDCA rules ensure confidentiality in the same terms provided in the CAA. Arbitrators nominated according to the CACC and CEDCA rules must sign confidentiality agreements before they can be appointed.

Interim measures

27 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Since the judgment rendered in the case of Astivenca on 3 November 2010, it is possible to request interim measures of protection from local courts before the commencement of the arbitration an until the constitution of the arbitral tribunal, which is empowered to order interim measures of protection by article 26 of the CAA. Additionally, arbitral tribunals could request the assistance of local courts if need be, although in practice this is more common at the enforcement stage. Finally, there is no exclusivity for the local courts on the ability to grant interim measures.

28 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

In CAA ad hoc proceedings, the arbitral tribunal can order any kind of interim measures that are necessary, depending on the controversy and the nature of the claim. The same power is given to CACC and CEDCA arbitral tribunals.

As a consequence, the above arbitral tribunals may order any kind of interim measures. These can be ordinary or special remedies, and include attachments, seizures, embargoes and freezing orders, among others. Security for costs can also be ordered by the arbitral tribunal at its discretion. The arbitral tribunal, or any of the parties (with the approval of the arbitral tribunal), may request the assistance of local courts for the enforcement of interim measures.

Awards

29 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

In CAC ad hoc proceedings, unanimous decisions are not required. When the tribunal is comprised of more than one arbitrator, it is sufficient that the decision is made by a majority. The CACC and CEDCA rules include a similar provision. These rules also provide that where a majority decision cannot be reached, the vote of the chairman of the tribunal will prevail.

30 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

There is no particular provision with regard to dissenting opinions. Usually, dissenting opinions are attached to the arbitral award and are considered to be part of it.

31 Form and content requirements

What form and content requirements exist for an award?

The CAA and the CACC and CEDCA rules require awards to be made in writing, and also to be signed by the arbitrator or arbitrators that form the arbitral tribunal. In arbitration proceedings with more than one arbitrator, the signature of the majority of the arbitrators will suffice.

Unless the parties have otherwise agreed, awards must set out reasons and must also provide the date of issue and place of the arbitration. The award will be deemed to have been issued in the seat of arbitration.

32 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law?

The CAA rules both require an award to be made six months after an arbitration tribunal has begun, the CACC establishes the same time limit, but starting from the signing of the Terms of Reference. The rules of arbitration of CEDCA provide that the arbitration proceedings should not last longer than eight months from the filing of the application for arbitration.

33 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Neither the CAA nor the CACC or CEDCA rules provide a practical difference between the date of the award and the date of the delivery of the award. This is because all of them refer to the date of notificacion of the award as the decisive date. As per the CAA, a challenge of the award may not be filed before the date of notification.

As for the CACC rules, the parties can request clarification, correction and complementation of the award as from the date of notification. Similarly, parties to a CEDCA arbitration, as from the date of notification of the award, can request the correction or interpretation of the award or an additional award (if the original award omitted an issue).

34 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

All types of awards and relief would be available unless contrary to public policy rules. There are no special provisions in the CAA and the CACC and CEDCA rules on the types of awards and relief that an arbitral tribunal may grant.

35 Termination of proceedings

By what other means than an award can proceedings be terminated?

Arbitral proceedings could be terminated by an award in default, settlement agreement, and discontinuance by the parties. The parties are free to end the arbitral proceedings at any stage, and can file a written petition before the arbitral tribunal for the proceedings to be terminated.

In addition, the CAA provides that if the parties fail to pay the arbitrators' fees the arbitral tribunal can suspend and even terminate the proceedings. Should this happen the parties could resort to the local courts or reactivate the arbitral proceedings if the fees are paid. Similar provisions are included in the rules of CACC and CEDCA.

36 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The CAA and the CACC and CEDCA rules provide that, unless otherwise agreed by the parties, the arbitration costs will be fixed by the arbitral tribunal in the award. The arbitral award should state the proportion in which the costs will be covered by the parties. All arbitration-related costs are, in principle, recoverable, and these include arbitrators' fees, administrative fees and attorneys' fees. In court proceedings a maximum of 30 per cent of the value of the claim can be recovered as costs. In practice, this procedural rule may influence arbitrators.

37 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest is normally awarded for principal claims, but could also be awarded for costs. The CAA and the CACC and CEDCA rules contain no special provision in this regard.

Update and trends

A recent decision rendered on 3 November 2010 by the Constitutional Chamber of the Supreme Tribunal of Justice in the case of Astivenca has solved some issues in the Venezuelan arbitration legislation. The most relevant aspects developed by the Constitutional Chamber are:

- The courts should not examine the arbitral agreement with regards to the consent of the parties and must limit the analysis to a formal revision of the main elements of the agreement, ie, that the agreement must be in writing.
- The tacit waiver to the arbitration agreement should not be deemed but on the grounds of the activity of the parties in the court proceedings.
- It is recognized that local courts are empowered to order interim measures of protection, and the pre-arbitral referee proceedings of the ICC, ICDR, and CEDCA are recognized as a valid mechanism for provisional relief. An application for interim measures of protection shall not be deemed as a waiver of the arbitration agreement.
- Once the arbitral tribunal has been constituted, the arbitrators are empowered to revisit the interim measure ordered by a local court or a referee.
- The nullity action is the only available for the challenge of the arbitration, any other, including the Amparo are not allowed.
- The jurisdictional powers of arbitral tribunals is recognized.
- Kompetenz-kompetenz and separability of the arbitration agreements are deemed as the pillars of arbitration.

Regarding Investment Arbitration, the most relevant decision was given in the award on jurisdiction in the case of Mobil v Venezuela, where the arbitral tribunal concluded that article 22 of the Venezuelan Decree-Law for the Promotion and Protection of Investment is not an offer of arbitration. Finally, Venezuela currently has 12 pending cases before ICSID arbitral tribunals.

