Precedential Value of Arbitral Awards in International Arbitration

By Josefa Sicard-Mirabal

Why do arbitrators and parties cite and rely on prior decisions?

First of all, why do we even talk about a precedential value in international arbitration?

Precedent in arbitration has recently received a lot of attention, particularly in Investor-State arbitration. The attention comes from the fact that some decisions are publicly available and the fact that we have seen differing and apparently contradictory decisions rendered by tribunals interpreting the law. Investor-State arbitration has also come under scrutiny, either because the amounts at issue and or awarded are astronomical or because the subject matter, for example health or the environment, is of great concern to the public.

Awards are now readily available either in their entirety or some redacted form. In the past, however, it was a different story and there was a completely different understanding of what work product of arbitral tribunals would be publicized. Indeed, when discussing this issue, Sir Robert Y. Jennings commented:

> And what do they all do? Where do they all sit? It is not easy to find out. There is no kind of structured relationship between most of them. There is not even the semblance of any kind of hierarchy or system. They have appeared as a need or desire or ambition. In this particular respect, contemporary international law is just a disorderly medley. Suffice it to say that it is very difficult to try to make a sort of pattern, much less a structured relationship, of this mass of tribunals, whether important or petty. It is sometimes too difficult to find out what is going on, much less to study it.

Sir Jennings expressed that sentiment in 1996, and probably some commentators would say the same today.

The term precedent is generally used to indicate a binding precedent under the doctrine of *stare decisis et non quieta movere* (meaning to stand by what is decided). Where this doctrine is applicable in public judicial systems, courts must follow precedents and treat like cases alike. The term is also used to refer to a persuasive precedent, a de facto stare decisis, which means that courts do not have a legal obligation to follow the prior decisions or precedents, but may use them under certain circumstances, depending on the facts of the case.

Under different national legal systems, precedents have a different binding value. The most common distinction is between civil law and common law systems. Civil law countries do not recognize a doctrine of stare decisis, whereas common law countries do. Although there are more civil law traditions around the world, the argument for consistency, certainty, predictability, reliability, and equality that stare decisis is based on is a powerful one. But what happens in international arbitration?

In international commercial arbitration, there is no doctrine of stare decisis and no tendency to follow or cite past cases. In fact, past cases may only have indirect influence on subsequent arbitral awards, but no precedential value. In commercial arbitration, awards have much less weight and authority because you rarely have the whole award—just extracts. There is no confidence that you are seeing the whole universe of decisions because there is no systematic reporting. Moreover, commercial cases are fact and contract specific, thus extracts are not very helpful.

In international investment arbitration, however, there is again no governing doctrine of stare decisis, but it is practice for arbitrators to consider and cite previous cases. The main reason for the distinction is that investment cases are generally published. Indeed, the ICSID Reports convey the concept of a system of precedent in order to develop a coherent interpretation of the law and a consistent jurisprudence. The parties themselves are bound by a decision as set forth under Article 53 of the ICSID Convection, stating: "The award shall be binding on the parties." The negative pregnant of that sentence is that the award is not binding on non-parties. For non-parties, we may only say that prior cases have a persuasive, and not binding, value. But if there is no binding system of precedent, why do arbitrators and parties cite and rely on prior decisions?

In trying to answer this question, arbitrators, academics, and users were interviewed for the purpose of reaching a conclusion regarding the value of arbitral awards. These were the questions posed:

1. Do you believe you are bound by prior awards?
2. Do you consider awards useful for developing a body of law?
3. How do you account for the different and sometimes contradictory awards by different tribunals?

4. Would you agree that, depending on your legal training and background (common or civil law), some arbitrators and practitioners will feel more or less inclined to "follow" prior decisions?

5. What are the consequences for not "following" a prior award?

These are some revealing answers from personalities and experts in the international arbitration arena.[1]

—In response to question 1. The unanimous position was that prior awards are not binding. However, the question elicited an additional response: "A prior award will have weight/authority if it is convincing." "Nothing happens if you don't follow a prior award." "I believe that prior awards are at times abused because they are used out of context and simply as moral support."—"I do not believe I am bound by prior awards. Yet, they [awards] have a convincing value, as they oblige the arbitrator to find good reasons not to follow them in a specific case." "They are very useful, especially when several awards have decided in the same way, there is a strong presumption that they are right." "All arbitrators are inclined to follow prior decisions. The consequence for not following an award is only the need to present a stronger and more elaborated reasoning."

