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Anti-Arbitration Injunctions in Argentina

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In the 2007 edition of *Arbitration Review of the Americas*, we discussed the importance of court support to arbitration and elaborated on the then current situation in the Republic of Argentina. We mainly focused on certain statements of Argentine government officials referring to the *CMS Gas Transmission v Argentina Republic* case pending before ICSID, and on the government views on whether Argentina would undertake to carry out potentially adverse final awards.[1]

We also analysed a recent holding of Argentina's highest court on constitutional and federal matters, the National Supreme Court of Justice, in *José Cartellone Construcciones Civiles v Hidroeléctrica Norpatagónica o Hidronor*. The court stated in an obiter dictum that arbitral awards would always be subject to appeal whenever considered "unconstitutional, illegal or unreasonable".

This obiter dictum was construed by some legal scholars as a potential hazard to future ICSID awards, which on the view stated by the court might be subject to court supervision. Finally, we concluded that an official statement of the Argentine attorney general in the *CMS* case that Argentina will comply with section 54.1 of the ICSID Convention brought some hope that the country will respect its international commitments.

However, an anti-arbitration injunction filed by Argentina, which sought to interfere with an international arbitration, is proving otherwise. Argentina requested an interim measure before the Argentine Court of Appeals in Administrative Matters, 4th section (CNCAF), asking for the suspension of the arbitration proceedings in *National Grid Transco plc (UK) v Argentina,* being held in Washington, DC. On 3 July 2007, the CNCAF, in *EN-Procuración del Tesoro v Cámara de Comercio Internacional* (*Argentina v ICC*)[2] issued an interim measure ordering: (i) the panel of arbitrators – Messrs Andrés Rigo Sureda, Alejandro Miguel Garro and Eli Whitney Debevoise – to suspend the arbitration proceedings in the *National Grid Transco* case; and (ii) the claimant to abstain from moving forward with the arbitration proceedings.

Since the *National Grid Transco* case follows UNCITRAL rules, the eventual enforcement of the award differs from what is provided under ICSID arbitration. While in the former enforcement is governed by the 1958 New York Convention, which admits court supervision,[3] in the latter no such court supervision is allowed. That is, Argentine courts would probably have had the chance to control the award of the *National Grid Transco* case at the time of enforcement.[4]

After the anti-arbitration injunction was rendered, the panel of arbitrators informed the parties that they would not suspend the proceedings. Therefore, claimants shall have no interest to reverse the decision,[5] so the ruling shall remain as an unsuitable precedent. For instance, a potential enforcement of the *National Grid Transco* case in Argentina will have to face this precedent with a negative forecast for claimants.

The question examined here is not the right of Argentina as respondent to present its case or to resort to any remedy available under the arbitration rules or under the national legislation of the forum or in the country where recognition and enforcement of the award is sought. Rather the issue under analysis is Argentina's conduct, as it interferes through a local court with an international arbitration when, at the time the interim measure was rendered, both Argentina and the local court should have known that all local courts lacked jurisdiction over the case.

Argentina has signed more than 50 bilateral investment treaties (BITs) and been sued in more than 29 international arbitrations (ICSID and others) and the *National Grid Transco* case will probably remain as a study case for the investor–state dispute resolution methods and its effectiveness. For the reputation of Argentine courts, it would be desirable that the decision rendered in the *Argentina v ICC* case is promptly reversed.

Statement of the case

The *Argentina v ICC* decision states that National Grid Transco plc, a company incorporated in the UK, owned an interest in Transener, a leading company in the public service of the extra-high-voltage electricity transmission system in the Republic of Argentina, and that National Grid Transco began an international arbitration arguing that the results of the enactment in 2002 of the Argentine emergency laws affected its investment in Transener and, as a consequence, breached the UK–Argentine BIT.

The UK–Argentine BIT refers to arbitration under the UNCITRAL arbitration rules when the parties do not reach an agreement on other types of arbitration (ie, ICSID or ICSID Additional Facilities) in a three-month period.[6]

Under the UNCITRAL arbitration rules, National Grid Transco and Argentina appointed Mr Debevoise and Mr Garro as arbitrators, respectively, and those arbitrators appointed Mr Rigo Sureda as chairman of the panel.[7]

On 20 December 2004, Argentina challenged Rigo Sureda, arguing that there were serious doubts regarding his impartiality or independence. The grounds for the alleged doubts were the links between Rigo Sureda and the Argentine attorney Santiago Tawil: the former acted as chairman in the *Azurix* and *Siemens* cases against the Republic of Argentina, where Tawil acted as attorney for the claimants; and in *Duke Energy International Peru Investments N° 1 Ltd c/Republic of Peru*, Tawil was appointed arbitrator by claimants who were represented by Fulbright & Jaworski, a law firm where Rigo Sureda was senior adviser.

