Cuatrecasas Arbitration Highlights

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Coordinators: Alberto Fortún and Santiago Rojas

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Our jurisdictions

Our lawyers in Chile, Colombia, Spain, Portugal and Peru explain the most relevant judicial decisions and legislative developments for our clients in international arbitration matters

Chile – Juan Manuel Rey and Valentina Alamo

Supreme Court tendency in recent years to grant recognition and enforcement of foreign arbitral awards in Chile, except in special circumstances

On January 24, 2024 when ruling on an application for exequatur of an ICC arbitral award rendered in Singapore[1], the Supreme Court dismissed the arguments of the respondent (which primarily claimed that the award was based on a termination agreement that did not include an arbitration agreement), concluding that the application met the formal requirements stipulated in Law 19971 and the New York Convention, and that the award was based on a valid arbitration agreement included in the sales contract signed by the parties. Therefore, its enforcement was not contrary to Chilean public policy.

However, on January 18, 2024, the Supreme Court denied an application for exequatur of an arbitral award from the Court of Arbitration for Sport (CAS) in Lausanne[2]. The Supreme Court rejected the arguments that the statute of limitation and other applicable prohibitive rules had been incorrectly applied, but it denied the exequatur stating that the award violated Chilean public policy by disregarding the res judicata effect that article 2460 of the Chilean Civil Code grants to a settlement agreement entered into by the parties. The Supreme Court stated that res judicata has a constitutional and legal basis and is a public policy institution because it is one of the foundations of the Chilean legal system that gives certainty to the rights enshrined in it.

Court of Appeals follows trend rejecting appeals to vacate awards filed against international arbitration awards rendered in Chile

In a decision dated March 1, 2024[3], the Santiago Court of Appeals emphasized that the appeal to set aside an award regulated in Law 19971 is an exceptional control mechanism. It is a mechanism of strict law and applies solely to the grounds strictly and exhaustively regulated in that law, which must be interpreted according to the principles inspiring the regulation of international arbitration. Thus, it lacks jurisdiction to review the merits of the decision because the grounds for invalidation are only intended to control minimum standards of legality, i.e., the forms of arbitration proceedings, especially the guarantees that the law itself grants to the parties.

In view of the above, the Court of Appeals rejected the allegation that the award had overlooked defense arguments and critical evidence to resolving the dispute, and that it had failed to fulfill its obligation to provide its reasoning for the award.

The Court of Appeals concluded that the appellant's approach related to substantive issues—without referring to the alleged defect of failure to state the reasoning being present—which would be sufficient to dismiss the appeal seeking the vacation of the award.

However, the Court of Appeals did review the merits of the case and concluded that the arbitral award was issued in strict adherence to the pleadings, arguments, and counterarguments submitted by the parties, the evidence adduced, and the law applicable to the specific case under the rules of arbitral due process.

[1] Supreme Court, Rol N°71.508-2022 (24/01/2024).

[2] Supreme Court, Rol N°20.169-2023 (18/01/2024).

[3] Court of Appeals of Santiago, Rol N°13.359-2023 (01/03/2024).

Colombia – Alberto Zuleta and Madelin Ramos

Below, we highlight some of the most significant international and domestic arbitration updates in Colombia

The Supreme Court of Justice of Colombia denied the recognition of an arbitral award issued against Venezuela.

As we reported in greater detail in our legal flash of 3 July 2024, on June 20, 2024, the Supreme Court of Justice denied the request submitted by *Rusoro Mining Limited* for recognition of the award issued by a tribunal set up under the Additional Facility of the International Centre for Settlement of Investment Disputes (ICSID). The Court's ruling contained two significant inaccuracies regarding the application of sovereign immunity: (i) it treated a request for recognition under the rules of immunity from execution, where it should have applied the rules of immunity from jurisdiction; and (ii) it departed from established precedent set by the Constitutional Court, the Council of State and the Supreme Court of Justice itself regarding the relative nature of immunity from execution. If the court had analyzed the case under the rules of immunity from jurisdiction, as it should have done, it likely would have recognized the award.

