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Editorial: Miami Now Go-To Destination For International Arbitration

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Miami: crossroads of the Americas and, increasingly, Europe and Asia, host city for the 2014 International Council for Commercial Arbitration Congress, site of the Latin American headquarters for countless multinationals and the worldwide base of at least five Fortune 500 companies.

And now, home to only the second international arbitration court in the United States and one of a handful across the globe.

On Dec. 17, 2013, the Miami-Dade County Circuit Court announced the creation of an International Arbitration Court "designed exclusively to handle international commercial arbitration matters." The court, a subdivision of Miami-Dade's Complex Business Litigation court, will feature judges with specialized international arbitration expertise.

At first, the post will be filled by two judges (compared to only one judge at a similar court recently created in New York last September), who will be trained by the University of Miami, in conjunction with the Miami International Arbitration Society.

What Disputes Are Eligible for the IAC?

Two types of arbitration-related matters may be heard by Miami's IAC: (1) those falling within the Florida International Commercial Arbitration Act (Chapter 684, Florida Statutes) — which mirrors the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration enacted in seven U.S. states and more than 50 countries, or (2) those falling within the Federal Arbitration Act (9 U.SC. § 1).

To qualify under FICAA, a matter must meet either of two conditions:

First, the parties' "places of business" must have been "in different countries" at the time they reached their arbitration agreement.

Alternatively, the agreed-upon arbitration situs, or the place where a "substantial part of the obligations of the commercial relationship are to be performed or the place with which the subject matter of the dispute is most closely connected" must be "outside the country in which the parties have their places of business."

In contrast, the FAA applies more broadly to contracts involving interstate commerce and, in those circumstances, controls over inconsistent state law. Although a federal statute, the FAA applies in state and federal courts and to contracts made pursuant to state law.

So, for example, the FAA would apply to an arbitration proceeding between a Florida construction company and California supplier, while the FICAA would not. An arbitration proceeding between a Florida importer and a Brazilian manufacturer would fall under both the FAA and the FICAA.

And the FICAA, but not the FAA, would apply to an arbitration between two Venezuelan companies which agreed to arbitrate in Bogota, Colombia, or whose dispute concerns the sale of oil and gas to France (although the full FICAA provisions would only be available to the parties if they elected Miami or another Florida location as the arbitration situs).

Miami's IAC is authorized to hear matters relating to any of these hypothetical arbitrations, with the exception of the first, which involves parties based in the United States. Indeed, to ensure the international character of the matters brought before the IAC, the order creating the court specifically exempts FAA arbitrations "arising out of a relationship which is entirely between citizens of the United States." This limitation itself has three exceptions: (1) the parties' relationship "involves property located abroad;" (2) "envisages performance or enforcement abroad;" or (3) "has some other reasonable relation with one or more foreign states."

What Requests for Relief Could Be Brought Before the IAC?

Apart from these criteria, the Miami-Dade County Circuit Court, in establishing the IAC, did not limit the types of issues the court can hear. As a result, arbitrating parties should be able to bring before the IAC most requests for judicial assistance that are incidental to their arbitration agreement.

One of the most common of these requests is a petition to compel arbitration. Sometimes, despite having agreed in writing to arbitrate, one party may decide for any number of reasons to choose litigation over arbitration. If the other party objects, that party can ask the IAC to stay any pending litigation and compel arbitration.

Conversely, where one party has waived its right to arbitration, but later institutes an arbitration proceeding, the objecting party could petition the IAC to adjudicate the waiver and enjoin the first party from proceeding with the arbitration.

Often, there is a lag between the time arbitration is filed and the time the tribunal is constituted. The realities of litigation, however, can require quick action to prevent a party from dissipating assets or to compel the return of property. The FICAA empowers Florida courts to issue such interim measures "in relation to arbitration proceedings, irrespective of whether the arbitration proceedings are held in [Florida]."

So, for example, a Peruvian mining company, after instituting arbitration in Washington, D.C., could petition the IAC to attach a shipment of gold in transit through Florida before it can be resold. Or, an Argentine employer could ask the IAC to compel its former Miami-based representative to return his company laptop and trade-secreted files before the arbitration brought to recover for his breach of fiduciary duties can get underway.

Another important topic in international arbitration is the extent of discovery and, in particular, disclosures from third parties. Depending on how the parties have crafted their arbitration clause, these fact-gathering tools may be available in their arbitration.

And if the arbitration is seated in Florida, the FICAA expressly permits the arbitral tribunal or a party to seek "assistance in taking evidence" from Florida courts. The FAA, at Section 7, also provides means to obtain documents and testimony in arbitration.

Thus, if in a Miami-based arbitration, a third-party consultant refuses to produce documents subpoenaed by a Colombian textiles company about its adversary in the arbitration, the company can seek enforcement from the IAC.

Finally, an arbitration proceeding culminates with an award, which typically explains the tribunal's findings and the relief it has decided to grant. The parties will then apply to a court for recognition and enforcement. Both the FICAA and the FAA address these issues and provide very limited grounds for rejecting an arbitral award.

The IAC is also well-positioned to address these matters, which can be complex and contentious. If a Chilean fish distributor was aware that its New York buyer had assets in Miami, it could seek recognition and enforcement of the award from the IAC. On the other hand, if the New York buyer believed the award was infirm, it could preemptively petition the IAC to invalidate the award.

Why Will the IAC Be Better?

Although Miami has in recent years seen a marked increase in the number of international arbitrations and related proceedings, few state court judges are familiar with this specialized area of the law. Designated judges will be better able to address the complex issues that arise in the international arbitration context. Overall, this will add consistency and predictability to the process.

Another key benefit of the IAC will be its efficiency. Having ready access to judges specially trained in the laws and procedure of international arbitration should substantially expedite the resolution of arbitration-related matters. This will allow the parties — and the tribunal — a greater opportunity to actually achieve the traditional goals of making dispute resolution through international arbitration quicker and less costly than litigation.

Other efficiencies (as well as strategic advantages) appear when one considers that under standard Florida practice, discovery and emergency matters are usually heard on short notice. So, the Colombian textiles company could set a petition to enforce its third-party subpoena on the IAC's motion calendar and have it heard within about a week.

The Peruvian mining company could have a live emergency hearing before the IAC and get a ruling on its injunction application before the gold shipment leaves the state. And the Chilean fish distributor can know whether its arbitral award is going to be recognized or not before trying to have it confirmed and enforced elsewhere.

Ultimately, these advantages of the IAC inure to the substantial benefit of the end users of international arbitration, the parties. In turn, the creation of the IAC will further increase Miami's attractiveness as a premier international arbitration venue, complete with world-class arbitrators, able counsel, and, now, the city's very own international arbitration court.

Miami's star indeed is rising.

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