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Initial considerations on a new judgment rendered by the Argentine Supreme Court on the extent of the review of arbitration awards

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On 6 November 2018, the Argentine Supreme Court resolved, by the majority of its members, to confirm the dismissal of a motion to vacate judgment that had been filed by the National Government against an award rendered by an Argentine arbitrator after the unilateral termination of the management contract that the National Government had with a temporary union of companies.[1] The award had ordered the government to indemnify the other party. The government had accepted that the disputes arising in the framework of said contract could be resolved

by arbitration, hence the resulting award would be subject to appeal exclusively for the causes provided for in section 760 of the Civil and Commercial Code of Procedure of the Nation (essential failure of the procedure, because the arbitrators rendered the award out of term or on uncommitted issues). The Argentine Supreme Court determined that the issues raised in the case, did not prove that the arbitrator had incurred in any of these causes or that the public order was affected.

It must be recalled that the Civil and Commercial Code of Procedure of the Nation allows to waive the appeal of an arbitration award, but such waiver does not prevent the possibility to file a motion to vacate judgment with respect to the award grounded on: (1) an essential failure of the procedure; (2) because the arbitrators rendered the award out of the agreed upon term; (3) because the arbitrators rendered the award on uncommitted issues; or (4) the fact that the award includes decisions incompatible among them (sections 760 and 761 of the Code).

In its judgment, the Argentine Supreme Court pointed out that, in previous decisions, it had determined that the intervention of the judges was only legally admissible through the stage provided for in section 760, second paragraph of the Civil and Commercial Code of Procedure of the Nation.[2] It also highlighted that said position rested on previous general jurisprudence whereby freely agreed upon jurisdiction excludes judicial jurisdiction and does not admit remedies other than those set forth by the procedural laws.[3]

As regards the extent of the judicial review of an arbitration award within the context of a motion to vacate judgment, the Argentine Supreme Court pointed out that since many years ago it had adopted a restrictive criterion, denying the possibility to review the merits of said award. Hence, in *Otto Frank* of 1922, in view of the claim of defects in the procedure, the Argentine Supreme Court stated that 'it lacks jurisdictional authority to analyze the merits of the case and review it, under the conditions in which it has been agreed upon, introduced and resolved'.[4] Such doctrine was recently confirmed when the Supreme Court considered that the causes for review provided for in section 760 of the Civil and Commercial Code of Procedure of the Nation are restrictive and do not authorise the analysis of the merits on which the award was issued by the arbitration court.[5]

It may be considered that the concepts contained in the recent judgment of the Argentine Supreme Court shall constitute a rule to interpret section 1656 of the Civil and Commercial Code of the Nation since said regulation states that: 'the arbitration agreement cannot waive the judicial objection to the final award that was contrary to the body of laws'. It seems that said regulation has opened the door for a broad objection of the award, which included the chance to review on the merits of the dispute.

However, Panel E of the National Appellate Court having jurisdiction in Commercial matters[6] had already decided that section 1656 of the Civil and Commercial Code was referred to the causes of nullity provided for in the Code of Procedure. In said judgment, the Appellate Court considered that reference to 'contrary to the law' could be interpreted only as the impossibility of waiving the right to object to the award for nullity, but that said provision does not contemplate the impossibility of waiving the right to appeal the award, which may be validly waived. Said interpretation was confirmed by Panel D of the same Appellate Court.[7]

The Argentine Supreme Court, without specifically mentioning section 1656 of the Civil and Commercial Code, has now established that the causes for review of section 760 of the Civil and Commercial Code of Procedure of the Nation are restrictive and do not authorise the review or analysis on the merits of the arbitration court's resolution. Hence, it seems to be confirmed that the proper interpretation of said section 1656 of the Civil and Commercial Code could not allow the judicial review of the merits of the award.

Said conclusion seems to be reinforced by the Argentine Supreme Court's statement whereby:

> 'the solution intended by the National Government, in fact, implies to assimilate the motion to vacate judgment regulated by said regulation with the appeal contained in sections 242 et seq of the Code mentioned above, in a clear surpassing of the limits set by section 760 of the Civil and Commercial Code of Procedure of the Nation for the motion to vacate judgment. Consequently, *the claim for the review of the merits of the arbitration award is inadmissible*' [emphasis added].

The National Government's claim to apply the *Cartellone* judgment

It must be recalled that extraordinary appeals have only been admitted against judgments that have dismissed motions to vacate against arbitration awards under the limited causes provided in the Civil and Commercial Code of Procedure of the Nation.