Colombian Council of State partially sets aside arbitral award on arbitrability grounds

On March 14, 2024, the Council of State applied the second cause for setting aside an award stipulated in article 41 of Law 1563 of 2012. It found the claim for annulment to be well-founded in relation to the arbitral award issued on July 11, 2022, concerning the contractual disputes that arose between *Sistema Integrado de Transporte S.A.* and *Transmilenio S.A.* The Council of State determined that the tribunal, by making a decision that affected the scope of unilateral resolution 589 of 2017 that had been issued by *Transmilenio S.A*, it implicitly ruled on the legality of the resolution. Under the Council of State standing jurisprudence, arbitral tribunals (either domestic or international) may not rule on the legality of contractual resolutions concerning the use by government entities of certain unilateral powers granted to them by the law.

Spain – Elia Raboso

High Court of Justice of the Valencian Community grants exequatur request and reaffirms limited grounds for denial of recognition of foreign awards

On March 25, 2024, the High Court of Justice (Tribunal Superior de Justicia, "TSJ") of the Valencian Community granted an exequatur request for an award issued in Latvia by the Eastern European Arbitral Tribunal in Riga in October 2023, through order 8/2024. The award ordered the respondent to pay the claim arising from a loan between the parties. The respondent opposed the recognition of the award for two main reasons: (i) violation of its right of defense, as it had not been served notice of the initiation of the arbitral proceedings and subsequent procedural actions; and (ii) non-arbitrable subject matter of the dispute (since the claimant argued that it was related to maintenance payments).

The TSJ applied the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of New York of 1958 (New York Convention) to resolve the application. After confirming the respondent's right of defense had not been violated (finding, on the other hand, a strategy of passivity intending to evade the arbitral proceedings and enforcement), the court confirmed that the procedure related to an arbitrable matter (a commercial loan) and granted the exequatur. This decision is another example of the application and handling of the New York Convention by Spanish courts.

High Court of Justice of Madrid rules on extending arbitration clause to non-signatory third parties

In its judgment 22/2024, dated April 30, 2024, the High Court of Justice ("TSJ") of Madrid dismissed a petition to vacate an award issued in an arbitration proceeding of the International Chamber of Commerce (ICC). The claimant argued (i) the arbitrator's lack of jurisdiction, as it had not signed the contract containing the arbitration clause that gave rise to the ICC arbitration; and (ii) a violation of public policy due to the arbitrary assessment of the evidence.

Although Spanish law does not expressly provide for the extension of arbitration clauses to non-signatory third parties, the TSJ identified several theories admitted by the Spanish Supreme Court caselaw as a basis for doing so: (a) piercing the corporate veil, (b) estoppel, (c) direct implication in the performance of the contract, (d) consent by reference and (e) implied consent based on the appearance created. Thus, the TSJ upheld the arbitrator's decision to extend the arbitration agreement to the claimant, in view of the factual and legal reasoning used to reach the decision in the award.

As for the second ground, the TSJ dismissed the claimant's arguments based on well-established constitutional caselaw regarding the duty to state the reasoning in arbitral awards. This ruling is particularly interesting, as it contributes to consolidate caselaw on extending arbitration agreements to non-signatory third parties.

Madrid welcomes international arbitration community to the CEIA 18th International Conference

From June 9 to 11, 2024, the 18th International Conference of the Spanish and Ibero-American Arbitration Club (CEIA) was held in Madrid. With a record attendance of 600 participants from 27 countries, the Conference was a huge success, helping not only to strengthen the CEIA but also to foster closer ties among the different players in the international arbitration community.

Peru – Domingo Rivarola, Elody Malpartida and Laia Valdespino

New General Law of Public Contracts modifies rules on precautionary measures in national and international arbitrations

In Peru, arbitration is mandatory for disputes arising from contracts between state entities and providers of goods and services or project executors. This type of arbitration is subject to both the Peruvian Arbitration Law (Legislative Decree 1071) and the Law of Contracts with the State (Law 30225).

The new General Law of Public Contracts (Law 32069) was published on June 24, 2024. It will replace Law 30225 once its regulations are published. Law 32068 establishes new rules for precautionary measures in the context of domestic and international arbitration regarding disputes arising from contracts between state entities and providers of goods or services and project executors.