Neither National Grid Transco nor Rigo Sureda accepted the grounds for the challenge. According to article 12 of the UNCITRAL arbitration rules, the challenge should be decided by the appointing authority designated by the secretary-general of the Permanent Court of Arbitration (PCA) at The Hague. Thereupon, the secretary-general of the PCA designated the Court of Arbitration of the ICC to decide on the challenge.

On 2 January 2006 the Court of Arbitration of the ICC communicated to the parties its decision to reject the challenge submitted by Argentina. According to article 2.13 of the ICC Rules,

> *[d]ecisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final. The reasons for decisions by the Court as to the appointment, confirmation, challenge, or replacement of an arbitrator*

on the grounds that he is not fulfilling his functions in accordance with the Rules within the prescribed time limits, shall not be communicated.

Argentina's reaction was to file an appeal for annulment of the decision. Argentina resorted to the local courts, based on section 760 of the Argentine Civil and Commercial Procedural Code (the Procedural Code), which allows an annulment proceeding against the final award of an arbitral panel.

Argentina requested the annulment of the decision of the Court of Arbitration of the ICC, arguing that the decision rendered was not only wrong but also that failure to communicate the reasons to reach that decision affected its constitutional rights of defence. In addition, Argentina requested CNCAF interim measures ordering: (i) the panel of arbitrators to suspend the arbitration proceedings; and (ii) National Grid Transco to abstain from going forward with the arbitration process until a final court decision on the annulment is rendered.[8]

The CNCAF requested the Argentine Ministry of Foreign Relations to obtain from the panel a copy of the *National Grid Transco* case. The ministry, through the Argentine embassy in the US, addressed the request to the arbitral panel; but such request was not answered at two opportunities.

Therefore, in absence of a due response from the panel, CNCAF considered it appropriate to issue the interim measures to protect the alleged violation of the constitutional rights of Argentina.

Surprisingly, CNCAF in its own decision argued that it could not analyse its own jurisdiction over the case, because the panel of arbitrators did not comply with the submission of the copy of the docket requested. Even more astonishing is the failure of CNCAF to request a copy of the arbitration docket for Argentina before deciding on the case. It did so on 17 July 2007, after issuing the anti-arbitration injunction.

Furthermore, the anti-arbitration injunction resolution declared section 196 of the Procedural Code applicable, which reads:

a judge must not order interim measures when the case is not of his competence. However, the interim measure ordered by a non-competent judge will be valid whenever it complies with the other sections of the chapter, but this will not prorogate the jurisdiction. The judge that ordered the interim measure will deliver the file to the competent judge as soon as required.

The hearings in the *National Grid Transco* case were scheduled for 9 July 2007. A few days before, Argentina requested and CNCAF issued the anti-arbitration injunction. Their ruling stated that if the arbitration proceding continued and, thereafter, the award was issued, the request for annulment of the decision on the challenge of Mr Rigo Sureda would have been late and ineffective. Therefore, CNCAF found that Argentina had a right to the requested injunction, so that the decision on Rigo Sureda's challenge could be revisited in due time.

Analysis

It is worth analysing whether the CNCAF had jurisdiction over the arbitral proceedings and commenting on some general issues related to the challenge of arbitrators. Since the *Argentina v ICC* docket does not contain enough information about the grounds on which Rigo Sureda was challenged, we will not include any comments on that matter.

In the Argentine/UK BIT, Argentina agreed to prorogue the jurisdiction of investor–state disputes to international arbitration.[9] Although some Argentine scholars have questioned Argentina's right to prorogue those disputes to international arbitration, we understand that a reasonable construction of the Argentine Constitution, international treaties, and national laws authorise said prorogation. However, it would exceed the scope of this analysis to expand on these issues.

Did CNCAF have jurisdiction over the appeal for annulment of the decision of the ICC under section 760 of the Procedural Code? Did it have jurisdiction to hear on an anti-arbitration injunction requested under section 195 of the Procedural Code?

The only possible answer to both questions is plainly, no.

