The changing opinion of Tribunal D

Tribunal D of the Commercial Court of Appeals resolved in favor of an arbitral tribunal with competence to decide over the constitutionality of the economic emergency laws dictated at the beginning of 2002, in relation to the named "pesification" of the debts agreed in foreign currency.

In a decision commented previously, *"Rivadeneira, Hugo Germán c/ABN AMRO Bank N.A. y otros s. ordinario"*, from February 28, 2008, Tribunal D of the Argentine Commercial Court of Appeals resolved, amongst other things, that *"It is not argued that the arbitration clause agreed between the parties constitutes a contractual convention to which they should submit as to the law (cciv 1997). But this stipulation, according to logic, must be interpreted according to what the parties most plausibly understood or could have understood, acting with care and precaution (cciv 1198). Therefore, even if this principle impedes to grant as wanted something which is not usually wanted, it does not look like that is the situation in the present case, since the unforeseen economic cataclysm that occurred after the signing of the contract (it should be remembered that happened in 1999), does not allow to consider that it was the parties' will to submit before arbitrators, and within the scope of the arbitration clause, the interpretation of laws and other norms of economic emergency and the determination of costs and damages that were alleged to have been suffered."*

Just as has been indicated in our comment,[i] we understand that the doctrine established in it was a step backwards from the correct doctrine.

Tribunal D seems to have thought over this matter, and having once again the opportunity of deciding over the competence of an arbitral tribunal to decide on constitutional matters, it has done so in a way opposite to the abovementioned decision.

In the decision rendered in *"ARC & CIEL S.A. c. Sky Argentina S.C.A. y otro"*, on April 3, 2008,[ii] Tribunal D resolved in favor of an arbitral tribunal with competence to decide over the constitutionality of the economic emergency laws dictated at the beginning of 2002, in relation to the named "pesification" of the debts agreed in foreign currency.

On this opportunity, Dr. Gerardo G. Vassallo, the judge in charge of writing this decision, sustained:

"On the other side, it is also inadmissible the unconstitutional label given to the emergency laws by the plaintiff. (…) (a) There is no objection for the subject to be treated by the Arbitral Tribunal, since as it has been highlighted by the Argentine Supreme Court of Justice, that iuris arbitrators may solve any matter submitted to them except for those left out by law, be them purely legal, be them mixed or merely related to facts; and in the broad analysis of cases, they may take into consideration all the reasons they bring, both legal, and constitutional; therefore, the fact that throughout the debate a reason of constitutional order appears, brought by one of the parties, it may not have the effect of displacing the arbitral tribunal (accord. to Argentine Supreme Court of Justice, 8/7/1935, "S.A. Puerto de Rosario c/ Gobierno Nacional", Decisions 173:221…)"

It is worth mentioning that the arbitral tribunal had decided in favor of the constitutionality of the emergency laws, a position shared by Tribunal D's decisions. This coincidence in criteria may be taken as a reason why the Tribunal, this time did bend towards recognizing the arbitral tribunal's competence over matters of constitutionality.

However, it is striking to note that the sentence dictated in the case *"Rivadeneira"* has been, apparently, an isolated decision of that Court, since that if previous decisions the same Tribunal had shown itself in favor of arbitration and of the arbitrators being able to understand and apply emergency laws dictated after the signature of a contract – in this case – the entering into the corresponding arbitration clause.

This was established in the decision made in the case *"Mobil Argentina S.A. c/ Gasnor S.A. s/ Laudo Arbitral s/ Queja",* on 08/08/2007.[iii]

It said there:

"On its side, the affirmation by the plaintiff according to which the waiver of recourses made could not comprehend the hypothesis of a future controversy based on the application of emergency laws dictated after the signing of the arbitration clause, misses the point –making it therefore unacceptable- that such waiver was not made to operate in arbitrations that should be decided according to the laws in force at the moment of the agreement of the given arbitration clause but, logically, also to be enforceable for arbitrations dealing with laws that were dictated in the future. It is that, in its essence, arbitration clauses refer always to future disagreements, and not to present disagreements that should be resolved according to the existing laws. In effect, far from referring to present conflicts, the arbitration clause (pactum de compromittendo) refers to the obligation that the parties have of submitting their "future" differences to arbitration (according to Martínez Vázquez de Castro, L., "La cláusula compromisoria en el arbitraje civil," Civitas, Madrid, 1984, p. 34; Fernández de la Gándara, L. y Calvo Caravaca, A., "Derecho Mercantil Internacional", Tecnos, Madrid, 1993, p. 284,) and it is obvious that those future controversies shall be examined under the law in force at the time in which they appear or are solved (arg. Art. 3° Civil Code) without being able, then, that it may validly be said that the generic waiver to recourses established in the arbitral agreement does not comprehend, within it, the waiver to a judicial questioning of the award (necessarily in a future time) that is based on the application of the laws in force at the time the conflict appears or in force at the moment of being solved.
Admitting anything else would be like accepting a division in the treatment of cases submitted to arbitration, since there would be one type according to which the waiver of judicial recourses would have broad application for having been rendered according to the laws in force at the time of the signing of the arbitration clause; and there would be another type according to which, for having been rendered according to laws that were not sanctioned at the moment of signature of the arbitration clause, would be susceptible of judicial recourses notwithstanding any existent waiver. It is evident that such an interpretation is clearly inadmissible."

We will have to wait for new decisions related to this aspect of arbitration in order to know, clearly, which is the definite position of the Tribunal when it decides on the constitutionality of emergency laws and its application.

It is impossible to know the grounds that generated the change of position, but what may be affirmed is that the sentence under comment is a positive step in the correct direction, since it is necessary that case-law heads that way, making uniform the decisions and doctrine about it,

generating in this way total security to the parties that include arbitration clauses in their contracts.

However, it is necessary to stress that it would be very positive to have a uniform legal doctrine in the Commercial forum, maybe through a plenary decision, or through a final decision from the Argentine Supreme Court of Justice that does not leave room for doubts and that leads to a reliable path and ends with the uncertainty generated up to this moment through contradictory decisions.

CONTACTS

For more information, please contact:

Manuel J Mariño

Lucila I M Hemmingsen

[i] *See Marval News from May, 2008, "A step backwards in terms of correct case law."*

[ii] *Published in La Ley 21/05/2008, 6 – IMP 2008-11 (June), 1002.*

[iii] *Published in La Ley online.*