First, article 85.1.d) provides that precautionary measures are not available without prior notification to the other party.

Second, article 85.1.e) provides that precautionary measures are not available when aimed at preventing, halting or delaying the start or continuity of works in the following sectors: health, education, road infrastructure, sanitation, and road management and maintenance by service levels.

Third, article 86.3 sets out that in disputes about the validity, resolution or effectiveness of a contract, the value of the counter-guarantee (contracautela in Spanish) must reflect potential damages and not be less than the faithful performance guarantee. In disputes with quantifiable claims, the value of the contracautela will be equivalent to the amount of the precautionary claim if it is less than the faithful performance guarantee.

Additionally, Law 32068 repealed the second paragraph of article 8.2 of Legislative Decree 1071, which is applicable to all arbitrations (including but not limited to disputes arising from contracts between state entities and providers of goods or services and project executors).

The second paragraph of article 8.2 of Legislative Decree 1071 was introduced in 2020 through Urgent Decree 020-2020. It states that, where the Peruvian State is the party affected by the precautionary measure, a bond is required as counter-guarantee for the duration of the arbitration process. The amount of the counter-guarantee is determined by the judge or the arbitration tribunal to whom the precautionary measure is requested, and it must not be less than the performance bond. This provision will cease to be in effect once the implementing regulations of Law 32069 are published.

Portugal – Miguel de Almada, Miguel Pereira da Silva and Afonso Moucho Diogo

Supreme Court of Justice of Portugal dismisses appeal against Lisbon Court of Appeal decision to stay proceedings to vacate arbitral award

On February 6, 2024, the Supreme Court of Justice of Portugal (*Supremo Tribunal de Justiça* or "STJ") examined the rejection by the Lisbon Court of Appeal (*Tribunal da Relação de Lisboa* or "TRL") of an appeal for review (*recurso de revista*) against its own ruling in the context of the proceedings to set aside an arbitral award. Under article 46(8) of the Voluntary Arbitration Law (*Lei da Arbitragem Voluntária*), the TRL had stayed the proceedings to set aside the award and referred the case back to the Arbitral Tribunal to correct a potential violation of the right to a fair hearing, which is grounds to vacate arbitral awards.

Despite the appellant's challenge arguing that postponing the appeal until the end of the proceedings would render a challenge based on other grounds for vacation of the award futile, the STJ upheld the contested decision. In summary, the STJ determined that the ruling was interlocutory and that staying the proceedings did not prevent the appellant from challenging all the grounds for vacation of the award once the final decision on the merits of the dispute was eventually issued.

Lisbon Court of Appeal dismisses appeal on the grounds of an existing enforceable arbitration agreement

On March 19, 2024, the Lisbon Court of Appeal (TRL) confirmed the validity of the declinatory exception invoked by the defendant, based on an arbitration agreement included in the contract entered into with the claimant. The ruling determined that the dispute was covered by that agreement and that it was not manifestly unenforceable, despite setting a term of only three months for the arbitral decision. Furthermore, the decision was based on the principle of *competence-competence* (or *kompetenz-kompetenz*) and its negative effect, so it upheld the declinatory exception invoked by the defendant and referred the parties to the agreed arbitration.

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Cases relevant to our practice

Beyond our own jurisdictions, our team of lawyers highlights foreign judicial decisions with the greatest impact on our international arbitration practice

France – Santiago Rojas Molina

Paris Court of Appeal dismisses petition to set aside an award and concludes that adversarial principle did not require arbitral tribunal to remedy deficiencies of evidence submitted by the parties

In a ruling dated December 19, 2023, and published in March 2024, the *Cour d'Appel de Paris* dismissed the petition to set aside an ICC award under the 2009 Libya-Turkey Bilateral Investment Treaty (BIT). The award had rejected a Turkish company's claim for USD 190 million against Libya for the suspension of an infrastructure project in Tripoli in a context of civil war.

