INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

General Report Questionnaire for Working Session

"*State Court Participation in Arbitration – Help or Hindrance?*"

International Arbitration Commission & Litigation Commission

AIJA London 2015 Congress

General Reporters:

Silvia Pavlica Dahlberg
VINGE
Gothenburg, Sweden
T.+46 721-79 15 72
E-mail: Silvia.Dahlberg@vinge.se

Arnoldo Lacayo
Astigarraga Davis
Miami, USA
T.+1 305-372-8282
E-mail: alacayo@astidavis.com

Gunnar Pickl
Dorda Brügger Jordis
Vienna, Austria
T. +43-1-533 4795-102
E-mail: Gunnar.Pickl@dbj.at

2 December 2014

1. Enforcement of the Arbitration Agreement and other issues related to Jurisdiction

1.1 In your jurisdiction, is there an obligation for state courts to enforce an arbitration agreement, i.e. to deny or otherwise refrain from exercising jurisdiction on that ground?

Indeed, state courts can't hear a case or controversy which contains an arbitration agreement and may preliminarily reject the lawsuit filed in court (refusing to hear the case) or through a statement following the filing of an *arbitration agreement objection*.

Indeed, the Arbitration Law (hereinafter the Law) provides that if a lawsuit is filed in respect of a matter submitted to arbitration, this circumstance may be invoked as an *arbitration agreement objection* even if the arbitration wasn't initiated.

The state courts are compelled by the Arbitration Law itself, which provides in article 3.2 that: "*In the matters governed by the said law the courts will not intervene except in cases where this law so provides."*

Even in its article 3.4, it provides that any judicial intervention to exercise control of the functions of the Arbitrators or interfere with the arbitration proceedings before the award is subject to liability.

1.2 If so, how is the enforcement carried out? Please give a short overview of the procedure and the type of decision that the court would issue.

There are two ways. 1) That the state court dismisses the Lawsuit on its own initiative, when qualifying it (obviously, it must know about the existence of the arbitration agreement). 2) That the *arbitration agreement objection* be declared founded, and that the Court declares the conclusion of the process. The objection is resolved when the courts cure all procedural defects.

1.3 Is it required that the respondent(s) challenge or object to the court's jurisdiction or would the court enforce the arbitration agreement on its own motion, provided that it becomes aware of the fact that an arbitration agreement between the parties exists?

See answer 1.2

1.4 Does your jurisdiction allow a party to bring a declaratory action or any other kind of action to obtain an affirmative declaration by the court about an arbitration agreement (e.g. that an arbitration agreement exists between the parties, that it has a certain scope or that it covers a specific dispute between specific parties)?

There is no regulation on the matter. There is no rule that allows to file a declaratory action to obtain a ruling by a state court. I consider that, if a judicial process is started through a declaratory action to determine the validity of an agreement or its scope, it might contravene the provisions of the article 41 of the Law which states: *"The arbitral tribunal is the only one competent to determine on its own jurisdiction, including any objections to the arbitration concerning the nonexistence, nullity, validity or ineffectiveness of the arbitration agreement or because the disputed issue was not agreed upon the afore mentioned agreement or any others whose estimation would preclude the tribunal to resolve on the merits of the dispute"*

1.5 If so, what are the procedural requirements, if any, for bringing such a declaratory action? Please focus on the requirements which are specific for this type of action.

See the above answer.

1.6 Are there any restrictions as to timing for asserting an objection to the state court's jurisdiction or to bring an action for an affirmative declaration about arbitral jurisdiction? E.g. would on-going challenge proceedings on the ground that the tribunal lacked jurisdiction prevent such an action from being brought?

According to article 16 of the Law, if a lawsuit is filed regarding a matter submitted to arbitration, this circumstance may be invoked as an *arbitration agreement objection* even when the arbitration hasn't commenced. The objection is raised within the period specified in each procedural way, proving the existence of the arbitration agreement and, if appropriate, the initiation of the arbitration. The *arbitration agreement objection*, whether it's made before or after the commencement of the arbitration shall be declared founded by the only merit of the existence of the arbitration agreement.

