

First Argentine Court Judgment on the Recognition of an ICSID Award

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Until recently, recognition and enforcement of investment awards remained untested before Argentine courts. This changed in 2015. On August 18, 2015, Chamber A of the National Court of Appeals on Commercial Matters, rendered a judgment on the recognition of an ICSID award in the court case “CCI – Compañía de Concesiones de Infraestructura S.A. le pide la quiebra República de Perú” (the “Court of Appeals” and the “Judgment”, respectively. Published in Argentine Law Journal La Ley on December 30, 2015).

Background of the case

Convial Callao S.A. and CCI – Compañía de Concesiones de Infraestructura S.A. (“Compañía CI”) initiated an ICSID claim against the Republic of Peru under the Argentina-Peru BIT.

The investors claimed that Peru had breached the BIT protections through the early termination of a concession agreement to design, build, operate and maintain the so-called Callao Expressway.

The Tribunal rendered its award on May 21, 2013 (the “Award”). It dismissed the

claims in full and ordered the claimants to pay Peru's arbitration costs in the amount of US\$ 2,117,489.27.

Thereafter, Peru filed a bankruptcy claim against Compañía CI before Argentine courts. It argued that the Award was enforceable in Argentina as a final Argentine court judgment in accordance with article 54 of the ICSID Convention and alleged that Compañía CI defaulted on its obligation to pay the arbitration costs.

Pursuant to Argentine Bankruptcy Act, the applicant is not required to demonstrate the existence and validity of its credit, but just the likelihood of it (section 83 of the Argentine Bankruptcy Act).

Recognition and Enforcement of an ICSID Award

A distinction must be made between ICSID and non-ICSID awards. Recognition and enforcement of non-ICSID awards in Argentina are subject to exequatur proceedings. The petitioner must submit the award before local courts and request that it be recognized as a binding decision pursuant to Argentine law—which includes a formal review of the award and an analysis whether the award abides by Argentine public policy principles.

Note that, if no treaty applies, Argentine courts must recognize and enforce the award in accordance with the requirements set down by the domestic rules of procedure. If a treaty applies (e.g. the 1958 New York Convention, the Inter-American convention on international commercial arbitration -Panama, 1975-, the Inter-American Convention on the extraterritorial validity of foreign judgements and arbitral awards -Montevideo, 1979-), the court must abide by the treaty provisions which prevail upon domestic laws under Argentina's Federal Constitution (Section 75.22).

Under the ICSID Convention, awards are binding and shall not be subject to any appeal –other than those provided in the Convention itself– and shall be recognized and enforced by each Contracting State as if it were a final judgment of a court in that State(ICSID Convention, articles 53 and 54).

Accordingly, Argentine courts cannot subject ICSID awards to exequatur proceedings.

The Judgment

The First Instance National Court on Commercial Matters rejected Peru's petition on a decision dated April 23, 2015. It considered that the Award could not be deemed sufficient legal title unless it first went through an exequatur proceeding to be recognized and become enforceable in Argentina. Peru appealed the dismissal.

The Court of Appeals overruled the First Instance Court's decision and ordered the bankruptcy claim to move forward. In its Judgment, it pointed to articles 53 to 55 of the ICSID Convention and considered that:

(a) The bankruptcy claim was submitted by an ICSID Contracting State against a national of another Contracting State. The Court of Appeals noted that the petitioner did not seek enforcement of a decision against the Argentine State, but against a private entity.

(b) The ICSID Convention provides for no court remedy and excludes any court intervention with respect to an ICSID award; and

(c) The party seeking the recognition or enforcement of an ICSID award must only submit a certified copy of the award to the competent court or authority.

The Court of Appeals concluded that an ICSID award does not require exequatur proceedings in order to be recognized or enforced. It further clarified that, "having Argentina adhered to such convention, it waived the exequatur proceeding for the recognition and enforcement of awards rendered by an arbitration tribunal constituted under the ICSID Convention." (See, ¶ 6).

As obiter dictum, notwithstanding the above conclusion, the Court of Appeals held that the judges preserved the attribute to exercise their powers with prudence, controlling a possible violation of public policy principles. In this regard, it underscored that the Federal Supreme Court has considered that Argentine international public order incorporates the principle of due process of law.

The Judgment did not distinguish that, while Argentina's National Code of Procedure and international treaties provides for the public policy defense (National Code of Procedure, section 517; NY Convention, section V.2.a; Panama Convention, section 5.2.b.; Montevideo Convention, section 2.h), the ICSID convention does not.

In general, the Judgment properly construed the ICSID Convention. As the first court decision on the recognition of an ICSID award, it correctly established that an ICSID award may be recognized and enforced in Argentina without being first subject to an exequatur proceeding. The Judgment distinguished the particular regime applicable to ICSID awards from the rules that apply to non-ICSID awards.

The reference, in obiter dictum, to a potential public policy screening of an ICSID award could raise some concerns. However, it could be explained once both the Argentine Government's policy in the last few years and the Argentine court's practice on recognition and enforcement proceedings is properly taken into account. We will address these two matters in turn.

As it is widely known, since September 2007 –when the first ICSID award against Argentina became final–the Argentine government has refused voluntary compliance with obligations resulting from the awards by arguing that investors must submit awards before local courts and follow the local enforcement proceedings applicable to domestic judgments against the State. (See, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, September 25, 2007). This position was officially delivered in the arbitration proceedings, formal government letters and further made public through media articles and some legal scholars' writings.

As a result, foreign investors have refrained from pursuing award enforcement procedures against Argentina in Argentine courts. At the time, there was no clear prospect of reaching a successful outcome. The Argentine courts' intervention could lead to further disputes, particularly if the award was subject to a public policy scrutiny.

With respect to the Argentine courts' practice, the losing party frequently raises the public policy defense to resist recognition and enforcement of any arbitral award in Argentina, and Argentine courts grant due consideration to such defense.

In fact, the Argentine Civil and Commercial Code –in force as from August 1, 2015–provides that the public policy defense cannot be waived, since the parties to an arbitration agreement cannot waive the right to challenge an award which is contrary to the legal system (Section 1656). Recently, in *Claren Corporation v. the Argentine Government*, the Argentine Supreme Court resorted to the public policy

defense to refuse recognition of a U.S. court judgment rendered against Argentina. (See, Argentine Federal Supreme Court, “Claren Corporation e/ E.N - arts. 517/518 CPCC exequátur s/ varios”, March 6, 2014). In that case, the Supreme Court deemed that a foreign judgment ordering the Argentine Government to pay outstanding amounts owed under bonds subject to the 2002 sovereign default violated Argentine public policy principles.

Based on the above, we believe that the Judgment should be read in context. At its core, it is a substantial step towards the appropriate application of the ICSID Convention. The Judgment departs from a Government policy contrary to the proper enforcement of ICSID awards and, although it makes reference to the Argentine courts’ power to determine whether an award complies with public policy principles, the court did not actually engaged in any such review.

It still remains to be seen whether, with respect to an ICSID award rendered against Argentina -and not an Argentine investor-, the competent courts will observe the ICSID Convention provisions regarding the enforcement of arbitral awards.