Although the 2020 partial award had found Libya liable for violating the full protection and security standard and for the unlawful expropriation of certain plots of land, the final award of 2021—which the party sought to have set aside—did not order the State to pay damages, concluding that it did not have sufficient evidence to quantify the value of the project, and that there was no causal link between the BIT violation and the alleged damages claimed by the company. In its challenge, the appellant alleged a violation of the adversarial principle, arguing that, faced with insufficient evidence, the tribunal should have requested additional information and conducted its own investigations.

This stance was rejected by the *Cour d'Appel*, which concluded that the claims for damages were duly dismissed due to lack of evidence, and that the adversarial principle did not require the arbitral tribunal to remedy the deficiencies in the evidence provided by the parties. Additionally, it concluded that there was no contradiction between a partial award recognizing the existence of an unlawful act (*fait dommageable*) and a final award determining the absence of economic damages (*préjudice*).

Paris Court of Appeal rejects appeal against ruling of Commercial Court of Paris and concludes that an arbitration clause can only be invoked by its signatories

In a ruling dated March 26, 2024, the *Cour d'Appel* rejected the appeal against a ruling by the *Tribunal de Commerce de Paris* ("TCP") concerning a dispute stemming from a loan agreement between a lender domiciled in France and a borrower domiciled in Morocco. Although the loan agreement submitted any dispute to the exclusive jurisdiction of the Paris courts, the appellant borrower argued that the TCP did not have jurisdiction by invoking the existence of an arbitration clause in a share transfer agreement signed by the lender and third parties. In that agreement, the lender transferred all its shares in the group of companies benefiting from the loan and promised to ensure repayment of the borrower's debt within a specified period. The proceedings before the French courts sought to obtain that repayment.

The *Cour d'Appel* indicated that, under article 1448 of the French Code of Civil Procedure (*code de procédure civile*), applicable to international arbitration by reference,[4] if a dispute subject to an arbitration clause is brought before a State court, the court must decline jurisdiction, unless (i) an arbitral tribunal has not been constituted (an application of *the kompetenz-kompetenz* principle[5]), and (ii) the arbitration clause is manifestly void or unenforceable.

In analyzing the specific case, the court concluded that the invoked arbitration clause was manifestly unenforceable, given that the appellant was not a party to the contract that contained it. It also noted that the reference to the Paris courts in the loan agreement dismissed any doubt about the TCP's jurisdiction. Lastly, the court highlighted that the lender had sought payment of its claim within the framework of parallel arbitration proceedings initiated under the disputed arbitration clause, and that the TCP had waited until the arbitral tribunal declined jurisdiction over the borrower before asserting its own. The court, therefore, concluded that the TCP had not violated the *kompetenz-kompetenz* principle.

[4] See article 1506 of the *code de procedure civile*.

[5] Although the court does not frame it in those terms, it is an application of the *kompetenz-kompetenz* principle (or "*compétence-compétence*" in the original French), under which an arbitral tribunal has jurisdiction to rule on its own jurisdiction.

United States of America (USA) – Borja Álvarez

D.C. Court of Appeals confirms jurisdiction of US courts regarding *Micula* award and application of arbitration exception to sovereign immunity, clarifying that its conclusion is not conditioned by European Union law

On May 14, 2024, the D.C. Circuit Court of Appeals ruled on the enforcement of the ICSID award obtained by the Micula brothers against the Republic of Romania. The ruling confirms on appeal the dismissal of the most recent collateral issues raised by Romania to date.

On this occasion, Romania sought the review of three decisions that had confirmed the Micula award (and imposed certain procedural sanctions on the defendant) based on the arbitration exception in matters of sovereign immunities, under section 1605(a)(6) of the Foreign Sovereign Immunities Act (FSIA). To this end, Romania invoked two 2022 rulings by the Court of Justice of the European Union (CJEU)[6] which, in Romania's view, confirmed the invalidity of the arbitration agreement on which the *Micula* case was based.

