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Arbitration and Adhesion Contracts

Section 1651 of the Civil and Commercial Code of the Nation (CCCN) sets forth the issues that are excluded from arbitration. The judgment under analysis, in our opinion, wisely deals with the disputed subsection d) of said **section 1651 of the CCCN** that provides that: "Adhesion contracts are excluded from the arbitration agreement …" "…whatever the purpose thereof is". **Hence, the decision validates the possibility of subjecting adhesion contracts to arbitration**.

By way of an introduction, it must be pointed out that doctrine had already criticized the exclusion, as an arbitration issue, of conflicts arising within the framework of adhesion contracts. On this respect different authors had highlighted that:

"The exclusion of all the adhesion contracts, whatever their purpose is, proves to be serious. The fact is that there are thousands of contracts between companies that are executed by adhesion and in which arbitration is provided for as a means to resolve conflicts. It is usual practice that insurance, reinsurance, waybills, bills of lading, letters of credit, etc. contain arbitration clauses and that the proposed rule deprives them of effects against the universal flow and without justification. Obviously said clauses have no effect with respect to consumers but such fact was already provided for in another subsection of the same Code [in a reference made by the quoted author regarding subsection c) of the same section]. Incidentally it implies a violation to the Convention of New York, since it requires only that the arbitration agreement must be written."**[1]**

Likewise, and in connection with the same regulation, the following had been pointed out:

"The logic that has led the legislator to strongly exclude the possibility of arbitrating disputes related to adhesion contracts is incomprehensible and must be certainly based on an improper appreciation of reality of the contracts executed by adhesion"[2]

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"The prohibition set forth in subsection d) is even more reprehensible, since this is a Code that deals with both, civil and commercial matters. (…) However, in most cases appear adhesion contracts to pre-formulated clauses. Again, a principle has been taken that does not accept adverse evidence on the fact that unilateral stipulation of clauses is negative and implies in itself an abuse. As mentioned by Caivano, in the case of contracts between businessmen, the rule is to acknowledge the full operation and enforceability of arbitration clauses, even if they are contained in adhesion contracts. In the same sense, Sandler Obregon adds that it is not reasonable to generically prevent arbitration agreements contained in adhesion contracts because what should be avoided, in any case, is that the strong part of the contract may impose upon the weakest to resort to a court that may render it defenseless."**[3]**

On the other hand, it has been pointed out also that:

"it forbids a set of issues that cannot be the purpose of an arbitration agreement, since they are of public order, exceeding equity-related rights available for the parties. (…) As regards the exclusion of adhesion contracts, whatever its purpose is, and the grounds of the regulation are the non-existence of freedom of negotiation, and, consequently, the subjection of the adhering party to pre-formulated conditions.

(…) "as a rule, all the equity-related issues of disposable nature may be subject to arbitration, even though it must be warned that even if it is not expressly stated, the arbitration agreement presupposes an agreement or contract that will be valid only if executed between equal parties (*contrato paritario)*, since, in case of structural weakness of any of said parties, said possibility is excluded

Strictly speaking, the new "*lex mercatoria*" authorizes arbitration as an issue between peers, and that is the reason why it emerged in the international arena that allowed large companies to settle their disputes without need of resorting to the national courts."**[4]**

"provided that both parties intend to resort to arbitration to resolve an eventual controversy arising between them, I consider that this legal prohibition should not limit said possibility for them."[5]

"hand in hand with said jurisprudential trend on the issue, submission to arbitration cannot be considered as no longer voluntary because the clause is

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contained in an adhesion contract, and it does not prevent us from examining its content or verifying that it is neither abusive nor clearly detrimental for the adhering party. That is to say, that the arbitration agreements contained in commercial contract, including the adhesion contracts should be considered valid and mandatory, unless an abusive use of a contractual technical resource is proved. It may thus be concluded that, strictly speaking, we are not witnessing "*stricto sensu"* a non-arbitrable issue, but eventually a stipulation that cannot be enforced against the adhering party."**[6]**

In the case under analysis, the plaintiff (Vanger) filed a complaint before the Ordinary Courts against Minera San Nicolás, in spite of the fact that the contract contained a waiver of the agreed upon jurisdiction, whereby the parties decided the intervention of the Mediation and Arbitration Business Center *(Centro Empresarial de Mediación Arbitraje)* for the resolution of conflicts that may eventually arise between them. To such end, the plaintiff claimed the nullity and non-existence of certain contractual clauses based on the existence of an abuse of dominant position by the defendant, who drafted the terms and conditions of the adhesion contract, consequently stating that said clauses - including the arbitration clause - proved to be inapplicable.

In view of said scenario, and in order that the merits of the case be resolved by the relevant Arbitral Tribunal, the defendant filed a demurrer of jurisdiction, on the grounds that an arbitration clause existed and was considered valid by it, whereby the parties had undertaken to submit to arbitration every controversies derived from the contract that joined them.

