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International Arbitration Report

He Who Controls the Past Controls the Future: Crafting An Effective Arbitration Provision For A Latin American Deal

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A commentary article reprinted from the May 2013 issue of Mealey's International Arbitration Report

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Commentary

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[Editor's Note: Gustavo is a partner in the Miami office of Hunton & Williams LLP where he handles a wide variety of commercial litigation matters, focusing on cross-border disputes and transnational arbitrations, including class action litigation. He has significant experience representing financial institutions of all sizes, both domestic and foreign, and in handling construction/infrastructure disputes both in the United States and abroad. Jordi is an associate in the Miami office of Hunton & Williams LLP and a member of the firm's international arbitration and transnational litigation team. He currently focuses on disputes against Latin American sovereigns. *Responses are welcome.]*

I. Investing In Latin America

With the continuing increase in cross-border investments,[1] both North-South and South-South, it bears reminding that companies must plan in the good times for the eventuality that parties may not see eye-to-eye in the future – something known but not always implemented. Latin America is poised for even greater investment due to high economic growth rates[2] and a burgeoning middle class with its increased demand for goods and services.[3] Some investors believe Latin America to be in a better position for growth than Asia.[4] With increased investment, however, comes an increased likelihood of disputes. Disputes, particularly those involving parties of different nationalities, multinational entities, or foreign sovereigns, can be incredibly expensive and can seriously affect a client's bottom line. As also stated in the book from which the title to this article is taken, words can be incredibly powerful.[5] Resolving cross-border disputes effectively and cost-efficiently requires a clear and thoughtful dispute resolution mechanism. As "[t]he end was contained in the beginning,"[6] so too is an arbitration controlled by the provision contained in the deal documents.

In an effort to regulate costs and avoid local courts, arbitration has become an increasingly popular option. As such, alternative dispute resolution mechanisms should be discussed with clients, and great care should be taken in preparing such agreements before the disputes arise. The key to ensuring a cost-effective and efficient arbitration is careful consideration of numerous factors. While much of this article can be applied to crafting an effective arbitration agreement generally, this article makes reference to issues specific to deals involving Latin American entities. Considering the following topics is fundamental to preparing an arbitration provision that captures the intent of the parties and avoids needless litigation and costs. They are: 1) conditions subsequent to the arbitration; 2) choice of law; 3) the seat of arbitration; 4) timing provisions; 5) quality and number of arbiters; 6) confidentiality measures, 7) language; 8) categorization as a "domestic" or "international" arbitration; 9) costs and attorneys' fees, and; 10) concurrent, subsequent, and final proceedings. Each are dealt with, in turn, from the perspective of a U.S. practitioner attempting to limit his client's risk and future costs when dealing with a Latin American entity.

II. The Risks Run When Not Utilizing An Arbitration Provision

The main benefit of a properly drafted arbitration clause is that it avoids needless litigation – generally seen as the most expensive way of resolving a dispute.[7] Litigation costs are increased when there is an international connection and parties file competing lawsuits in different countries. As litigation is guided and limited by the Court system of the country the proceedings are in, there is an increased degree of uncertainty and the possibility of contradictory verdicts – a problem heightened when one of the parties is a sovereign. Even if a judgment was obtained in a United States court, placing complete faith in that judgment may be misguided. The United States does not have any treaties providing for the enforcement of foreign judgments.[8] Thus localizing U.S. judgments in Latin America presents a whole new set of challenges and hazards for creditors, not to mention greater delays in collecting.[9] Most Latin American countries require that there be reciprocity with the originating country before they enforce a foreign judgment.[10] This may be difficult to satisfy for a U.S. judgment.[11]

Because of real or imagined deficiencies in the court systems of Latin America, as well as an increased positive reception of arbitration by Latin American countries, arbitration has become a more popular option.[12] The Latin American public at large has, relative to the perception of United States citizens to their courts, a poor perception regarding to the judiciary. On average, around only 30% of survey respondents in Latin American countries reported having "a lot" or "some" confidence in the judiciary.[13] Further, Latin American judicial proceedings can be very lengthy. Faced with this backdrop, parties to a Latin American transaction are usually willing to enter into arbitration agreements.

