

Paving the Way Forward: the Supreme Court's Ratification of Grounds for Annulment of Arbitral Awards in Argentina

Kluwer Arbitration Blog

January 31, 2018

Leandro Caputo and Martina Monti (Bruchou, Fernández Madero & Lombardi (BFM&L))

Please refer to his post as: Leandro Caputo and Martina Monti, 'Paving the Way Forward: the Supreme Court's Ratification of Grounds for Annulment of Arbitral Awards in Argentina', Kluwer Arbitration Blog, January 31 2018,

<http://arbitrationblog.kluwerarbitration.com/2018/01/31/paving-way-forward-supreme-courts-ratification-on-grounds-annulment-arbitral-awards-argentina/>

The judicial review of arbitral awards has been a continuous topic of discussion amongst scholars and legislators. Considering the major effects of the seat of the arbitration in annulment proceedings, even when the arbitral award is in principle final and binding, local legislators are faced with the need to balance the aim of assuring the finality of awards with the need for judicial control to guarantee a certain degree of fairness. Verily, excessive judicial review could lead to re-litigation of the case in the domestic forum, which in turn would contravene the very purpose of an arbitration proceeding which seeks finality.

In its most-recent decision, the Argentine Federal Supreme Court (the "Supreme Court") made its own mark in the debate over judicial control of arbitral awards by crystallizing the development of a long line of case law by ratifying the limited reach of judicial control of annulment proceedings of awards.

In the judgment handed down on 09/05/2017 in the case Ricardo Agustín López [et al.] v. Gemabiotech S.A., the Supreme Court recognized the grounds for annulment contained in sections 760 and 761 of the National Procedural Civil and Commercial Code (the "Procedural Code"). Section 760 states that arbitral awards may be set aside if: (i) there is an essential flaw in the proceedings - which could include the failure to give reasons for the decision, constituting a violation of the due process of law-, (ii) an award is rendered beyond the stipulated term and (iii) an award is rendered on issues not listed to be resolved. On its part, section 761 adds that (iv) an award may be annulled if it contains incompatible and contradictory decisions. In essence, the Procedural Code is the local judges' primary guidepost in order to decide whether or not to set aside an award.

Ricardo Agustín López [et al.] v. Gemabiotech S.A.: A Brief Overview

The application arose from an arbitration where the plaintiffs requested the payment of the price of shares they had sold to the respondent. The respondent filed a counterclaim, alleging the plaintiffs' breach of various contractual clauses. Soon thereafter, the plaintiffs sought the suspension of the proceedings -which was later denied by the arbitral tribunal- on the basis of the existence of parallel criminal proceedings instituted by the respondent against the plaintiffs.

An arbitral award was eventually rendered in favor of the respondent, but was later annulled by Chamber F of the National Court of Appeals on Commercial Matters (the "Court of Appeals"), as it considered that the arbitral tribunal should have postponed the issuance of the final award until the

decision in the parallel criminal proceedings was resolved.

The annulment decision was elevated to the Supreme Court, whereby the Court of Appeals decision was revoked as the award had been annulled for reasons different than those set forth in the Procedural Code, which contained an exhaustive list of grounds for annulment. In other words, the plaintiff had not alleged that its grievance fell within any of the causes that the law exhaustively enabled for the judicial review of an arbitral award by means of a recourse of annulment. Even more so, the Supreme Court added that the Court of Appeals did not articulate the plaintiff's grievances upon any of the grounds that would enable the request of nullity, nor therefore, did it examine the extent of its jurisdiction. On the contrary, it entered directly into the treatment of issues relating to the merits of the dispute, according to its own assessment of the claims and defenses wielded by the respondent, as well as the records of the criminal case.

Crystallization of Previous Case Law and Lessons Learnt from the Supreme Court's Decision

The Supreme Court's ruling in *Ricardo Agustín López [et al.] v. Gemabiotech S.A.* strikes a balance between the need for arbitration proceedings to render final decisions and the need for judicial review and supervision. By stating that the judicial review of an arbitral award must be limited to verifying the existence of grounds for annulment expressly stated by the Procedural Code, it not only ratified that the judicial control of awards is limited, but also crystallized the development of Argentine jurisprudence regarding the matter.

In this sense, Argentine precedents have supported a limited judicial review of arbitral awards. For instance, in the July 2013 case *Seven Group v. ADT Security Services S.A.*, Chamber F of the Court of Appeals denied the request for annulment of the award as the plaintiff had essentially presented a full-fledged appeal, not an annulment proceeding. In fact, it stated that: "(...) the judge must limit himself to resolve the existence of expressly indicated grounds for annulment which may affect the validity of the arbitral award", and even added that those express grounds for annulment were found in sections 760 and 761 of the Procedural Code.

Similarly, on November 2013 in the *Aronna v. Petrobras* case, Chamber A of the Court of Appeals stated that it did not find any defect in the compromise the parties had agreed upon, but that the plaintiff merely disagreed with the content of the decision. It also highlighted that the challenge of annulment of an arbitral award did not involve a substantive review of the case, but rather the confirmation of certain conditions that are contained in rules of public order that must be respected, that is, those contained in the Procedural Code.

On August 2014, in the case *NSB v. A.A.*, one of the three arbitrators in an ICC arbitration passed away during the issuance of the final award. Consequently, the award was issued by the two remaining arbitrators. As they did not reach a consensus, the dispute was resolved by the vote of the tribunal's chairman, as stipulated by the ICC Arbitration Rules. In turn, the respondents requested the annulment of the award based on this alleged defect in the proceedings. The Chamber B of the Court of Appeals rejected the petition for annulment by stating that the recourse was not meant to challenge the merits of the case. It went on to add that judges must limit themselves to controlling the fulfillment of the formal conditions that the legislation has considered indispensable for a proper administration of justice.

As mentioned, the Supreme Court in *Ricardo Agustín López [et al.] v. Gemabiotech S.A.* not only reaffirmed that the judicial review of arbitral awards could not delve into the merits of the case, but it went even further and stated that the only possible grounds for annulment were those set out in sections 760 and 761 of the Procedural Code. On our behalf, we fully support the Supreme Court's

decision. Otherwise, the scope of grounds for annulments of arbitral awards could be unduly broad, thus dwindling the attractiveness and advantages of the arbitral system. Therefore, the precedent set by the Supreme Court allows both the plaintiff and the respondent to rest assured that the award, whether favorable to their position or not, will only be annulled on the grounds expressly stated by the law. For this same reason, this decision increases the overall confidence in the institution of arbitration as a means for seeking finality.

Final Considerations

The Supreme Court's ruling leaves us with high-hopes for the future of arbitration in Argentina. Not only this, but new developments are in the horizon. For instance, a bill was presented in the Argentine Chamber of Deputies on 03/03/2017 in order to partially reform the National Civil and Commercial Code with respect to the rules regulating arbitration that have been criticized by scholars. Even more, there is a draft International Commercial Arbitration Act based on the UNCITRAL Model Law pending approval by the Chamber of Deputies, as it has already been approved by the Senate.

We can reasonably expect that with a consistent line of jurisprudence and internationally-aligned arbitration standards, Argentina will be able to establish itself as a safe haven for arbitration in the near future.