In addition, the defendant highlighted that the parties executed the contract in perfect equal conditions, negotiating capacity, management, organization and legal assistance. In short, it argued that there existed parity of equity and economic power.

In turn, the plaintiff answered the service of the demurrer of jurisdiction pointing out that the acting Court had full jurisdiction to hear the case, since, to the extent that the arbitration clause had been decided through an adhesion contract and, the discussed matter was excluded from arbitration due to the provisions of subsection d) of section 1651 of the CCCN - which unconstitutionality was not claimed by the other party -, the proposed waiver of jurisdiction could not be sustained.

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The Lower Court Judge sustained the demurrer of jurisdiction filed by the defendant, explaining that:"… non-application of what was agreed upon according to the prohibition set forth in section 1651 subsection d) of the CCCN, in principle was not feasible. Firstly, because in case of doubt there must be abidance by the effectiveness of the arbitration agreement since the intended nullity is neither evident nor inapplicable, and the version attempted by the plaintiff must be proved through the production of evidence offered to such end (art. 1656 CCCN, National Commercial Appellate Court, Panel D, "Francisco Ctibor SACI y F v. Wall-Mart Argentina SRL, Ordinary proceedings", dated 12.20.16)."

And that "not every adhesion contract (CCCN 984) sets aside the possibility of facing an agreement or contract executed between equal parties, in equal conditions and who were aware of what they were signing and accepted it under such terms *(contrato paritario)*. When, as in this case, a contract is executed between businessmen, and it is referred to available equity-related issues" (Commercial Appellate Court, Panel C, "Servicios Santamaría SA v. Energia de Argentina SA, Ordinary Proceedings", dated 05.25.18).

That is the reason why, the demurrer of jurisdiction should be sustained since the waiver of jurisdiction is available for the parties, in principle, the alleged abusiveness is not obvious and because none of the public order issues is at risk (section 1649 CCCN)."**[7]**

Said decision was confirmed by Panel C of the Commercial Appellate Court of the Nation.

To render such decision, the Appellate Court pointed out that only the adhesion contracts, in which there is a different negotiation capacity, legal assistance, equity and economic power between the parties could be excluded from arbitration, and all such facts did not appear in the case.

Additionally, Panel C limited the intent of literally interpreting the criticized subsection d) of section 1656 of the CCCN, respecting the validity of the waiver of jurisdiction set forth in the adhesion contracts, provided that they are contracts that will be valid only if "executed between equal parties, under equal conditions and who were aware of what they were signing and accepted it under such terms" (*contrato paritario)*.

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On the other hand, it concluded that when: “it is a contract executed between businessmen, related to available equity issues, **the operational efficiency of the clause in question must be admitted even in the case of an adhesion contract,** provided that its abusiveness has not been proved and public order issues are not at risk so as to justify the deviation from the extension agreed upon by the parties.

The force that creates obligations, inherent to the contract, when it happens, must be considered valid (section 959 Civil and Commercial Code) under penalty that the courts may end up validating conducts that are close to bad faith.”

It must be highlighted that said decision has as a precedent a judgment of the same Panel C of the Commercial Appellate Court in which the Court had pointed out that: “The intent of not acknowledging the arbitration clause that joins the parties is not appropriate, since the base contract of these actions shows the relationship of two specialized companies as a result of their purpose and which are sufficiently important so as to carry it out. It must be noted that the amount claimed shows the economic importance of the contract that contains said clause. Under such conditions, the presumption that the provisions of the CCCN section 1651 subsection d) -since it excludes arbitration in the adhesion contracts whatever its purpose is - applies to the case, does not bear in mind the purpose of said regulations. Said regulation tries to ensure the intervention of the courts in contracts that, for being adhesion contracts, must be understood as prepared with the presumable purpose of speeding up the (mass) negotiation with those who are willing to execute a contract with parties that do not have equal negotiating capacity, legal assistance, parity of equity and economic power. On the other hand, it cannot be provided for to deny an admitted agreement when the co-contracting party could consider itself surprised by its inclusion within the scheme that should govern it. It must be noted that due to the participation in a bid -call for direct contracts-, the plaintiff was related to the defendant -state-owned company -, and knew beforehand the conditions that it should perform in order to provide the required services which were awarded to it. Not every adhesion contract (CCCN 984) sets aside the possibility of facing an agreement or contract executed between equal parties, in equal conditions and who were aware of what they were signing and accepted it under such terms *(contrato paritario)*. When, like in the case, it is a contract executed between businessmen, related to available equity-related issues, **the operational efficiency of the clause in question must be admitted even in the case of an adhesion contract,** provided that its

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abusiveness has not been proved and public order issues are not at risk so as to justify the deviation from the extension agreed upon by the parties."[8]

As for us, we believe that the judgment rendered by the Panel was correct since, in spite of the provisions of subsection d) of section 1651 of the CCCN, it does not exclude from arbitration the conflicts derived from the adhesion contracts. In fact, on the contrary, it considers that:

1) In principle, the non-application of the agreed upon arbitration according to the prohibition set forth in section 1651 subsection d) of the CCCN, is not feasible.