III. Important Considerations In Drafting A Latin American Arbitration Provision

Arbitration allows for extreme flexibility in the procedures and allows the parties to control many more aspects of the process than traditional litigation. This inherent flexibility makes it critical that parties draft precise arbitration clauses that specify exactly what they want and how the proceedings should occur. In other words, practitioners should craft provisions which ensures they receive all the expected benefits of arbitration, and few, if any, of the disadvantages. Unfortunately, arbitration provisions were often treated as an afterthought by attorneys working the deal because they are so focused on working out terms.[14] Luckily, there has been a recent trend by practitioners to place greater importance on arbitration provisions.[15] By taking the time to draft a clear arbitration agreement, costly surprises and delays may be avoided. Additionally, the parties are far more likely to agree on aspects of the litigation while they are still on good terms and negotiating a mutually beneficial agreement, than when the dispute has already arisen and the relationship may have soured. Indeed, every arbitration provision should be drafted with a view towards a dystopian future.[16] Every issue which the parties can agree to in advance is one less issue that may contribute to delay or cost further down the road. Particularly costly is litigating whether there is an enforceable agreement in the first place. Luckily, many of these issues and costs can be avoided.

Although each contract presents a unique factual scenario that may give rise to numerous other considerations, below are ten universal topics that should always be considered when drafting an arbitration provision in a Latin American deal:

1. Conditions Subsequent To The Arbitration

It may be beneficial to require the parties to comply with certain requirements before a formal demand for arbitration is made. Some examples include submission of the claim to administrative process, waiting a certain number of days from the time the claim matures until arbitration can be sought, and notice or conferral requirements. Including such a provision can assist the parties to better understand each other's positions prior to initiating an arbitration, and may lead to a quicker and cheaper resolution of the dispute, even before initiating arbitration. This is a particularly enticing option when the parties regularly conduct business with each other or have a long-standing good relationship.

2. Choice Of Law

While choice of law provisions have become commonplace in international contracts, some courts have found that general choice of law provisions do not necessarily require that the arbitration clause be interpreted under the general chosen law provision.[17] This can be easily avoided by making explicit in the arbitration clause itself that a particular law will govern the interpretation of the clause and the arbitration proceedings. Doing so

eliminates needless expense and delay. Unless explicitly stated, certain areas of law may be governed by local law contrary to a party's intent at the time it entered into the agreement. For example, many arbitration forums have limited rules regarding discovery, and local law may fill the avoid. While the International Bar Association's Rules on the Taking of Evidence in International Arbitration have been widely adopted,[18] it has not been universally accepted. In Latin America, discovery and the use of testimonial evidence is not as common or as far-reaching as it is in the United States. Therefore parties should decide whether they should address discovery or any other additional substantive law or procedure in the arbitration clause.

3. Seat Of Arbitration

Parties are generally free to select any forum. Some considerations that may factor into a party's decision are: the connection between the performance of the contract and the forum locale, the relationship of the individual parties to the locale, location of relevant witnesses and documents, and whether the party has a relationship with competent counsel that practices before that forum. Of utmost importance is understanding the forum's specific rules and practices. The interplay between the forum's rules and practices and the arbitration agreement will govern how the arbitration will proceed. Indeed, many of the topics in this list could be considered sub-topics of this particular consideration. It is therefore critical that practitioners familiarize themselves with the particular forum's rules **before** drafting the arbitration clause.

In order to determine which forum is applicable, it is imperative to understand the parties and the nature of the transaction. Generally, some popular arbitration forums, each with their own specific rules and practices are: the International Centre for Settlement of Investment Disputes ("ICSID"), the London Court of Arbitration ("LCIA"), the International Chamber of Commerce Court of Arbitration ("ICC"), the United Nations Commission on International Trade Law ("UNCITRAL"), and the International Centre for Dispute Resolution ("ICDR"), the foreign branch of the American Arbitration Association ("AAA"). In a fairly recent survey, 50% of respondents chose the ICC as their preferred arbitration institution.[19] 14% of respondents preferred the LCIA, while 8% preferred the AAA/ICDR.[20] It is worth noting that the law is unsettled as to the enforceability of so-called "mix-and-match" or "hybrid" arbitration provisions: where the parties choose a specific forum's rules but agree that the arbitration should be administered by a different forum.[21]

