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# MDIS v. CORAL: Can Two Challenged Arbitrators Render An Enforceable Award?

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Recently, the First Commercial Chamber of the Superior Court of Lima issued an annulment decision in the case MDIS v. CORAL. The court had to deal with an arbitral award rendered by two arbitrators that had been challenged (without the participation of the other arbitrator) and while the arbitration procedure was suspended.

In this case, a Peruvian Ministry (Ministerio de Desarrollo de Inclusión Social – "MDIS") and Consorcio de Alimentos S.A.C. ("Coral") executed a contract for food supply for a social program. The contract set forth that any dispute between the parties must be referred to an ad-hoc arbitral tribunal seated in Lima, Peru. A dispute arose when one of the vehicles, carrying part of the food to be delivered, crashed. The Ministry refused to receive the goods arguing that the food did not comply with the quality requirements established in the contract.

Coral submitted the controversy to arbitration. During the arbitration proceedings, MDIS challenged two of the members of the arbitral tribunal (the President and Coral's appointed arbitrator) before the Colegio de Arbitraje Administrativo ("SNA-OSCE") (the appointing authority). As will be explained below, according to the relevant provisions of the Peruvian Procurement Administrative Law, whenever two arbitrators are challenged, the arbitration procedure must be suspended. In the case, the non-challenged arbitrator issued a procedural order suspending the arbitration procedure. However, the two challenged arbitrators issued a procedural order rejecting the suspension of the arbitration. MDIS opposed this order.

While the SNA-OSCE decision on challenging was pending, the two challenged arbitrators issued an arbitral award in favor of Coral. The other arbitrator neither signed the award nor participated in the deliberations. MDIS objected to this issue before the arbitral tribunal but its objection was rejected.

MDIS requested the set aside of the award before the First Commercial Chamber of the Superior Court of Lima. MDIS argued that the two arbitrators had violated due process rights of the parties and that the arbitration procedure was not conducted according to the Arbitration Law and the applicable rules of procedure. As explained, the Law provides that the arbitration proceeding should be suspended when two or more arbitrators have been challenged.

On November 2, 2015, the First Commercial Chamber of the Superior Court of Lima annulled the award. In an ambiguous decision, the Court concluded that there had been a violation of the due process of MDIS because of the two contradicting decisions, one of the non-challenged arbitrators and the other of the two challenged arbitrators. The Court held:

> "In the proceedings there was two procedural orders manifestly contradictory (one that ordered the suspension and the other which considered that the arbitral tribunal has an impossibility to resolve and decide the suspension), thus obviously affecting the right of due process of MDIS who challenged the two arbitrators and requested the suspension of the arbitral proceedings."

The decision of the court was correct. The award should have been annulled. However, we shall manifest our discrepancies with the reasoning of the decision.

The seat of the arbitration was Lima, thus the applicable law was the Peruvian Arbitration Law. Our law is based on the UNCITRAL Model Law of 1985 with the amendments of 2006. But, note that since this arbitration concerned a public entity, the Peruvian Procurement Administrative Law and its Regulations were also applicable.

Article 226 of the Regulation of the Peruvian Procurement Administrative Law, which is also applicable in ad-hoc arbitrations, establishes that when two arbitrators are challenged, the challenge has to be decided by the SNA-OSCE. Furthermore, the Regulations establish that the arbitration proceedings are to be suspended. So what really happened was a breach of this provision of the applicable law. The procedural orders never came to existence because the arbitration was suspended in light of the challenge and the relevant provisions of the applicable law.

Another feature that could be alleged is that the two arbitrators rendered an award without a proper deliberation of all the members of the tribunal. In fact, the award was a complete surprise. According to the practice, it is usual that the arbitrators fix a time to render its award; however, this never occurred. Here, the challenged arbitrators rendered the award only three days after MDIS' challenge and never fixed a time to issue the award.

Peruvian courts have also established that a failure of deliberations can be a ground for annulment. In Pure Biofuels v. Blue Oil Trading, another recent case, the Second Commercial Chamber of the Superior Court of Lima had to deal with an allegation of one arbitrator that argued that he was excluded from the deliberations concerning the arbitral award. The Court found (in its appreciation of facts) that the arbitrator participated in the "electronic deliberation" and denied the request for annulment.

The challenge decision is still pending. Under the provisions of the Administrative Law applicable to arbitrations with public entities, the arbitrators who rendered the award can be disqualified, in which case two new arbitrators would need to be appointed.

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