2) In case of doubt there must be abidance by the effectiveness of the arbitration agreement since the intended nullity is neither evident nor inapplicable, and must be proved through the production of the evidence offered to such end.

3) Pursuant to the provisions of section 2 of the CCCN, the regulations must be interpreted according to their purpose. Seen from such point of view, the intent of one party of not acknowledging the arbitration clause that joins it with the other party cannot be validated without affecting the elemental principle of good faith.

4) Sections 9 and 10 of the CCCN set forth that the rights must be exercised in good faith and that the law does not protect the abusive exercise of rights, just like the one that contradicts good faith.

5) The total rejection of an arbitration agreement executed by a businessman would be contrary to said regulations and to section 961 of the CCCN that sets forth that: "The contracts must be entered into, construed and executed in good faith. They bind the parties not only as regards their formal provisions, but also to all the consequences that may be considered comprised therein, with the extents in which a careful and prudent contracting party would have reasonably bound itself". Consequently, the intention not to perform the undertaken obligations as regards the submission of the controversies arising between the parties to arbitration cannot be considered since it is contrary to said principle.

The arbitration agreement contained in the adhesion contracts prove to be binding for the parties in the case of a contract executed between businessmen, related to available equity-related issues, provided that its abusiveness has not

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been proved and there is no difference in the negotiating capacity, legal assistance and the amount of equity and economic power of the contracting parties. The fact is that not every adhesion contract (CCCN 984) sets aside the possibility of facing agreements executed between equal parties, in equal conditions and who were aware of what they were signing and accepted it under such terms *(contrato paritario)*. This is coupled with the fact that none of the parties could prove the existence of a specific damage derived from the mere election of the arbitral jurisdiction per se. Such damage could eventually appear for example if the agreed upon arbitral jurisdiction determines, the actual deprivation of access to the courts derived from the impossibility of paying its own arbitration costs as opposed to those contemplated by the judiciary, and such impossibility were effectively proved, in the benefit to proceed "*in forma pauperis*".

Following the line of thinking of the above quoted judgments of Panel C of the Commercial Appellate Court, the Supreme Court of Justice of San Juan had stated that, even before the effectiveness of the CCCN: "In every case, it is necessary to set particular rules, but in no way forbid with general application the arbitral jurisdiction for these contracts, what would have a very negative impact in the usual business relationships. In fact, it is important to check that the adhering party has consented to arbitration and arbitration has not been imposed upon it, just like jurisprudence has wisely resolved it."**[9]**.

Position undertaken by Panel F of the National Commercial Appellate Court

On August 30, 2016 Panel F **of the National Commercial Appellate Court** resolved the cases Yasa and Argennet. Both causes had been filed by said commercial agents against Telecom Argentina S.A.

In both cases, the defendant filed the demurrer of jurisdiction on the understanding that the contract that joined it with the plaintiff contained an arbitration agreement whereby the parties had agreed to submit the differences derived from the contract to arbitration.

Through the lower court's judgments the acting judges sustained the demurrer of jurisdiction.

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In turn, The Prosecutor's Office before the Commercial Appellate Court decided that, as set forth in section 1656 of the CCCN, in case of doubt, there must be abidance by the effectiveness of the arbitration agreement.

However, Panel F of the Appellate Court revoked said resolutions, dismissing the jurisdiction of the Arbitral Tribunal Arbitral based on the literal application of subsection d) of section 1651 of the CCCN (said Judgment had the unanimous vote of Judges Barreiro, Tevez and Ojea Quintana).

To render a judgment accordingly, Panel F considered that the agency agreement that joined the parties was an adhesion contract, highlighting that the standardization of the content of the business polices in the cellular telephony are loopholes of the phenomenology of the contracts with pre-formulated clauses. On considering the agency agreement as an adhesion contract, it concluded that the dispute was excluded from arbitration according to the already referred regulations.

However, one year later in the case "Pérez Mendoza Juan v. Hope Entertainment S.A., summary proceedings", although with a different composition, Panel F (with the favorable vote of Judges Barreiro and Hernán Moncla who were in agreement with the grounds of the Prosecutor's Office) confirmed the lower court's resolution whereby the Lower Court Judge had sustained the demurrer of jurisdiction, pointing out that in case of doubt there must be abidance by the effectiveness of the arbitration agreement.

Notwithstanding, the judgment had the dissenting vote of Judge Tevez that was rendered in line with the decisión issued in cases Yasa and Argennet. Consequently, it would be necessary to wait if in the future, in view of eventual similar claims, Panel F keeps the opinion of the Judgment Perez Mendoza on the basis of the inclusion in said Panel of Judge Lucchelli.