Further, certain regional trade agreements, such as the Andean Community of Nations ("CAN") and the Central American Common Market ("CACM"), provide their own permanent courts to solve disputes. Other agreements, such as the North American Free Trade Agreement ("NAFTA"), the Dominican Republic – Central America Free Trade Agreement ("CAFTA-DR"), and the Common Market for the South ("MERCOSUR") allow qualifying disputes to be settled in international arbitration. It is important to note that the dispute resolution mechanisms in these trade agreements are not always available to private parties, or that the claim may not otherwise qualify. Practitioners must take special care in choosing an arbitration forum where a sovereign is a party to the agreement. Not all Latin American sovereigns participate or recognize all arbitration forums.[22] If a sovereign does agree to arbitrate, it may insist on an arbitration seated in its own jurisdiction.[23]

In certain situations, the parties may prefer to have their dispute arbitrated in front of a local arbitration forum. Also, some Latin American companies, particularly state-owned companies or companies with relatively higher bargaining power, may require that the arbitration take place in a local, national forum. Like international forums, local forums are not all created equal. A few well-regarded institutions are discussed below, but each of them have their own idiosyncrasies which must be researched before agreeing to an arbitration there. For example, the *Centro de Arbitraje y Conciliación de la Càmara de Comercio de Bogotà* (Arbitration and Conciliation Center of the Bogota Chamber of Commerce), like Colombian arbitration law generally, is rapidly modernizing.[24] While that forum gets relatively few international cases, it is the ICC's representative in Colombia and is the only Latin American institution authorized to conduct ICSID hearings.[25] Sometimes arbitrating in front of a local forum can be to the benefit of the parties. For example, arbitrating before the *Centro de Arbitragem e MediaÇão da Câmara de Comércio Brasil-Canada* (Arbitration and Mediation Center of the Brazil-Canada Chamber of Commerce), one of Brazil's oldest arbitration forums, can allow parties to avoid a currency remittance tax which can reach

up to 30%.[26] The *Centro de Arbitraje de México* (Arbitration Center of Mexico), where the secretary general and the "general council" are composed of renown Mexican jurists, offers greater control of the process and content-quality of the arbitration.[27] And the *Centro de Mediación y Arbitraje de la Càmara Nacional de Comercio de la Ciudad de México* (Mediation and Arbitration Centre of the National Chamber of Commerce of Mexico City), with rules promulgated in 2007 that follow UNCITRAL principles, has an extraordinarily fast small claims procedure for claims under $45,000.[28] Again, knowledge of the parties involved, the available forums, and the underlying law are paramount.

4. Timing Provisions

One of the reasons arbitration is viewed favorably is because it allows for the expeditious resolution of disputes. The parties can agree on how long an arbitration can take from the demand to final resolution. Setting an unreasonable or unclear time limit can create jurisdictional and enforcement issues.[29] It is important to note that some arbitration forums already impose time limits on a length of arbitration,[30] while others have different provisions that provide for shorten time limits under their rules.[31]

5. Quality And Number Of Arbiters

Parties can agree beforehand how many arbiters should serve and what qualifications they should or should not have. In one contract, the arbitration provision allowed each **party** to an arbitration to name an arbiter. Unfortunately when a dispute arose under that contract, there were two claimants and only one respondent.[32] Concerned about the impartiality of the arbitration tribunal, the respondent waived the clause. Precise drafting or clear understanding of the arbitration forum's rules for selecting arbiters could avoid these kinds of issues. The arbitration provision could have clearly stated: "The arbitration panel will be composed of three arbitrators – one elected by the Claimant(s), one selected by the Respondent(s), and a third selected by the arbitration body." Another consideration is that while a greater number of arbiters may help ensure an impartial result, each additional arbiter increases the costs and time necessary to reach resolution.

Parties may also want to consider the qualifications they want potential arbiters to possess. Common considerations include an arbiter's familiarity with the relevant law, nationality, language proficiency, and technical/experiential background.[33] In some instances the parties may agree that the arbiters can be chosen by the arbitration forum, or that the arbitration forum may do so only in the event that the parties cannot agree on an arbiter. There are reasons, however, to insist on certain qualifications.[34] Being too specific or demanding in terms of qualifications, however, may lead to delays as finding an adequate, available, and willing arbiter may be difficult.