1.7 When deciding on arbitral jurisdiction, do the courts in your jurisdiction apply the *doctrine of assertion* or any other doctrine according to which evidence is not required with respect to certain facts (so-called facts of double relevance) or the standard of proof is lowered compared to decisions on the merits in regular civil litigations? If so, does the doctrine apply equally in a declaratory action regarding arbitral jurisdiction and in a litigation case where an objection to the court's jurisdiction has been made with reference to an arbitration agreement? Please describe.

There are few cases that have undergone a declaratory action. State courts often dismiss such disputes alleging the article 41 of the Law, which has been quoted on answer 1.4

1.8 When deciding on arbitral jurisdiction, how does your jurisdiction handle the situation where there are several alternative grounds for the claims, some covered by the arbitration agreement and some not (e.g. one ground based on contract, one on tort)? Will the courts split the case between different fora or if not, what forum will it refer the entire dispute to?

What would happen is that a previous defense can be filed in court or arbitration proceedings alleging that part of the claim is not covered by the arbitration agreement. Under Article 41 of the Act (see answer 1.4) the Arbitral Tribunal may be incompetent to make certain claims (e.g. damages) and request the parties to sue in the appropriate way (judicial). If this happens in a judicial procedure where a party considers that the claim is covered by an arbitration agreement, the party would have to file an *arbitration agreement objection*, in which the Judge will solve about his own competence.

1.9 Does your jurisdiction allow for *anti-arbitration injunctions* or any other types of decisions attempting to prevent an arbitration from being initiated or from proceeding? Please describe.

No. What has happened is that through the constitutional process of "*amparo*", it has been attempted to avoid the start of arbitration or stop its proceedings; but they are exceptional cases. However, as of September 26, 2011 the ruling contained in the Judgment 00142-2011-PA/TC, through which the Constitutional Court established a set of guidelines that constitute a binding precedent for arbitration injunctions. Along these guidelines it was stated that claims seeking to paralyze the start of arbitration must not be admitted.

1.10 If so, who can such an injunction be directed at – a party, the arbitrator(s), an arbitral institute, etc.?

See the above answer.

1.11 What connection to your jurisdiction is required for the state courts to be competent to hear such a request?

See answer 1.9

1.12 Are you aware of any case in the past ten years where an anti-arbitration injunction or a similar type of decision has been issued by a state court in your jurisdiction? If so, please describe briefly the facts and what the effect of the injunction ultimately was.

I have no knowledge of any case with such characteristics.

2. The Arbitral Tribunal

2.1 Does your jurisdiction offer assistance by the state courts in appointing arbitrators? If so, please describe briefly what options are available.

In the article 23 of the Law, it has been established that the parties are free to choose the procedure they see fit for the appointment of the arbitrators.

Failing the agreement between the parties, the article 23 of the Law establishes the supplementary procedures by which the arbitrators shall be appointed. Certainly, if the parties fail to agree, the appointment shall be made, at the request of either party, by the Chamber of Commerce of the arbitration location or the location of the arbitration agreement, when the place of arbitration hasn't been agreed. In the absence of a Chamber of Commerce in those places, the appointment shall be made by the Chamber of Commerce of the nearest town.

Along the same lines, the law provides that if the parties appointed a third party or an arbitral institution for the appointment of the arbitrators and they do not meet within the specified period by the parties or, failing that, within fifteen (15) days after they are requested to intervene, it shall be deemed that they reject the request. In such cases, the appointment shall be made, in the absence of a different agreement by the

parties, by the Chamber of Commerce of the Arbitration location or the location of the arbitration agreement.

Our legislation does not provide that the appointment be made with the intervention of the state courts.

2.2 What prerequisites, if any, must be satisfied for the court to deal with the appointment of an arbitrator (timing, failure by a party to act, etc.)?