Romania's petition was dismissed by the D.C. District Court in December 2022. On appeal, the Court of Appeals upheld the decision of the lower court and confirmed that EU law was not applicable to the facts in dispute in the *Micula* case. It also confirmed that EU law is not a parameter for analyzing the validity of the arbitration agreement in question, as the dispute predated Romania's accession to the EU in 2007. The Court of Appeals, therefore, reasoned that the decisions invoked by Romania could not retroactively invalidate the arbitration agreement. Of particular interest is the Court of Appeals' clarification that the jurisdictional analysis conducted by US courts is not based on the application or interpretation of EU law but rather on the finding of a jurisdictional fact by federal courts: the offer of arbitration (Sweden-Romania BIT) and its acceptance (through referral of the relevant arbitration request) provide the jurisdictional basis for finding and applying the arbitration exception under the FSIA, without the need to make any inquiry into EU law, and thus confirm the jurisdiction of US courts to hear this action to uphold and enforce the ICSID award against Romania.

[6] See rulings Commission v. European Food S.A. (ECLI:EU:C:2022:50, of January 25, 2022); and Romanian Air Traffic Serv. Admin. v. European Food S.A. (ECLI:EU:C:2022:79, of September 21, 2022)

Belgium – José Ángel Rueda García

Brussels Court of Appeal authorizes freezing of ENAIRE's assets in enforcement of award under the Energy Charter Treaty against Spain

On June 18, 2024, the Brussels Court of Appeal authorized the freezing of the sums that the Kingdom of Spain receives, through ENAIRE E.P.E., from EUROCONTROL (with headquarters in Brussels) as fees collected for the use of its airspace. The measure was taken *ex parte* in favor of the creditor fund of the arbitral award and of the decision to set aside the award rendered in *JGC Holdings Corporation v. Kingdom of Spain* (ICSID Case ARB/15/27), which sought its enforcement in Belgium under article 54 of the ICSID Convention.

In this matter, the Japanese investor had sued Spain under the Energy Charter Treaty (ECT) due to the impact on its investments of the reform of the legal framework applicable to the production of electricity by renewable energy facilities between 2013 and 2024. The investor obtained a favorable award on November 9, 2021, ordering Spain to compensate it with over EUR 23 million, plus interest and costs. On February 6, 2024, an *ad hoc* ICSID committee rejected Spain's request to set aside the award and ordered Spain to pay also the investor's costs.

In its decision, the Court of Appeal considered that ENAIRE—the national air navigation manager appointed by Spain to collect fees for the use of Spanish airspace under the EUROCONTROL Convention—carries out commercial functions, receives income from the market and its commercial activities, and operates as a commercial entity in view of its financial statements. Given ENAIRE's operations, the Court of Appeal determined that these collection rights may be frozen under the exception set out in article 1412 quinquies 2.3 of the Belgian Judicial Code, which allows the freezing of assets of foreign States located in Belgium as long as they are used for purposes other than non-commercial public services, i.e., they are not subject to immunity from enforcement.

The cited decision paves the way for enforcement of numerous other arbitral awards issued against Spain under similar circumstances and casts a light on the limits of immunity from enforcement as a legal obstacle to enforce monetary obligations entered into by States.

3 To be followed closely

Our team of lawyers explains recent developments that will continue to our impact international arbitration practice in the future

ICSID Tribunal grants bifurcation in first case against Portugal, new ICSID claim against Mozambique, and Angola sued for the first time

– Miguel de Almada, Miguel Pereira da Silva and Afonso Moucho Diogo

In ICSID Case ARB/22/28 (*Suffolk and others v. Portugal*), the arbitral tribunal has decided to bifurcate the proceedings to address the jurisdictional objections raised by Portugal without delving into the merits of the case. The investors' claims focus on the alleged breach of the Portugal-Mauritius BIT stemming from the dissolution of *Banco Espírito Santo.*

On February 14, 2024, *Pathfinder Minerals PLC* and *IM Minerals Limited* initiated arbitration against Mozambique under the UK-Mozambique BIT. The dispute addressed in ICSID Case ARB/24/4 concerns the alleged expropriation of a heavy mineral sands mining project. The investors claim that Mozambique refused to intervene or to recognize a UK ruling that acknowledged *Pathfinder*'s rights over the project.

Lastly, Angola has been sued for the first time in an ICSID arbitration filed on March 28, 2024, by Ricardo Filomeno Duarte Ventura Leitão Machado. In ICSID Case ARB/24/8, it is alleged that the Angolan State expropriated energy materials—four GE-brand turbines—and that this action breached the protection standards guaranteed under the Angola-Portugal BIT.