6. Confidentiality

As opposed to court filings, arbitrations are conducted outside the public record and typically allow for greater confidentiality. Certain categories of information such as patents and trade secrets, however, may still need additional protection. In one survey, 62% of corporate respondents stated that confidentiality was "very important" to them in international arbitration, and an additional 24% said it was "quite important."[35] Specific arbitration provisions in the contract are a fast and inexpensive way of allaying these concerns. Certain forums already have rules providing for confidentiality.[36]

7. Language

When dealing with Latin America, language may be an issue. The arbitration provisions should make explicit the language the arbitration will proceed under. Language may also be a requisite in choosing an arbiter. Typically the language of the arbitration is the same as either the language of the most relevant documents and/or witnesses, or the controlling language of the contract. In the absence of an explicit language provision, some forums such as the LCIA and the AAA provide that arbitrations must be conducted in the language of the arbitration clause, while others, such as the ICC and UNCITRAL give the arbiter the power to choose the language of the arbitration.

8. "Domestic" Or "International"

While it may seem obvious that a dispute between parties from different countries is an "international" arbitration, one should not make that assumption. Some countries have specific laws which deal with the "domestic" versus "international" categorization of arbitrations.[37] Further, some arbitration forums have very different rules depending on how the arbitration is categorized. For example, in one arbitration, a Latin American governmental agency took the position that a dispute between it and a consortium of multinational corporations was "domestic" so that it could appoint

arbiters of the same nationality as the agency. This gave rise to increased costs, not only because of the necessary expense of researching and briefing the arbiters on the topic, but because of numerous tricky procedural issues that arose because the parties were in disagreement over the categorization of the arbitration, and which set of rules applied. This problem could have been avoided with the inclusion of just a few words in the arbitration clause.

9. Costs And Attorneys' Fees

Practitioners should consider if they wish to include awarding costs and attorneys' fees to the prevailing party. Without such a provision, allocation of costs and attorneys' fees are at the discretion of the arbiter or the arbitration tribunal. Practitioners may want to include a provision explicitly prohibiting the awarding of attorneys' fees and costs. As opposed to the U.S., many legal systems, and thus arbiters who were trained in that legal system, have a greater propensity for awarding fees and costs to the prevailing party.

10. Concurrent, Subsequent, And Final Proceedings

An arbitration clause should be drafted with possible disputes and end-results in mind.[38] The parties should analyze if potential disputes or awards issued by an arbitration tribunal may be barred in relevant countries. In the U.S., parties are permitted to arbitrate contractual matters as well as certain issues related to tort and statutory law. While Latin American countries are not uniform in their treatment of what is "arbitrable" or what constitutes an enforceable award, certain topics such as criminal matters,[39] matters concerning labor disputes,[40] and matters otherwise barred for "public policy" considerations,[41] for example, tend to be excluded more than others.

A well-drafted arbitration clause should be understood as the exclusive or final resolution of a dispute. Some Latin American countries, but not most, allow parties to appeal an award issued in that country.[42] This may sometimes be waived by the parties.[43] Additionally, while there may be situations where the parties wish to provide for the option of arbitration but not foreclose the right to mediate, litigate, or otherwise attempt to resolve the dispute in some other manner or forum, the arbitration provision should make explicit the parties' intent.

IV. Conclusion

The economies of Latin America are booming and are poised for even greater growth.[44] While there are inherent risks and costs when investing in Latin America, as with any transaction, these can be lessened if parties take the small affirmative step of preparing detailed arbitration provisions. The costs to the parties are minimal and can eliminate needless litigation and expense, giving parties a fair and expeditious mechanism for resolving their disputes in a way they both desire. Every issue made explicit in the arbitration provision before a dispute arises or the relationship turns sour, better serves both parties.

Endnotes

*. This article presents the views of Mr. Membiela and Mr. Martínez-Cid and do not necessarily reflect those of Hunton & Williams, its clients, or Mealey's. The information presented is for general information and education purposes. No legal advice is intended to be conveyed; readers should consult with legal counsel with respect to any legal advice they require related to the subject matter of the article.

1. *See* Amy Guthrie, *Foreign Investment Returns to Latin America*, Wall St. J., May 5, 2011, <http://online.wsj.com/article/SB10001424052748703992704576305683366390742.html> (citing a report by the United Nations stating that investment by foreign entities in Latin America rose by 40% in 2010 to $113 billion).

