

# REMARKS ON THE COOPERATION BETWEEN THE LATIN AMERICAN JUDICIARY AND ARBITRAL TRIBUNALS WITH RESPECT TO THE TAKING OF EVIDENCE

NICOLÁS GAMBOA-MORALES<sup>1</sup>

A discussion on the attitude of the Latin American judiciary towards arbitration cannot exclude two important considerations, one general and the other specific to Latin America. The first deals with the resistance of domestic courts worldwide to arbitration.<sup>2</sup> In the words of Lord Mustill, the “*tension about the points at which one institution yields a dominant role to the other*,” which he explains in the following terms:

“Ideally, the handling of arbitrable disputes should resemble a relay-race. In the initial stages... the baton is in the grasp of the court... When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfill, the arbitrators hand back the baton so that the court can in case of need lend its coercitive powers to the enforcement of the award.”<sup>3</sup>

Yet, this clear-cut scenario does not always work: does the subordinate role of the courts remain if something goes wrong

with the arbitration? Or should they “retake the baton” and introduce at that point the appropriate corrections?

The second consideration is currently in the process of reversal, but still has some presence. Thus, for example, Henri Alvarez points out that that “*the hostile tradition toward international commercial arbitration attributed to Latin American states*”<sup>4</sup> is closely associated with the Calvo Doctrine,<sup>5</sup> whose justification cannot be exaggerated in light of the interventionist actions undertaken against Latin American states during the XIX century mostly by European countries.<sup>6</sup>

Keeping in mind the growing importance of arbitration in Latin America<sup>7</sup> and the improvement of national laws, for example Chile and Peru, it is within this uphill context that we ought to evaluate the attitude of local courts towards the increasing support of arbitration.

Thus, considering Horacio Grigera Naon’s view that one way to evaluate the degree of acceptance of commercial arbitration in

<sup>1</sup> Senior Partner of the Bogotá Law Firm “Gamboa & Chalela” Professor of graduate courses on international arbitration at Universidad del Rosario, Bogotá and Universidad Externado de Colombia, Bogotá.

<sup>2</sup> Cf., e.g., Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17(1) ARB. INT’L 19, 29–20 (2001).

In *Volt Information Sciences, Inc. v. Board of Trustee of Leland Stanford University*, 489 U.S. 468 (1989), the U.S. Supreme Court stated:

The FAA was designed ‘to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate,’ ‘Dean Witter Reynolds Inc. v. Byrd’, 470 U.S., at 219–220, and to place such agreements ‘upon the same footing as other contracts’ ‘Scherk v. Alberto-Culver Co.’, 417 U.S., at 511 (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)). While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage ‘was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.’ ‘Byrd’, 470 U.S., at 220. Id. at 478.

<sup>3</sup> Michael Mustill, *Part III: Comments and Conclusions*, in ICC INTERNATIONAL COURT OF ARBITRATION, CONSERVATORY AND PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION 119 (1993).

<sup>4</sup> Henri Alvarez, *Recent Developments in International Commercial Arbitration in Latin America*, 7(1) LCIA News at 4 (February 2002). Contra. José María Abascal, *Establishing Common Ground: Harmonizing Cultural Differences (Mexico and Latin America)*, presented at the Conference of the International Federation of Commercial Arbitration Institutions (May 1999).

It is a common slogan that in Latin America there is, or has been, mistrust on arbitration as a method of commercial dispute resolution. It is my opinion that there is much of misunderstanding and exaggeration. I rather think that in Latin America there was, and to certain extent there is, little practice and experience on commercial arbitration as a whole, national and international. It happens that in the last centuries arbitration was abandoned as the preferred dispute resolution method for commercial disputes and it is only in this century [XX] the resort to international arbitration resumed. This renaissance started in Europe, shortly followed by the United States. It was only during the last decades, that it reached Latin America. Latin America legal frame and practice, since then has evolved towards an arbitration hospitable atmosphere. *Id.*

<sup>5</sup> Cf., e.g., JOHN P. BOWMAN, THE PANAMA CONVENTION AND ITS IMPLEMENTATION UNDER THE FEDERAL ARBITRATION ACT 12–13 (2002).