"Although arbitrators are not bound by prior awards in the same sense as judges in hierarchical national legal systems, awards certainly can be useful in creating bodies of legal principles to inform arbitrators. Different and sometimes contradictory awards should not be a mystery. Even within the most hierarchical of national legal systems, courts take varying approaches, seeing facts from varying perspectives, and weighing competing policy considerations in different manners. Individual arbitrators certainly vary in their inclination to give deference to prior decisions. However, in my observation, this has nothing at all to do with common law vs. civil law backgrounds. The consequences for not 'following' a prior award depend on whether the earlier decisions were clearly wrong or were wise and sound. Arbitrators often use prior rulings to justify their decision to the rest of the world and to enhance the prospect that similar cases will be treated similarly. An arbitrator would need to be bold indeed to assume that nothing could be learned from reading how others struggled with comparable issues, even if their awards are not binding in the sense of precedent."

"I see awards as persuasive, and some are particularly influential when they deal with a procedural matter, especially under the same rule set and especially if the arbitral tribunal includes well-known arbitration experts. I would not rely on an award for substantive law. Even then, the award would be persuasive authority, creating a body of authority that should be respected and considered. Courts, even within the same jurisdiction, have equally contradictory outcomes on similar facts/law or even in the same case, through the string of appeals. These are difficult issues that are subject to interpretation. Some inconsistency is to be expected. I wouldn't see a breakdown by legal background. I think most arbitrators will consider the legal authorities submitted to them by the parties and give those authorities the weight they consider appropriate. However, since an award is not binding, I don't think there should be any consequences for not following a single previous award. If there is a large body of agreed principles, reflected in numerous awards, commentary and case law, then an anomalous decision is problematic, but failure to follow one single award is not. The issue is still somewhat open."

"Arbitrators are not bound by prior awards. Generally, they are not even useful as a body of law because they are not accessible. I would love it if this was the case, and awards were published. I don't also believe that the background plays a part. And there are no consequences for not following a prior award, and I think it is a problem."

"Prior awards are not binding. This does not imply that they lack value. I believe that they may be useful to inspire and confirm later decisions."

—I am not bound, under any circumstances. However, prior awards are definitively useful to create a body of law. There are various reasons for contradictory awards, including: arbitrator´s lack of responsibility to do his or her job to find out, study, and examine prior cases decided under similar facts; different facts, which the arbitrator in any event should disclose and highlight; and arbitrator´s lack of institutional responsibility. The legal background of course influences the arbitrator's practice. And there are no consequences for not "following" a prior award.—"A distinction should be made between commercial and investor-state arbitration, but in neither case awards are binding. Still, they are useful as jurisprudence constante—to create stability. Only when there is consensus does it become particularly authoritative. The consequence for not following a prior award is that the system suffers and people lose confidence."

Based on the content of the interviews, it is possible to summarize that the weight given to prior arbitral awards by arbitrators may be classified by:

1. Those who find them persuasive.
2. Those who distinguish them from prior awards.
3. Those who may use them to reinforce an interpretation.
4. Those who consider it a duty to take them into consideration.

It may also be summarized that there are generally no consequences for not following prior awards. In that respect, the response from the users clearly states that they

will be less inclined to use arbitration because they would prefer consistency.

> *"It behooves us all to work towards a more transparent, consistent, and cohesive body of jurisprudence constante in international arbitration."*

In conclusion, arbitral tribunals consistently acknowledge that in international law there is no doctrine of binding precedent and that they are not bound by precedent. Based on the interviews conducted, it is not clear, and there is no general consensus on whether prior awards should be considered persuasive. The consequences of this conclusion are lack of certainty and lack of transparency, causing the system to suffer and people to lose confidence in it. It has been said that prior awards are not binding, unless convincing, but convincing to whom? It has also been said that prior awards have an inspirational function. What is the legal value of the term inspirational?

Jurisprudence constante is slow in developing, but it is useful to create a body of law and stability as a consequence. It behooves us all to work towards a more transparent, consistent, and cohesive body of jurisprudence constante in international arbitration. The entire arbitration system and community can only gain from interpreting prior awards and making them useful for future decisions.

Endnote

1. These experts include Bernardo Cremades, Yves Derains, William "Rusty" Park, Fernando Mantilla-Serrano, Stacie Strong, Eric Schwartz, Mark Morill, Michael McIlwrath, Mark C. Baker and many others.

Josefa Sicard-Mirabal is an adjunct professor of law at Fordham Law School; she concentrates her practice in international business transactions and dispute resolution. The author wants to acknowledge and give credit to Veronica Mazzoleni for her assistance with this article. Veronica is the Corporate Counsel for Sinkrom Corp., an international business development company. She concentrates her practice in the area of international dispute resolution and is involved in different projects and studies committed toward advancing intercultural negotiation matters.