2. *See* Simon Romero, *Economies in Latin America Race Ahead*, N.Y. Times, June 30, 2010, <http://www.nytimes.com/2010/07/01/world/americas/01peru.html?_r=0> ("Latin America, beset in the past by debt defaults, currency devaluations and the need for bailouts from rich countries, is experiencing robust economic growth that is the envy of its northern counterparts"); Dan Molinski, *IMF Sees Latin America Economic Growth Rising; Risks Remain*, Wall St. J., April 25, 2012, <http://online.wsj.com/article/SB10001424052702304723304577366110557994858.html> (citing the International Monetary Fund's new forecasts for economic growth in Latin America which were 3.7% and 4.1% in 2012 and 2013, respectively); Jonathan Watts et al., *Latin*

America's Booming Economies Face Tough Test, The Guardian, Aug. 15, 2012, <http://www.guardian.co.uk/business/2012/aug/15/ brazil-latin-america-economic-growth> (contrasting Latin America with the European Union which is currently mired in a financial crisis).

3. *See* Taylor Barnes, *Franchising Boom in Latin America and the Challenge of Adapting to Local Taste*, Latin Trade, March/April 2010, at 44 ("Strong economic growth and a surge in the middle class have more people turning to franchises as a way to tap rising consumer demand"); *id.* at 47 ("The growth rate is astounding. Brazil's franchising sector has tripled in revenue over the past decade as the middle class blossomed.").

4. *See, e.g*, Francisco Luzón, Executive Board Member, Banco Santander S.A., *La hora de Latinoamérica* at the Universidad Internacional Menédez Pelayo (July 6, 2010) (press releases available at <http://www.uimp.es/blogs/prensa/2010/07/06/dossier-de-prensa-digital-del-6-de-julio-de-2010>); Rosie Cresswell, *The Land of Opportunity*, 11 Latin Law. (Issue 1) 5 (2012).

5. George Orwell, 1984 123-124 (Houghton Mifflin Harcourt, 1st Mariner ed. 2008) (1949) ("Don't you see the whole aim of Newspeak is to narrow the language of thought? In the end we shall make thoughtcrime literally impossible because there will be no words in which to express it.").

6. *Id.* at 348.

7. *See, e.g., Brucker v. McKinlay Transp., Inc.*, 557 N.W.2d 536, 540 (Mich. 1997) ("Because civil litigation can be lengthy, expensive and stressful, it is employed only to resolve disputes that cannot be concluded by any other peaceful method. Thus, parties who can locate an alternative method of dispute resolution are encouraged to bypass the courts and use other appropriate means."). It is important to note, that in comparison to traditional litigation however, arbitration costs can be very front-loaded. *See* Sebastian Perry, *In-House Counsel and the '8am Clause'*, Global Arbitration Review, (May 14, 2013), <http://globalarbitrationreview.com/news/article/31574>.

8. *See* Bureau of Consular Affairs, U.S. Dept. of State, *Enforcement of Judgments*, Travel.State.Gov (May 16, 2013, 12:22 PM), <http://travel.state.gov/law/judicial/judicial_691.html>.

9. *See* Sergio A. Leiseca & Thomas W. Studwell, *Latin American Accounts Receivable: To Sue for Collection or to Refinance?*, 39 Bus. Law. 495, 497 (1984) (stating that the procedure for a writ of execution "in most Latin American jurisdictions is not an expeditious one" and "may take one to three years or more"); *id.* at 499 ("Even when the parties have expressly chosen U.S. law to govern the contract, applicable provisions of U.S. law must be proved as a fact, a burden which may be time consuming and ultimately pointless because of the foreign court's inability to apply provisions of U.S. law.") (citing Código de Procedimientos Civiles [Civil Procedure Code], art. 284 (Mex.); Código Procesal Civil y Comercial de la Nación [Cód. Proc. Civ. y Com.] [Civil and Commercial Procedure Code] art. 377 (Arg.)).

10. *See* Jeff Larsen, *Enforcement of Foreign Judgments in Latin America: Trends and Individual Differences*, 17 Tex. Int'l L. J. 213, 218 (1982).

11. *Id.*

12. *See, e.g.*, Bishop Doak, *The United States' Perspective Toward International Arbitration with Latin American Parties*, 8 Int'l L. Practicum 63, 63-66 (1995) (discussing Latin America's historical hostility to international arbitration under the Calvo Doctrine and the increasing acceptance of arbitration as a viable means of dispute resolution in the region).