If a party fails to appoint an arbitrator within the deadline set by the parties or, in case of no agreed deadline, within the period prescribed by Law, a party can sought the arbitral institution or the third party designated by the parties for this purpose or, alternatively, proceed according to the outlined procedure in the previous answer for the appointment of the arbitrator (appointment by the Chamber of Commerce).

The deadline will depend on the applicable regulations or the agreement of the parties. Failing such agreement the terms of the Law are applied, which are fifteen (15) days after the receipt of the request for appointment.

2.3 When deciding thereon, will the court consider whether there is arbitral jurisdiction? If so, what level of review will the court undertake in this respect?

See answer 2.1

2.4 Please describe briefly the procedure for the appointment of arbitrators by the state courts, including any time-limits.

The State Courts don't appoint arbitrators in any case, unless the parties have agreed so. The Law establishes the supplementary procedures for parties to appoint arbitrators by agreement or otherwise to the corresponding Chamber of Commerce.

2.5 How does the court decide which arbitrator to appoint? Is there a list of arbitrators available to the court?

See the above answer.

2.6 Does the above apply irrespective of whether the arbitration is administered by an institute or not?

See answer 2.4

2.7 Does your jurisdiction offer assistance by the state courts to remove or replace an arbitrator?

In our system, the state courts are not competent to assist in the removal or replacement of arbitrators. Certainly, if the challenged arbitrator denied the arguments of the challenge or doesn't pronounce, it proceed as follows:

i) For a single arbitrator, the challenge is resolved by the arbitration institution which appointed him or, failing that, the corresponding Chamber of Commerce.

ii) In an arbitration tribunal composed of more than one arbitrator, the challenge is resolved by the other arbitrators with an absolute majority, without the challenged vote. In case of a tie, solves the presiding arbitrator, unless he might be the challenged one, in which case solves the arbitration institution who appointed him or, failing that, the corresponding Chamber of Commerce.

iii) If more than one arbitrator is challenged by the same cause, the corresponding Chamber of Commerce resolves.

In no case the state courts intervene.

2.8 If so, please describe the procedure therefore briefly.

See answer 2.7

3. Interim Measures

3.1 In your jurisdiction, does an arbitral tribunal have the power to issue an interim injunction? If yes, what is the way to enforce such interim injunction?

According to article 47 of the Law, once constituted, the Arbitral Tribunal, at the request of either party, could adopt any injunctions deemed necessary, in order to ensure the effectiveness of the award, requiring the warranties deemed necessary to ensure de compensation for damages that may result from the implementation of the injunction.

According to article 48 of the Law, the arbitral tribunal is empowered to execute, upon request of either party, its own injunctions, except that, in its sole discretion, it deems necessary or appropriate to require the assistance of the state courts.

In cases of non-compliance with injunctions or when judicial enforcement is required, the interested party will rely on the competent judicial authority, who for the sole merit of the copies of the document proving the existence of the arbitration and the injunction, must implement the injunction without admitting any defenses or objections.

It is important to clarify that the Law, specifically stablishes that the state court have no jurisdiction to interpret the content or scope of the injunction. Any request for information or clarification about the injunction or its enforcement, shall be requested by the court or either party to the arbitral tribunal. Once the injection is implemented, the judicial authority must inform the arbitral tribunal and shall send certified copies of the proceedings.

3.2 In your jurisdiction, what is the way, if any, to enforce an interim injunction issued by an arbitral tribunal having its seat outside your jurisdiction?

Our legislation in the article 48 of the Law provides that any injunction ordered by an arbitral tribunal located outside of Peru may be recognized and enforced in the country. The requirements are that the party applying for the recognition of the injunction must submit the original or copy of the decision of the arbitral tribunal, which must be authenticated by the laws of the country where the injunction was ordered and then certified by a Peruvian diplomatic, consular agent or his substitute. If the document was not made in Spanish, it shall be accompanied by simple translation to that language, unless the court considers, in view of the circumstances, an official translation must be submitted.