From the statement of the *Argentina v ICC* decision and its docket, we know that the *National Grid Transco* case is being held in Washington, DC. Also, that National Grid Transco suggested The Hague as the forum for the arbitration, but finally accepted Argentina's proposal of Washington, DC. Therefore, any need of assistance, control or supervision of national courts should have come from those of the agreed forum.

It is an accepted principle in an international arbitration (except in ICSID arbitration, which is considered a stateless arbitration), that "the law governing the arbitration (the so-called *lex arbitri*) is typically considered to be the law of the country where the proceedings are held and the award rendered".[10] And, "[t]he law governing the arbitration determines the relationship between the arbitral tribunal and national courts. It will, for instance, determine whether, and to what extent, judicial review of the award or court intervention during arbitral proceedings is authorized."[11]

It is also submitted that where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate prima facie, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings.[12]

The New York Convention, ratified by Argentina in 1998, reinforces this position obliquely.[13] "Article V(1)(d) permits non-recognition of an arbitral award if '[t]he composition of the arbitral authority or the arbitral procedure was not in accordance… with the law of the country where the arbitration took place'. Similarly, Article V(1)(a) permits non-recognition of an arbitral award if… the arbitration agreement was not valid under the curial law."[14] Thus, it is clear that US federal courts would have jurisdiction over any question raised on the *National Grid Transco* case arbitration proceeding.

Is section 196 of the Procedural Code, which authorises a non-competent court to issue an interim measure when urgency advises to do so, applicable to international commercial arbitration?

Again, no is the only possible answer.

The CNCAF and Argentina should have known that the anti-arbitration injunction issued by an Argentine court against an arbitration whose forum was Washington, DC would be futile, because the Argentine court does not have authority over the arbitrators. In the *National Grid Transco* case the panel of arbitrators refused to follow the order of the CNCAF.

Local courts decided otherwise in a similar precedent, *Reef Exploration Inc v Compañía General de Combustibles*.[15] The Court of Appeals in Commercial Matters (CNCom), Section D, allowed the enforcement of an award, even when a previous decision of CNCom, Section B, found that Argentine courts had jurisdiction over the matter being held in an AAA arbitration in Dallas, Texas.

Section B of CNCom issued a ruling over jurisdiction that resulted in a typical anti-arbitration injunction. The ruling ordered the AAA arbitration panel to decline its jurisdiction in favor of Argentine courts. The panel of arbitrators of the *Reef* case did not accept the order. When the time of enforcement of the *Reef* arbitral award arrived, Section D of CNCom argued politely that Section B's ruling would have a point only if the panel of arbitrators agreed on its terms.

Dr Horacio Grigera Naón, referring to the *Reef* case, stated that "[t]he surrealistic facets of the situation are underlined by the obvi-

ous fact that there is no superior, overarching, Argentine, national or international court with authority to resolve a supposed conflict of jurisdictions between an Argentine court of law and international arbitral tribunal sitting in a different country."[16]

Additionally, the Federal Arbitration Act (FAA) is applicable in an international arbitration held in Washington, DC, whenever parties have not agreed on any procedural laws. Hence US federal courts have jurisdiction in any question raised in the arbitration proceedings whenever the rules chosen by the parties or national mandatory laws provide for court intervention.

Consequently, it was very clear at all times that CNCAF did not have jurisdiction over the matter or the appeal for annulment (section 760 of the Procedural Code). The argument invoked by CNCAF that section 196 would authorise an anti-arbitration injunction issued by a non-competent national court is absurd. Under such section, once CNCAF concludes that it lacks jurisdiction, its duty is to send the file to the competent court. Would the CNCAF send the *Argentina v ICC* case to a US court? In our opinion the CNCAF should have simply rejected the injunction, stating that it was not competent, and the defendant should have gone before the competent US court.

It is further noted that section 760 of the Procedural Code does not require participation of the counterparty in the appeal for annulment. This section, though likely unconstitutional, may be ultimately beneficial for National Grid Transco, who may argue at a future stage (the time of enforcement, if any, in Argentina) that it was not a party in the *Argentina v ICC* case and, therefore, was not bound by any decision taken in said procedure. This is the principle applied by CNCom, Section D, in the *Reef* case.

As we explained above, there is insufficient information in the docket to examine substantially the grounds for challenging Mr Rigo Sureda as chairman. However, what is clear under Argentine law is that national courts should abide by the choice of the rules and forum agreed to by the parties (in the *National Grid Transco* case, UNCITRAL Rules and Washington, DC).

