IBA SUBCOMMITTEE ON RECOGNITION AND ENFORCEMENT

OF ARBITAL AWARDS

2016 Research Project: Comparative Study of '*Arbitrability*'

under the New York Convention

Questionnaire for the Country Reporters

1. How do courts in your jurisdiction define the notion of 'arbitrability' when applying the New York Convention?

(a) Do they make a distinction in defining the notion for the purposes of Article II (1) of the New York Convention ("*… a subject matter capable of settlement by arbitration*"), of Article II (3) ("*... unless it finds that the said agreement null and void, inoperative or incapable of being performed*") and of Article V (2) (a) ("*The subject matter of the difference is not capable of settlement by arbitration under the law of that country*")?

Though the Paraguayan Arbitration Law 1879 of 2002 –inspired in the UNCITRAL Model Arbitration Law- does contemplate the different notions of arbitrability embodied in the New York Convention, * there is no reported case law in which the courts have assessed 'arbitrability' in application of the NY Convention.

(*) Article 2 of the Paraguayan Arbitration Law defines arbitrability in the sense of article II (1) of the NY Convention, by indicating which subject matters are capable of being settled by arbitration. [*see answer to question 4 (b)*]

In turn, article 11 -drawn upon article 8 of the Model Law with minor variations- contemplates arbitrability in the sense of article II (3) of the NY Convention by demanding state courts to refer a dispute to arbitration –provided there is an arbitration agreement- unless it finds that said agreement is null and void, inoperative or incapable of being performed.

Concerning the notion of arbitrability embodied in article V (2) of the NY Convention, article 40 -which reproduces article 34 of the Model Law- indicates that a state court can annul an arbitral award if it finds that the subject matter of the difference is not capable of settlement by arbitration under the Paraguayan Law or that the award is contrary to the Paraguayan public policy.

The same is reproduced by article 46 in regards to grounds based on which the state courts can refuse the recognition and enforcement of arbitral awards.

(b) Do they make a distinction between 'subjective arbitrability' (capacity of a person to be party to an arbitration) and 'objective arbitrability' (capacity of a subject matter to be resolved by arbitration)?

There is no reported case law in which the courts have assessed 'arbitrability' under the NY Convention.

Anyhow, article 2 of the Paraguayan Arbitration Law does differentiate between subjective and objective arbitrability, though not expressly.

In its first paragraph article 2 refers to objective arbitrability by indicating that every matter that can be subject to settlement and is "patrimonial" (pecuniary) in content can be resolved by arbitration, as long as there is no definite judicial ruling on the issue.

In turn, the second paragraph refers to subjective arbitrability by prescribing that the State and instrumentalities of the State, as well as Municipalities, can enter into arbitration agreements in regards to disputes that may arise with particulars –nationals or foreigners-, provided they derive from legal acts or contracts governed by private law. [*see also answer to question 4(b)*]

2. Do the courts in your jurisdiction consider that arbitrability is a condition of validity of the arbitration agreement, or rather a requirement for the jurisdiction of the arbitral tribunal?

There is no reported case law in which the courts have assessed this specific matter. Arbitrability is certainly considered a requirement for the jurisdiction of the arbitral tribunal. Whether arbitrability is a condition of validity of the arbitration agreement is not as clear, though article 11 of the Paraguayan Arbitration Law does provide an insight on the issue.

This provision -drafted upon article 8 of the UNCITRAL Model Law- contemplates the court's obligation to refer a dispute to arbitration -when the parties have agreed to it- unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

If the arbitration agreement contemplates a non-arbitrable matter, the court, based on article 11, would not refer the dispute to arbitration. The agreement would therefore be inoperative. However, whether the court will determine that consequently, the arbitration agreement is also null, is yet to be seen.

3. Applicable law

(a) Which law do the courts in your jurisdiction apply to assess the arbitrability or non-arbitrability of a dispute at the stage of recognizing and enforcing the arbitration agreement and referring (or not) the dispute to arbitration (Article II NY Convention)? The *lex fori* (law of the deciding court)? The law of the place of arbitration? The *lex contractus*? Another law?