The judicial authority may require the requesting party to provide an appropriate guarantee for the implementation, if the arbitral tribunal has not yet ruled on such guarantee or when it is necessary to protect the rights of third parties. If compliance is not given, the judicial authority may reject the application for recognition.

3.3 If a specific interim measure as issued by a foreign arbitral tribunal is not available in your jurisdiction where it is sought to be enforced, what would be the way to proceed?

The judicial authority responsible for the enforcement of interim relief measures may reject the request if the measure is inconsistent with its faculties, unless it decides to reformulate the measure to suit its own powers and procedures for the purposes of enforcing, without changing its contents or nature.

3.4 In your jurisdiction, are state courts competent to decide on a request for interim relief despite the fact that the parties entered into an arbitration agreement? May a party file for interim relief with a state court even before arbitration proceedings are initiated? If yes, what are the consequences with respect to the "main" claim that is sought to be secured by such interim injunction, i.e. is the party asking for interim relief obliged to commence arbitration within a certain period of time?

The injunctions requested outside the arbitration process itself are regulated in the Arbitration Law. Indeed, the article 47 of the Law states that the injunctions requested to a judicial authority before the constitution of the arbitral tribunal are not incompatible with arbitration nor considered as a waiver of it. Once implemented, the requesting party must initiate the arbitration within ten (10) days, if hadn't done so previously. Failure to do so within this period or having fulfilled so, the arbitral tribunal is not constituted within ninety days of the issuance of the measure, the injunction expires

Constituted the arbitral tribunal, either party may inform the judicial authority of this fact and ask the remission of the court records. Judicial authority is obliged, by liability, to send it regardless of the state of the injunction, even so either party may submit to the arbitral tribunal a copy of the injunction proceedings. The delay of the judicial authority in the remission, does not prevent the arbitral tribunal to rule on the injunction requested, issued or contested. In the latter case, the arbitral tribunal processes the appeal filed under the terms of a review against the injunction.

The arbitral tribunal is empowered to modify, replace and rescind the injunctions given by state courts, even when dealing with final court decisions. This decision may be taken by the arbitral tribunal, either at the initiative of either party or, in exceptional circumstances, on its own initiative, after notifying them.

3.5 May parties file for interim relief with a state court even though an arbitration is already pending in the respective matter?

No, they can't, once the arbitration has commenced any injunctions and relief measures must be heard by the Arbitral Tribunal.

3.6 In your jurisdiction, does a state court have the power to order reimbursement of legal costs in proceedings for interim relief? If yes, what are the consequences if the claim that is sought to be secured by interim relief is subject to an arbitration agreement?

An applicant for an injunction shall be liable for the costs and damages caused by the measure to either party, if the arbitral tribunal later determines that, in the circumstances, the measure should not have been granted. In that case, the arbitral tribunal may order the applicant, at any time during the proceedings, to pay the costs and damages.

4. Evidence

4.1 In your jurisdiction, do the state courts play a role in the gathering of evidence for use in arbitration?

No, since there is no regulation regarding the discovery procedure.

Litigation law establishes a procedural mechanism called *"Prueba Anticipada"* (Anticipated Evidence), which seeks the performance of certain forms of evidence before the start of a trial or arbitration. The start of that procedure needs to be justified, otherwise it wouldn't be admitted by the state courts.

Through the process of the anticipated evidence, you can apply for an early declaration of witnesses, expert opinions, recognition of private documents, judicial inspections and display of certain documents (e.g. wills, documents concerning the property related to the future process, financial statements, books and other documents relating to companies, among other specific).

4.2 If your state courts play a role in the gathering of evidence for use in arbitration, how is the assistance or intervention of the state court requested (letters rogatory, petition, motion, filing of an action, etc.)?

See the above answer.

4.3 Is there specific legislation or other legal authority governing the assistance that the state courts can provide?

See answer 4.1

4.4 What requirements must the party requesting the evidence-gathering assistance satisfy in order to obtain the state court's assistance?

As stated in the answer 4.1, the request must be justified. Normally the justifications are linked to the passage of time or other circumstances that may alter its status or the evidence itself.