It has been considered that the *Cartellone* judgment had admitted the judicial review of the awards beyond the limits allowed by the Code of Procedure, because the Argentine Supreme Court had set forth in its judgment that the award may be judicially reviewed due to public order matters and also when it is 'unconstitutional, illegal or unreasonable'. Consequently, some authors held that admitting the control of the constitutionality and unreasonableness implied submitting the awards to the doctrine related to arbitrariness and that the review of the legality included the effect of the appeal which was absolutely incompatible with the waiver that may be made thereto pursuant to the explicit authorisation of the legislation (section 760 of the Civil and Commercial Code of Procedure of the Nation).[8]

In the case considered, the National Government also intended a broad review of the arbitration award by claiming doctrine established in the *Cartellone* case and held that public order had been infringed. However, the Argentine Supreme Court considered that:

> 'Said precedent dealt with a voluntary arbitration in which it was decided both, in the bidding conditions of the contract and in the arbitration commitment that the decision of arbitrators was not open to appeal and final. As regards the interests set by the arbitration court, the Supreme Court considered that the judicial review was suitable because the decision of the arbitrators affected public order. For such reason, it considered that the parties' waiver to file an appeal against the award did not prevent the revocation of the decision contained in the award as regards the calculation of interest (see whereas clauses 1st, 2nd,13th, 14th and 15th).'

When referring to *Cartellone*, the Argentine Supreme Court seemed to seize the opportunity to limit its scope and to circumscribe the judicial review of awards to the causes contemplated in the Civil and Commercial Code of Procedure of the Nation and cases in which public order is compromised, thus rejecting the application of a broadest standard of review, inherent to an appeal that was subject to the parties' waiver.

On this aspect the Supreme Court pointed out that:

> 'The suitability of the National Government's presentation would affect also the autonomy of the parties' will since they agreed that the award was final and unappealable, what would involve a serious limitation in the contractual freedom protected by the National Constitution (sections 14, 17 and 19). The Argentine law protects both, the freedom to enter into contracts, which is one aspect of the personal autonomy, and the creation of the content of the contract, which is an assumption of law to engage in a lawful industry. This is compatible with the classic jurisprudence of this Supreme Court, stated in an orthodox manner in the '*Bourdieu*' precedent, according to which, section 17 of the National Constitution protects 'all the significant interests that a man may have excluding himself, his life and his freedom' and that "[e] very right having a value acknowledged as such by the law, either originated in private law relationships, or arising from administrative acts (private or public subjective rights)… makes-up the constitutional concept of property" (pursuant to Judgments: 145:307, especially page 327). On this basis, *the Government's intent to disclaim what was agreed upon as regards the extent of the judicial review from what was decided by the arbitrator cannot be upheld.* In any case, the complaint resulting from the lack of review of the award, if any, is the result of its own discretional behavior (pursuant to quoted Judgments: 289:158, whereas clause 40, in which a case of labor arbitration freely agreed upon by the parties was considered). *To sustain the claim of the appellant would imply to validate a conduct contrary to the principle of good faith, that requires to behave according to the previous commitments voluntarily undertaken and that are rooted in regulations issued by the National Government itself, that set arbitration as a mechanism to solve controversies* (pursuant to subsection 1st article XII of the agreement approved by Act 23,396)…' [emphasis added].

Although the Argentine Supreme Court did not address the notions of unconstitutionality, illegality and unreasonableness set out

in *Cartellone*, it expressly mentioned the disruption of public order as a justified circumstance for judicial review. When it stressed again the unsuitability of the review of the merits of the arbitration award, the Argentine Supreme Court seemed to consider that, at least, the review for illegality referred to in *Cartellone* should not be admitted under the guidelines contemplated in this new judgment.

This judgment can be considered a step forward towards the promotion of arbitration as a mechanism for the solution of controversies.

Notes

1 *EN – Procuración del Tesoro Nacional c/ (nulidad del laudo del 20-Iii-09) s/ recurso directo*, CAF 12732/2009/CS1, dated 6 November 2018 (at http://public.diariojudicial.com/documentos/000/081/320/000081320.pdf).

2 See *Cacchione*, Judgments: 329:3339, and case CSJ 694/2003 (39-P)/CS1 *Pestarino de Alfani v Urbaser Argentina SA*, judgment rendered on 24 August 2006.

3 See Gutiérrez Rafael, Judgments: 237:392; De Caro Antonio, Judgments: 274:323; Unión Obrera Metalúrgica de la República Argentina – Secc. Formosa, Judgment: 289:158.

4 *Otto, Frank*, Judgments: 137:33, especially p 41.

5 *Ricardo Agustín López*, Judgments: 340:1226.

6 *Olam Argentina SA v Cubero Alberto Martín et alius, Reconsideration for the Dismissal (Recurso de queja)*, Appellate Court having jurisdiction in Commercial matters, Panel E, 22 December 2015, La Ley (10 May 2016).

7 *Amarilla Automotores SA v BMW Argentina SA, Reconsideration for the Dismissal (Recurso de queja)*, National Appellate Court having jurisdiction in Commercial matters, Panel D, 14 April 2016, LL, RCCyC (16 December 2016).

8 Julio César Rivera, *Arbitraje Comercial, Internacional y Doméstico*, 2014 Abeledo Perrot, p 676.