Paraguayan courts apply the *lex fori*, the law of the deciding country.

In the case “GUNDER ICSA c/ KIA MOTORS CORPORATION s/ INDEMNIZACIÓN DE DAÑOS Y PERJUICIOS” in which the parties had subscribed a distribution contract and agreed to arbitration in Korea, under Korean Law, the Supreme Court decided on the arbitrability of the subject matter based on a Paraguayan Law –Law 194 of 1993 on on Agency, Representation and Distributorship.

Gunder ICSA filed an action before the state courts. In response, KIA Motors filed an arbitration objection. According to the Claimant, the arbitration agreement was null and void, inoperative and incapable of being performed since article 10 of Law 194 of 1993 does not allow parties to submit their controversies to a foreign law.

Even though the major issue in this controversy revolved around whether Law 194 of 1993 allowed parties to submit their controversies to a foreign law or whether it demanded the application of Paraguayan Law, the Supreme Court, in its decision, did refer to whether the parties could resort to arbitration or not in the first place.

This is due to the controversial wording of article 10 which indicates that parties must submit their controversies to the jurisdiction of Paraguayan tribunals whereas in the following sentence it allows the parties to resort to arbitration before or after having initiated a procedure before state courts.

In the Acuerdo y Sentencia 285 of May, 25th 2006, the Supreme Court has settled the controversy by admitting that the issues governed by Law 194 of 1993 can indeed be submitted to arbitration. It also ruled that the arbitration procedure had to be conducted in Paraguay and governed by Paraguayan Law based on the mandatory character of Law 194 of 1993.

(b) Is there a difference of approach when assessing subjective and objective arbitrability?

There is no different approach in regards to the law applied to assess the arbitrability of a dispute.

4. Substantive content of arbitrability/non-arbitrability

(a) In your jurisdiction, does statutory or case law set a general standard for assessing whether a dispute is arbitrable or not?

Yes. There are several statutes that refer to objective and subjective arbitrability and non-arbitrability which are described in the answers to the questions that follow.

(b) If there is a statutory source for arbitrability in your jurisdiction, please indicate it below (if not, indicate “non-applicable”):

Paraguayan Arbitration and Mediation Law 1879 of 2002 –inspired in the UNCITRAL Model Arbitration Law- expressly references the subject of arbitrability.

Article 2 indicates that every matter that can be subject to settlement and is "patrimonial" (pecuniary) in content can be resolved by arbitration, as long as there is no definite judicial ruling on the issue. The State and instrumentalities of the State, as well as Municipalities, can enter into arbitration agreements in regards to disputes that may arise with particulars –nationals or foreigners-, provided they derive from legal acts or contracts governed by private law.

On non-arbitrability, article 2 excludes from arbitration matters that require the intervention of the Ministerio Público (which would be analogue to the office of an Attorney General) which are, for instance, issues related to family law or to minors.

Other provisions included in Law 1879 of 2002 also influence the consideration of subjective and objective 'arbitrability'.

Drawn upon article 8 of the UNCITRAL Model Law, article 11 contemplates the court's obligation to refer a dispute to arbitration –when the parties have agreed to resort to arbitration- unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Article 40 reproduces article 34 of the Model Law almost entirely. Among the grounds upon which an annulment of the arbitral award by a state court can be based, the provision contemplates the non-arbitrability under the law of the State of the subject matter of the dispute.

The same ground is indicated in article 46 as a motive to deny the recognition and enforcement of an arbitral award, regardless of the country in which it was rendered.

There are other other statutes that refer to 'arbitrability' in both its objective and subjective approach in regards to specific subject matters or institutions they regulate.

Law 194 of 1993 on Agency, Representation and Distributorship, provides for arbitration in its articles 7 and 10. Article 10 has been very controversial since it firstly indicates that parties must submit their controversies to the jurisdiction of Paraguayan tribunals whereas in the following sentence it allows the parties to resort to arbitration before or after having initiated a procedure before state courts.