4.5 What kinds of evidence gathering can the state courts authorize or assist in (document production, sworn interrogation, depositions, in-court examination by the judge, inspections, etc.)?

See answer 4.1. It is important to specify that in the case of document displays, the document must be detailed, one can't request documentation displays for a time period or by association with a subject.

4.6 What rules govern the evidence gathering (rules of the state court, rules of the arbitral institute, others)?

We just have the Anticipated Evidence procedure, which is governed by the Civil Procedure Code (articles 284 to 299).

4.7 Does the kind of arbitration (domestic vs. international, investor-state, commercial, etc.) impact what evidence can be gathered with the assistance of the state court?

No, see answer 4.1.

4.8 Who can the courts order disclosure or discovery from? In other words, who do the state courts have jurisdiction over?

We have no regulations regarding the Discovery procedure.

4.9 Does the state court have the power to compel the discovery or disclosure target to give the evidence? When will the state court take that step?

No, see answer 4.1

4.10 What can the state court do if the discovery or disclosure target fails to comply?

See answer 4.1

4.11 Who can request assistance from the state court (parties to the arbitration, the tribunal, the arbitral institution, others)?

The arbitral tribunal or either party with the tribunal approval, can request legal assistance for the performance of evidence, accompanying his request, copies of the document proving the existence of arbitration and the decision entitling the party to resort to such assistance.

This assistance may consist in the performance of the evidence before the competent judicial authority under its exclusive direction or in the decision by such authority of the concrete measures necessary for the evidence to be performed before the arbitral tribunal.

Unless the performance of the evidence is manifestly contrary to public order or express prohibitive laws, the judicial authority is limited to comply promptly with the request for assistance, without assessing about their origin and without admitting opposition or appeal against the decision of the arbitral tribunal.

If case of statements before the competent judicial authority, the arbitral tribunal may, if deemed appropriate, hear such statements, having the opportunity to ask questions.

4.12 Can the disclosure or discovery target seek relief from state court or to otherwise modify or prevent the disclosure or discovery?

See answer 4.1

4.13 What consideration will be given by the state court to concerns about the invasion of a privilege (attorney-client, etc.), confidentiality protections, or potential criminal liability in the event of disclosure? Whose laws and rules will the state court apply?

See answer 4.1

4.14 Do the state courts need to enquire into the view of the arbitral tribunal on the disclosure or discovery?

See answer 4.1

4.15 Do the state courts need to enquire into the ultimate admissibility of the evidence in the arbitration?

See answer 4.1

4.16 Do the state courts have the power to order reimbursement of attorneys' fees or expenses incurred by the disclosure or discovery target? If so, in what instances will they order that?

See answer 4.1

Transfer of Copyright

General Reporters, National Reporters and Speakers contributing to the AIJA Annual Congress 2015 accept the terms here below in relation to the copyright on the material they will kindly produce and present. **If you do not accept these terms, please let us know:**

General Reporters, National Reporters and Speakers grant to the Association Internationale des Jeunes Avocats, registered in Belgium (hereinafter : "AIJA") without any financial remuneration licence to the copyright in his/her contribution for AIJA Annual Congress 2015.

AIJA shall have non-exclusive right to print, produce, publish, make available online and distribute the contribution and/or a translation thereof throughout the world during the

full term of copyright, including renewals and/or extension, and AIJA shall have the right to interfere with the content of the contribution prior to exercising the granted rights.

The General Reporter, National Reporter and Speaker shall retain the right to republish his/her contribution. The General Reporter, National Reporter and Speaker guarantees that (i) he/she is the is the sole, owner of the copyrights to his/her contribution and that (ii) his/her contribution does not infringe any rights of any third party and (iii) AIJA by exercising rights granted herein will not infringe any rights of any third party and that (iv) his/her contribution has not been previously published elsewhere, or that if it has been published in whole or in part, any permission necessary to publish it has been obtained and provided to AIJA."