[The] judicial reluctance to support the resolution of commercial disputes through international arbitration may be attributed, in part, to the legacy of the Calvo Doctrine ... Resort to international commercial arbitration can be seen in conflict with the concept of exclusive reliance on local courts and local law and with the rules of national sovereignty and territorial jurisdiction that underlay the Calvo Doctrine. *Id.*

<sup>6</sup> CARLOS CALVO, EL DERECHO INTERNACIONAL TEÓRICO Y PRÁCTICO DE EUROPA Y AMÉRICA (1868). The Argentinean scholar Carlos Calvo, born in 1824, submitted his theory in the treatise, published in Paris in 1868, *El Derecho Internacional Teórico y Práctico*. The doctrine rests on the principles that (i) sovereign States, being free and independent enjoy the right from interference of any sort by other States; and (ii) equal treatment for nationals and aliens, whereby the latter shall resort to local courts for redress of their grievances. *Id.* Calvo pointed out that the intention of imposing on American countries the rule that aliens deserve greater consideration and fuller and more ample privileges than those granted to the nationals of the country of their residence, would entail establishing an excessive and dangerous privilege in favor of the most powerful States and contrary to the interests of weaker countries. *Id.*

<sup>7</sup> Horacio Grigera Naón, *Arbitration in Latin America: Overcoming Traditional Hostility*, 5(2) ARB. INT’L 137 (1989).

a particular jurisdiction is to observe how arbitration law matters are dealt with by national courts, one might point out that the area of interim or conservatory measures is, *per se*, the ideal ground for cooperation between the judiciary and arbitral tribunals and, in fact, the rules of major international institutions and bodies contain provisions to that effect.<sup>8</sup> Furthermore, the recourse to court assistance in this area seems to be fairly common.

On the contrary, though, there has been limited development of the interaction between the two sides in regards to the collection of evidence.<sup>9</sup> For example, article 27 of the UNCITRAL Model Law,<sup>10</sup> while distinctly addressing the issue, keeps short in one crucial respect, namely, to clarify whether the assistance is to secure the taking of evidence by the arbitral tribunal itself, or the taking of evidence by the local court on behalf of the arbitral tribunal. An adequate solution might, nonetheless, be found in the text of Article 33 of the Spanish Arbitration Law of 2003,<sup>11</sup> which states that assistance from the judiciary can take form in either way.<sup>12</sup>

In addition the recent revised version of the *IBA Rules on the Taking of Evidence in International Arbitration*,<sup>13</sup> alludes to the possibility of court assistance in obtaining the production of documents and securing the appearance of witnesses. Articles 3(9) and 4(9) of the new text provide, respectively:

If a Party wishes to obtain the production of Documents from a person or organization who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever

steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing... The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take such steps as the Arbitral Tribunal considers appropriate...

If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself... The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take such steps as the Arbitral Tribunal considers appropriate...

Which conclusions can be drawn from the preceding remarks?

First, that the arbitral process needs the partnership with the courts to keep its effectiveness. Lord Mustill confirms:

The old and sterile confrontation between the ‘minimalists’ and the ‘maximalists’ regarding the part to be played by the domestic courts has now given way to a recognition that the courts must recognize the essential role of arbitration in international commerce, and give it the maximum permissible support; and a converse recognition that arbitration cannot flourish without that support.<sup>14</sup>

---

<sup>8</sup> See, e.g., LCIA Arbitration Rules art. 25(3), which provides that:

The power of the Arbitral Tribunal under Article 25.1 [to issue interim and conservatory measures] shall not prejudice howsoever any party's right to apply to any state court or other judicial authority for interim or conservatory measures before the formation of the Arbitral Tribunal and, in exceptional circumstances thereafter. Any application and any order for such measures after the formation of the Arbitral Tribunal shall be promptly communicated by the applicant to the Arbitral Tribunal and all other parties.