We will briefly describe which procedure would have applied in Argentina in the absence of an agreement between the parties. The Procedural Code provides that an arbitrator could be challenged under the same rules applicable to the challenge of a judge. Such challenge should be filed before the arbitral panel, and if the arbitrator does not accept the grounds for the challenge, the lower court of ordinary jurisdiction should take the final decision on the matter (Procedural Code, sections 764 and 747), as said decision is not subject to appeal.

Therefore, had the *National Grid Transco* case been held in Argentina, even in that case CNCAF would not have competence to decide on the matter related to the challenge of the arbitrator. In the *Argentina v ICC* case, CNCAF missed the point because it misconstrued the law applying procedural rules established to question the award when the matter was the challenge of an arbitrator.

In addition, Argentina indicated the UNCITRAL Model Law as a secondary source of law to persuade CNCAF. Again, the UNCITRAL Model Law respects party autonomy and the procedure chosen by the parties (article 13(1)). When the parties have not chosen any procedure, and the questioned arbitrator does not accept the grounds for the challenge, the panel of arbitrators should decide on the matter (article 13(2)). Such decision might be reviewed before the competent court designated under article 6 of the UNCITRAL Model Law but such review does not suspend the arbitration and the decision reached by the competent court is final (article 13(3)). Although Argentina has not yet adopted the UNCITRAL Model Law it is widely held throughout the arbitration community that this model law should be adopted.

As it results from this analysis, it is unlikely that CNCAF would have any say regarding the challenge of the arbitrator in any possible regular proceeding derived from the rules and forum agreed to by the parties.

Conclusion

In our last contribution to *Arbitration Review of the Americas*, we envisaged certain Argentine government acts that might have constituted a new policy towards arbitration, respectful of international duties even when Argentina was a party to such proceedings.

The analysis of the *Argentina v ICC* case shows that the foregoing policy turned out to be not as established as desired. Both the conduct of Argentina in submitting an appeal to a local court in a matter that was clearly beyond its jurisdiction and the decision rendered by said court intending to interfere in an international arbitral proceeding have helped to fix the idea that Argentina lacks a policy of court support for arbitration.

Furthermore, it was also clear that the CNCAF lacks jurisdiction in a challenge of an arbitrator both under Argentine procedural law and under the applicable laws of the forum, Washington, DC. The decision has provoked a sense of mistrust of the Argentine courts.

Argentina's conduct is questionable. Argentina obtained an anti-arbitration injunction but this interim measure was futile. The panel of arbitrators where the *National Grid Transco* case is pending refused to follow the order and consequently it seems that the decision will not cause any harm to National Grid Transco, at least for the moment.

Probably, the Republic of Argentina has not correctly assessed the gains and losses of the decision to file the case before the local courts. The *Argentina v ICC* decision did not add to its case, and was a serious setback to the republic's image before the international community.

Notes

1 A final award would be the one rendered by the panel of arbitrators, as the ICSID Convention sets forth that "…each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State…" (section 54.1).

2 *EN-Procuración del Tesoro v Cámara de Comercio Internacional*, Lexis N° 35010977

3 See article V of the New York Convention.

4 We do not ignore that if NGT seeks the enforcement of the award in a third country, the Argentine courts may not have the chance to supervise the award.

5 NGT was not a part of the Argentine procedures.

6 See, article 8(3) of the UK–Argentine BIT.

7 Article 7 of the UNCITRAL arbitration rules.

8 Argentina invoked section 195 of the Procedural Code and article 26 of the UNCITRAL arbitration rules.

9 Supra, 5 note.

10 Reisman, W Michael et al, *International Commercial Arbitration* (Foundation Press, 1997), 172.

11 Idem, 691.

12 *James Millar & Partners Ltd v Withworth Street Estates (Manchester) Ltd*, 1 ALL E.R. 796, 801-02, 809-10 (House of Lords 3 March, 1970), cited in Reisman et al, *International Commercial Arbitration*, 692.

13 Born, Gary B, *International Commercial Arbitration in the United States* (Kluwer Law, 1994), 163.

14 Idem.

15 Lexis n° 20032229.

16 Grigera Naón, Horacio A, 'Competing Orders Between Courts of Law and Arbitral Tribunals: A Latin American Experience', 739 PLI/Lit 663.

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