Arbitrator Bias in Countries with No or Reduced Arbitration Tradition

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PURPOSE AND BASIC COMPARISON

This article tries to show the difficulties of the obvious: the different degrees of arbitration culture and arbitration environment, mainly as they relate to arbitrator bias. As usual, hopeful eyes are at least partially blind. I will address the problems of transplanting tulips—a plant in need of freezes in Holland and the Northern territories—to moderate and warm climates. It necessarily takes a long period of acclimatization. This is where arbitration in Latin America (LA) lies, including the deciding factor, that is, the arbitrators. They are acclimating. In particular, I will refer to Mexico, the country where I practice. Lastly, a warning—the topic, that is, arbitrator bias, will be mainly addressed regarding commercial arbitration.

This article begins by making a basic comparison of a country with an arbitration tradition to a country without an arbitration tradition.

Scenario of Country with Arbitration Tradition: In a New York case (Grendi v. LNL Construction Management Corp.) the court held that the arbitral tribunal’s mere knowledge that one party had not paid its share of the arbitrator’s fees may provide grounds to stay the arbitration or challenge the award on grounds of bias.1

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* This article reflects my points of view as a speaker at the Fordham University 2009 Conference on International Arbitration and Mediation. It is not a formal academic article.

1 See Grendi v. LNL Constr. Mgmt. Corp., 175 A.D.2d 775 (1st Dep’t 1991). The court’s mere knowledge of the fact was enough, without having to analyze the issue of actual arbitrator bias. Id. at 776, cited in Kiera S. Gans, “Don’t Bite the Hand
Scenario of Country with Reduced Arbitration Tradition: Among the many events that an arbitrator participating in a domestic commercial arbitration faces in Mexico are events such as the following:

(1) The likelihood of facing civil and/or criminal claims against him or her, during and after the arbitration. While these claims seldom have a strong basis, the arbitrator needs to answer and follow the procedure in order not to be found liable. This means time and litigation costs;\(^2\)

(2) Occasions when the plaintiff paid the full share of the arbitrator’s fees and administrative charges since the defendant refused to pay.

(3) Virtual certainty that the award will be challenged before the courts; and

(4) Pressure from the media and/or the parties’ employees/labor union.

This article's purpose is not to present an image of a good or bad commercial arbitration environment in Mexico, where no effort is being expended to improve it.\(^3\) As democracy finds its way in Mexico (and this is true in Brazil, Argentine, Costa Rica, and other LA countries), the climate for commercial arbitration is improving but is still in transition. It follows, that the continental European, English, or American national commercial arbitration model needs additional rules—adaptation rules—when used in countries where the rule of law shows different circumstances. A good example of this need is the case of arbitrator bias.

\(^2\) There is a saying among arbitrators in Mexico: an arbitrator who is practicing without being sued is no arbitrator at all.

\(^3\) An example are the recent actions taken by the Cámara Nacional de Comercio de la Ciudad de Mexico (CANACO) and the Centro de Arbitraje de Mexico, A.C. (CAM), amending its arbitration rules, effective June 9, 2008 and July 1, 2009, respectively. While the main purpose was to introduce provisions connected with emergency measures, they also have the general goal of increasing the use of arbitration in the country, through better service for its users. Many other examples can be mentioned recently in LA.