Proceedings subsequent to issuance of award

38 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Awards can be corrected by the arbitral tribunal on its own and upon a party's request within 15 days for CAA ad hoc proceedings and CACC arbitrations, or 10 days for CEDCA arbitrations, as from the date of notification of the award.

39 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The only remedy available against awards in the CAA is the appeal for annulment, which must be filed in writing before a domestic court of appeal of the place where the award was made. Pursuant to the CAA, the appeal for nullity must be filed within five working days as from the date of notice of the award or any further activities by the arbitral tribunal to correct, clarify or supplement the award. The filing of an appeal for nullity does not prevent or suspend the enforcement of the award. An arbitral award can be declared null and void when:

- the party against whom it is invoked proves that one of the parties was affected by an inability at the time of entering into the arbitration agreement;
- the party against whom it is invoked was not given proper notice of the appointment of an arbitrator or the arbitration proceedings being initiated, or by any reason was not able to assert its rights;
- the constitution of the arbitral tribunal or the arbitral proceedings did not conform to the CAA;
- the arbitral award deals with substantive issues not contained in the arbitration agreement or exceeds the agreement itself;
- the party against whom the arbitral award is invoked proves that the award is not binding on the parties or has been previously annulled or suspended according to the terms agreed by the parties for the arbitral proceedings; or
- the court before which the nullity of the award is requested proves that, as a matter of law, the object of the dispute is not capable of being resolved by arbitration, or that its subject matter is contrary to public policy rules.

40 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

There are two levels of appeal. First, there is he annulment action established in article 43 of the Commercial Arbitration Law. Said action can be filed in the Superior Court within five business days after the notification of the award. Second, the nullification of a judgment by the highest court or cassation; this action is not expressly found in the commercial arbitration law; however, according to Venezuelan case law, it can be brought (Banco de Venezuela v Seguros Mercantil file Num: 2005-000762. Civil Cassation Chamber of the Supreme Tribunal of Justice).

According to the law, if the appeal of annulment is admitted, the ordinary procedure, established in the Code of Civil Procedure, is enforced, which grants a series of time periods. Regarding the annulment by the Supreme Court, the law establishes that the judge has 30 days to decide.

There is a principle in Venezuela stipulating that the administration of justice is free of charge. Nonetheless, professional fees of the attorneys are paid as well as all the expenses that could derive from the process. In this case, the costs must be paid by the losing party or by the party that files the case and desists, or they are proportionally distributed according to the ruling of the judge.

41 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

As ordered in the CAA, awards must be recognised and enforced by Venezuelan courts as final and binding, regardless of the country where they were made. Thus, upon the filing of a written petition before a first instance court the award will be enforced without the need to follow the exequatur procedure established in the Venezuelan Civil Procedural Code for foreign decisions. This petition should be accompanied by a certified copy of the award translated into Spanish if necessary. According to the CAA, recognition and enforcement of an arbitral award, whether domestic or foreign, can only be denied:

- when the party against whom the award is enforced demonstrates that one of the parties was affected by some incapacity at the moment the arbitration agreement was entered into;
- when the party against whom the award is enforced was not properly notified of the designation of an arbitrator or any act of the arbitrator or the right to due process was violated;
- when the appointment of the arbitral tribunal or the proceedings themselves violated the laws of the country where the proceedings were conducted;
- when the award addresses an issue that was not within the scope of the arbitration agreement or includes a decision exceeding such agreement;
- when the party against whom the award is enforced demonstrates that the award is not binding or has been declared void by a competent authority according to the agreement of the parties;

- when the court before which the award is presented to be enforced demonstrates that the subject matter of the dispute is not arbitrable or against public policy rules; and
- when the arbitration agreement is not valid according to the law chosen by the parties.

42 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Article 48 of the Law for Commercial Arbitration expressly states that foreign awards are recognised as binding by ordinary courts. Once a written request is filed before the court, it is possible for the court to enforce the award without an exequatur, pursuant to the stipulations on the compulsory enforcement of decisions stated in the Code of Civil Procedure. Also, the party that brings the enforcement of a foreign award via domestic courts shall present a copy of the award that must be certified by the arbitral tribunal, with the corresponding translation to Spanish if necessary.

43 Cost of enforcement

What costs are incurred in enforcing awards?

Costs in enforcing awards mostly comprise attorneys' fees, court costs and disbursements. Costs may vary depending on the time that it takes to fully enforce the award.

Other

44 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

The procedural rules contained in the Civil Procedural Code could exert an influence on arbitrators, and particularly those who are lawyers. Written witness statements are used on a regular basis depending on the complexity of the case. The default way to obtain a witness statement is by bringing the witness before the arbitrators and giving the other party the right to cross-examine. US-style discovery is uncommon.

45 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign practitioners may require a visa to enter the country. It would be advisable for them to check with the Venezuelan consulate of the place where they will be before coming to Venezuela. This is not just for the possible visa requirement but also to check if they can work and earn money in this country. Only attorneys licensed to practice law in Venezuela can act as lawyers and provide legal advice. This is important to bear in mind, although arbitrators are not always lawyers. Foreign practitioners engaging in economic activities within the territory of Venezuela will be subject to the payment of taxes, especially income tax, unless the practitioner is a national of a state that has signed a double taxation treaty with Venezuela, and pays income taxes in that state. VAT is nine per cent and foreigners will also have to pay this tax.

There is an exchange control regime at present in Venezuela, according to which all the activities of currency exchange are controlled by the state. According to Venezuelan ethical rules for the practice of law, lawyers may not engage in advertisement activities for their legal services.

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