See also International Chamber of Commerce Rules of Arbitration art. 23(2) which sets forth:

Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof.

See also International Centre for Dispute Resolution Rules of Arbitration art. 21(3) provides:

A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

<sup>9</sup> Some commentators, with whom I disagree, are of the view that local courts are too overloaded to devote any time to assist arbitrators.

<sup>10</sup> See UNCITRAL Model Law art. 27 (The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.”).

<sup>11</sup> See e.g., 5 Spanish Arb. Law of 2003, art. 33

1. The arbitrators, or any party with the arbitrators' approval, may request from the competent court assistance in the taking of evidence, in accordance with the applicable rules on the taking of evidence. This assistance may consist on the taking of evidence by the court or the adoption by the court of specific measures needed so that the evidence can be taken by the arbitrators.

2. If so requested, the court shall take the evidence under its exclusive supervision. Otherwise, the court shall limit itself to deciding upon the applicable measures. In both cases the court shall provide a certified copy of the proceedings to the party who requested assistance.

<sup>12</sup> See *id.* at arts. 1(1)–(2) (providing that there might be some debate with respect to the applicability of article 33, which is part of Title V of the Spanish law, to arbitrations held outside Spain on account of article 1 (1) and (2), which provides:

1. This act shall apply to all arbitration proceedings, whether domestic or international, with their place of arbitration within Spanish territory, but nothing in this Law shall be taken to affect the provisions of any treaties to which Spain is a party or any laws containing special provisions on arbitration.

2. The rules set forth in paragraphs 3, 4 and 6 of article 8, in article 9, except for paragraph 2, in articles 11 and 23 and in Titles VIII and IX of this law shall apply even when the place of arbitration is outside Spain.). *Id.*

<sup>13</sup> On May 29, 2010 the International Bar Association Council adopted a revised version of the 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration.

<sup>14</sup> Michael Mustill, *supra* note 3, at 118.

Second, that the cooperation in the taking of evidence — and for that matter in all other phases of an arbitration proceeding— contributes to the growing awareness that arbitration often yields conclusions more efficiently than the judiciary, with the extra benefit that accountability may be demanded much sooner, thus defeating the bureaucratic point of view that arbitration goes against national interests, as vividly illustrated by Martin Hunter:

...the public view is that this project [it may have been a power station, a hospital, a road or whatever] was disastrously bungled by my Ministry. If I approve a settlement the newspapers and hostile deputies in the National Assembly will attack me. I will even be accused of being bribed to pay the contractor's claims. It is not my money. If the arbitrators make a big award against us it doesn't matter. I will simply send it down to the Ministry of Finance with a request for a cheque. In public I will say that the arbitrators are incompetent...<sup>15</sup>

Third, and quite important, one might conclude that the favorable attitude towards judiciary cooperation with arbitral tribunals is connected with, and a function of, modern arbitration statutes that arguably discourage the isolationist and protectionist tendencies built on ideologies like the Calvo Doctrine. Thus, any argument that cooperation would be a foreign intrusion into well-settled procedural traditions is plainly outdated and has given way to the idea of complementarity.

Thus, in the belief that there is always room for further debate and improvement, these reflections might contribute to eventually prompt the communities interested in arbitration to take the initiative and realistically evaluate the possibilities of facilitating cooperation between the judiciary and arbitral tribunals and the specific ways to do so, for the benefit of users of arbitration worldwide.

---

<sup>15</sup> Martin Hunter, *International Commercial Dispute Resolution: The Challenge of the Twenty-first Century*, 16(4) *ARB. INT'L* 383 (2000). It must be noted that the conversation referred to by Mr. Hunter was held with a high rank official of a non Latin American country.