In the Acuerdo y Sentencia 285 of May, 25th 2006 in the case "*GUNDER ICSA c/ KIA MOTORS CORPORATION s/ INDEMNIZACIÓN DE DAÑOS Y PERJUICIOS*" the Supreme Court has settled the controversy by admitting that the issues governed by Law 194 of 1993 can indeed be submitted to arbitration. Anyhow, another debate arose: Was there a legal obligation for the arbitration procedure to be conducted in Paraguay and governed by Paraguayan Law? The Supreme Court decided on the affirmative on the basis of the mandatory character of Law 194 of 1993. [*see also answer to question 3(a)*]

On the same issue, the Supreme Court sustained in the Acuerdo y Sentencia 827 of November 12th, 2001 that article 10 "constitutes a guarantee for the parties so that the matter at stake can be discussed in the place of performance of the contract. Nothing more logical or fair… the State, through this law, intervenes in the relationship by establishing clear rules to which the parties shall adhere."

Law 489 of 1995 authorized the Central Bank to submit controversies arising from international economic and financial contracts to arbitration (articles 2 and 9).

This possibility was later extended to other State entities and subject matters through **Laws 1618 of 2000 on Concession of Public Works and Services and 2051 of 2003 on Public Procurement**.

Though both statutes allow to submit to arbitration matters regarding public contracts, the difference in their provisions could lead to confusion.

Law 2051 considers arbitration as an optional mechanism and if it were agreed upon, it would be governed by the Paraguayan Arbitration and Mediation Law 1879 of 2002. In every case, the arbitrability of the subject matter and the capacity of the parties to submit to arbitration has to be previously determined (article 9).

In turn, Law 1618 mandates conciliation as the first method of dispute resolution. Only when the parties do not reach an agreement, they may resort to arbitration (article 45).

Law 5102 of 2013 on Public-Private Partnership Agreement provides for arbitration in matters related to the interpretation, performance, compliance, development or termination of the contracts, when the conflict could not be settled through negotiations between the State and particulars involved, as long as the dispute is related to private law matters (article 41).

In accordance, **Decree 1350 of 2014** which regulates Law 5102, indicates three tiers of dispute resolution mechanism. Arbitration is considered the third tier, preceded by direct negotiations between the parties and the treatment of the dispute before a Technical Panel only if the controversy were related to technical and/or economic issues (article 103).

If the conflict were to be settled by arbitration, the provisions of the Paraguayan Arbitration Law apply, unless the parties have agreed otherwise in the agreement (article 110).

Other statutes that contemplate the possibility to resort to arbitration are Law 779 of 1995 on Petroleum and other Hydrocarbons (article 5), Law 921 of 1996 on trusts (article 44) and Law 1163 of 1997 on commodities exchange (article 22).

(c) Which disputes are held to be non-arbitrable under the statutory or case law of your jurisdiction?

Article 2 of the **Paraguayan Arbitration Law 1879 of 2002** excludes from arbitration matters that require the intervention of the Ministerio Público (which would be analogue to

the office of an Attorney General), which are, for instance, issues related to family law or to minors.

By analyzing what article 2 considers as 'arbitrable', we can conclude that matters which cannot be subject to settlement nor those which are not pecuniary in content, are not susceptible of being discussed in an arbitration procedure.

Neither are conflicts between particulars -national or foreigners- and the State, instrumentalities of the State or Municipalities, when they are governed by public law.

On disputes involving consumers, **Law 1334 of 1994 on Consumer Rights**, prohibits standard contract clauses that impose arbitration (article 28.d) This constraint is tempered by other regulation –Decree 20572, Resolution 147 and Decree 21004 all of 2003- which provide that an arbitration clause would be valid if they were voluntarily agreed to by consumers.

5. Table of cases

Please append to the report a table of cases where arbitrability was addressed in the specific context of the New York Convention, based on the following template:

Case designation	**NY Convention Provision (II.1; II.3; V.2.a)**	**Summary of ground for objecting to arbitrability of the dispute**	**Arbitrability objection admitted**	**Arbitrability objection rejected**
There is no reported case law in which the courts decided on arbitrability on the basis of the NY Convention				