International Arbitration Center (CIAM) adopts new rules – Elia Raboso

The new regulations of the Madrid International Arbitration Center (CIAM), which came into effect on January 1, 2024, introduce substantial changes aimed at incorporating best practices in international arbitration.

Firstly, provisions on the intervention of additional parties and the joinder of proceedings have been expanded, thereby facilitating multi-party and multi-contract arbitration. The new regulations allow the CIAM to include additional parties to an existing arbitration, either with the consent of all the parties to the arbitration and the additional party or because, based on the relevant facts, the additional party appears *prima facie* as a part of the arbitration agreement. Moreover, the new rules allow the Center to combine two or more arbitrations into a single proceeding at the request of a party if certain conditions are met.

Secondly, the new regulations amend the provisions regarding the optional challenge of the award, which will only be possible if there is an explicit, written agreement by all parties before the appointment of an arbitrator. The challenge of the award can only be based on a manifest breach of the substantive rules applicable to the merits or on an obvious mistake in the assessment of the facts. In this procedure, the award will first be issued to the parties as a draft, upon which the parties may lodge their challenge. In this sense, the new regulations also introduce a new ultra-expedited procedure that requires the explicit, written consent of the parties, either included in the arbitration agreement or in a subsequent agreement.

Finally, the regulations introduce other minor changes, including the reduction of the deadline to (i) request a correction, interpretation or supplement to an award; (ii) the modification of the provisions related to the decision issued by an emergency arbitrator; and (iii) the publication of awards, in anonymized format, unless opposed by the parties. As a whole, the 2024 CIAM Rules are intended to provide users with a cutting-edge procedure in line with international best practices.

Conflicting decisions on annulment of awards under the Energy Charter Treaty reveal tensions between guarantees for foreign direct investment and the European legal order – Santiago Rojas Molina

The first half of 2024 has seen a series of conflicting decisions concerning the annulment of awards under the ECT that had resolved disputes between EU Member States and investors from other Member States (Intra-European Arbitrations). These contradictory decisions highlight the tensions between the regime for the protection of foreign direct investment under public international law, on the one hand, and the EU legal order and its principle of primacy, on the other.

On one hand, we highlight the decision of April 3, 2024, by the Swiss Federal Supreme Court, which rejected the petition filed by the Kingdom of Spain to set aside an ECT award of EUR 29.6 million in favor of the French energy company EDF. In essence, the Court stated that it was "*not convinced*" by the CJEU's reasoning in the *Komstroy* ruling, according to which the arbitration clause contained in the ECT would be unenforceable in all intra-European arbitrations. According to the court, this ruling only sought to preserve the primacy of EU law but had not considered public international law or the rules of treaty interpretation laid out in the Vienna Convention on the Law of Treaties (VCLT). On the other hand, the court held that good faith interpretation of the ECT showed that its contracting States had consented to arbitration in an "*unconditional*" manner, i.e., "*without any reservation or limitation*", thereby necessarily covering Intra-European arbitrations.

On the other hand, we find several decisions from the Svea Court of Appeal of Sweden, which in recent months has set aside ECT awards against Italy (decisions of May 27 and June 17, 2024), Spain (decisions of March 27 and June 28, 2024), and Poland (decision of December 20, 2023). In all these decisions, the court invoked the principle of the primacy of EU law and its incompatibility with Intra-European Arbitrations in light of the *Komstroy* ruling. Therefore, according to the court, upholding the awards would contravene fundamental principles of the Swedish legal system.

As these conflicting decisions suggest, the debate surrounding Intra-European Arbitrations is far from being settled, and we anticipate that it will continue to give rise to new litigation both within and outside the European legal space.

Key Contacts

Alberto Fortún
Partner
alberto.fortun@cuatrecasas.com

Alfonso Iglesia
Partner
alfonso.iglesia@cuatrecasas.com

Cristián Conejero
Partner
cristian.conejero@cuatrecasas.com

Miguel de Almada
Partner
miguel.almada@cuatrecasas.com

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