13. *See* Gretchen Helmke, *Public Support and Judicial Crises in Latin America*, 13 U. Pa. J Const. L. 397, 398 – 400 (2010 – 2011) (analyzing the *Latinobarómetro* survery results and contrasting them to U.S. perceptions). The Latinobarómetro Corporation is based in Santiago, Chile and conducts an annual public opinion survey for several Latin American countries.

14. *See* Perry, *supra* note 7.

15. *Id.* (noting how contractual dispute provisions were once popularly known as "midnight clauses," but now may more properly be referred to as "8am clauses" to reflect their importance to a new generation of in-house counsel).

16. Aldous Huxley, Brave New World xix (Penguin Books 1976) (1932) ("reality, however utopian, is something from which people feel the need of taking pretty frequent holidays").

17. Leading treatises on international arbitration recognize the prevalence of the concept of "autonomy," "severability," or "separability" of arbitration agreements. Under this principle, for purposes of enforceability, the arbitration agreement is separate and distinct from the overall contract in which it is contained. The severability principle is recognized by the ICC Rules, as well as under U.S. law. *See* ICC Rules, art. 6(9); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) ("Except when the parties otherwise intend, arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded"). As a result of this severability principle, if a contract has a general governing law provision, but the arbitration provision is silent as to what law governs its validity, the general governing law is not presumed to govern the arbitration provision. *See* W. Laurence Craig, William W. Park & Jan Paulsson, "Int'l Chamber of Commerce Arbitration," at § 5.05, p. 52 (3d ed. 2000). The most common approach under these circumstances is to analyze the arbitration agreement by applying the law of the place of arbitration (also known as the "seat law"). *Id.* at pg. 54.

18. *See* pg .2, available at <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence>.

19. *See*, The Sch. of Int'l Arbitration, *2010 International Arbitration Survey on Choices in International Arbitration*, pg. 23, available at <http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf>.

20. *Id.*

21. In *Insigma Tech. Co. Ltd. v. Alstom Tech.*, [2009] SGCA 24, the Singapore Court of Appeal upheld a provision providing for "arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce." The ICC responded by including a new provision in article 1(2) of their 2012 Rules, stating that the ICC Court is "the only body authorized to administer arbitrations under the Rules." *See* Perry, *supra* note 7.

22. For example, Venezuela, Argentina, and Ecuador all either do not recognize, or refuse to participate in, certain arbitral forums.
In 2012, Venezuela announced its withdrawal from the ICSID. That country, nevertheless, remains a party to 26 Bilateral Investment Treaties, of which only two name ICSID as the sole arbitral venue. The rest allow investors to arbitrate under other arbitral venues, such as UNCITRAL.
Argentina has been a party to more than 40 arbitrations arising out of their sovereign debt default in 2002, the vast majority of them before ICSID and some before UNCITRAL. Earlier this year, Argentina also announced that it was planning to withdraw from ICSID even though it currently faces about $65 billion in claims from 43 pending ICSID arbitrations. According to a Wall Street Journal article, no company has yet been able to collect damages award against Argentina in an ICSID arbitration. The country has argued that the plaintiffs must collect on those awards through Argentine courts. *See* Matt Moffett, *Besting Argentina in Court Doesn't Seem to Pay*, Wall St. J., Apr. 20, 2012, <http://online.wsj.com/article/SB10001424052702303425504577356262654410468.html>.
Although Ecuador effectively withdrew from ICSID on January 7, 2010, there have been encouraging pro-arbitration developments in that country. *See, e.g.*, Judgment No. 469-2009 of the Civil Court of First Instance in Guayaquil Ecuador (enforcing an arbitration award rendered in favor of Daewoo Electronics against its distributor Expocarga S.A.). Ecuador has arbitrated several investor disputes in front of the *Centro de Arbitraje y Mediación de la Càmara de Comercio de Santiago* (The Arbitration and Mediation Center of the Santiago Chamber of Commerce) (Chile). *See* David Samuels, *The GAR Guide to Regional Arbitration Centres*, Global Arbitration Review, available at <http://www.globalarbitrationreview.com/regional-arbitration/directory/4/article/31493>.

23. *See* Perry, *supra* note 7.

24. *See* Samuels, *supra* note 22.

25. *Id.*

26. *Id.*

27. *Id.* According to the article, this forum's rules are particularly well-drafted and are modeled on the 1998 ICC Rules. *Id.*

28. *Id.*

29. *See, e.g.*, ICC, *Techniques For Controlling Time and Costs in Arbitration*, pg. 16 (2007).

30. *See, e.g*, Reglamento de Arbitraje [Arbitration Rules], Centro de Conciliación y Arbitraje de Panamà (Conciliation and Arbitration Center of Panama), art. 33 (requiring that, under no circumstances, can an arbitration tribunal take more than six months from the date of constitution to issue a resolution).

31. *See, e.g.*, ICC Rules, art. 32(1) (enabling the parties to shorten time limits provided for in the Rules).

32. *But see*, Orwell, *supra* note 5, at 595 ("TWO AND TWO MAKES FIVE").

33. While arbitration gives parties a great deal of latitude in agreeing as to what qualifications a potential arbiter must possess, some countries prohibit preclusion for specific reasons. *See, e.g.*, L. 1563/12, July 12, 2012, Diario Oficial, art. 73(1) (Colom.) (prohibiting the preclusion of a person to serve as arbiter for reasons of nationality; a violation of this law may render an arbitration agreement void).

34. For example, when dealing with a Sovereign, one party may want to insist on the arbiter being of a neutral nationality. In the case of a contract dealing with complex or sophisticated technologies, a party may insist that the arbiter possess certain training or knowledge.

35. *See* Sch. of Int'l Arbitration, *supra* note 19.

36. *See, e.g.*, ICC Rules Art. 22(3).

37. *See, e.g.*, L. 5, July 8, 1999, Gaceta Oficial 23,837 de 10 de julio de 1999, art. 5 [Panama]; L. 1563/12, July 12, 2012, Diario Oficial, art. 62 – 68 (Colom.).

38. *Compare* Orwell, *supra* note 5, at 604 ("To die hating them, that was freedom.") *and* Orwell, *supra* note 5, at 637 – 38 ("But it was alright, everything was alright, the struggle was finished. He had won the victory over himself. He loved Big Brother.").

39. *See, e.g.*, Cód. Proc. Civ. y Com., art. 760 [Arg.]; Código Orgànico de Tribunales [Cód. Org. Trib.] [Judiciary Code], art. 239 (Chile).

40. *See, e.g.*, Ley de Arbitraje y Conciliación No. 1770 [Arbitration and Conciliation Law No. 1770], March 10, 1997, art. 6(II) (Bolivia); Decreto No. 67-95: Ley de Arbitraje [Decree No. 67-95: Arbitration Law], art. 3(4) (Guatemala).

41. *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V(2)(b), June 10, 1958, available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>. Further, it is an inherent risk, particularly with developing countries, that sovereigns may interfere in arbitration proceedings or declare "emergencies" that would allow it to nullify an arbitration award on "public policy" grounds. *Cf.* United States Trade Rep., 2013 Nat'l Trade Estimate Report on Foreign Trade Barriers, pg. 172 (stating that Honduras routinely declares "emergencies" to circumvent bidding procedures required by CAFTA-DR).

42. For example, Argentina and Chile allow appeals from an arbitral award. *See* Cód. Proc. Civ. y Com., art. 760 (Arg.); Cód. Org. Trib., art. 239 (Chile). Other countries, such as Bolivia, Guatemala, and Panama, do not allow appeals. *See* Ley de Arbitraje y Conciliación No. 1770 [Arbitration and Conciliation Law No. 1770], March 10, 1997, art. 62 (Bolivia); Decreto No. 67-95: Ley de Arbitraje [Decree No. 67-95: Arbitration Law], art. 43 (Guatemala); Decreto Ley No. 5, July 8, 1999, Gaceta Oficial 23,837 de 10 de julio de 1999, art. 34 (Panama).

43. *See, e.g.*, Cód. Proc. Civ. y Com., art. 760 (Arg.); Cód. Org. Trib., art. 239 (Chile).

44. *See* Guthrie, *supra* note 1; Romero, *supra* note 2; Molinski, *supra* note 2; Watts, *supra* note 2; Barnes, *supra* note 3. ■

MEALEY'S: INTERNATIONAL ARBITRATION REPORT
edited by Lisa Schaeffer
The Report is produced monthly by

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1089-2397