Arbitration in Argentina: More Positive Signs Towards Certainty?

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Arbitration in Argentina is finally finding its way to certainty. On 4 July of this year, Argentina passed the International Commercial Arbitration Act, based on the UNCITRAL Model Law. Furthermore, Argentinian domestic courts have recently handed down arbitration-friendly decisions. In this regard, a new judgment just been issued by the Argentine Federal Supreme Court of Justice is of the utmost importance for the development of arbitration in the country.

On 6 November 2018, the Argentine Federal Supreme Court of Justice in re "Estado Nacional – Procuración del Tesoro Nacional s/ recurso directo" ("*Estado Nacional*") held that the setting aside of an arbitral award is limited to the specific grounds for annulment set forth under the law and must be not treated as a recourse of appeal. The Supreme Court thus refused to enter into an analysis of the merits of the case. A number of conclusions can be drawn from this judgment:

First, the Supreme Court's decision contributes to certainty for arbitration in Argentina by affirming the approach in the case "Ricardo Agustín López [et al.] v. Gemabiotech S.A." ("*López*"), previously commented on this Blog. Said criterion is based on the limited scope of judicial intervention in annulment proceedings of an award. As the Supreme Court confirmed, pursuant to Argentine law, any recourse against an arbitral award cannot be based on the merits of the case. Neither is the court allowed to review the merits of the arbitral tribunal's decision.

In *López*, the Supreme Court referred to the grounds for annulment contained in the Civil and Commercial Procedural Code. Article 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 as requiring resolution. In addition, Article 761 states that (iv) an award may be annulled if it contains incompatible and contradictory decisions.

Second, while the "*López*" case involved private parties, this new case involved the Argentine Federal State as a party to both the arbitration and judicial proceedings. The decision is not only regarded as a ratification of the previous criteria in "*López*" but extends its scope to arbitrations against the Argentine Federal State. It is promising that the Supreme Court decision in *Estado Nacional* rejected the Federal State's attempt to reopen the merits of the case in recourse against a final award.

Long-established Supreme Court doctrine recognises the capacity of the Federal State to resort to arbitration in all matters not related with public policy or sovereignty issues, if agreed in a contract

and authorized by law. Nonetheless, Article 1651 of the Civil and Commercial Code of Argentina expressly declares that disputes involving the Federal or local State are outside the scope of its arbitration provisions. By excluding the State from being subject to such provisions, the Federal Congress sought, at that time, to uphold a perceived advantage for the State in litigating before domestic courts, which are sometimes devoted to protecting the State from private individuals. The Supreme Court's decision in "Estado Nacional" appears to retreat from this old-fashioned dogma.

Third, the new Supreme Court's decision can be construed as a clarification of the isolated doctrine espoused by the controversial judgement in "José Cartellone Construcciones Civiles S.A. v. Hidronor S.A." ("*Cartellone*"), decided in 2004. In that case, the Supreme Court ruled that an arbitral award is not subject to appeal, but judicial review is permitted if the arbitral award is unconstitutional, illegal or unreasonable.

Although the vague and imprecise wording that the Supreme Court used in "*Cartellone*" has led to ambiguities as to its intended scope, it raised concerns about the extent of judicial review that the Supreme Court permitted in applications for the annulment of arbitral awards. Despite this, the new Supreme Court's decision appears to overrule the approach in "*Cartellone*", upholding the limited scope of the annulment procedure under the Civil and Commercial Procedural Code.

Fourth, the new Supreme Court's decision may shed some light on the interpretation of Article 1656 of the Civil and Commercial Code of Argentina. Although – following enactment of the International Commercial Arbitration Act – this provision now only applies to domestic arbitration, this controversial rule provides a non-waivable ground for a party to object in court to any award that is "contrary to the legal system". The provision essentially creates a right of appeal against arbitral awards.

Argentine courts have, however, clarified some of the uncertainty created by these provisions. In this vein, courts have held that the wording in Article 1656 should be interpreted as a procedure for setting aside an award. Accordingly, three out of six of the chambers of the Commercial Court of Appeals have so far held that, under Argentine law, the remedy of annulment is the only available recourse against final awards.

The new Supreme Court judgment in "*Estado Nacional*", together with its previous decision in "*López*", may be understood as an affirmation of the lower courts' line of reasoning. By recognizing that the only grounds for setting aside a final award are those contained in Articles 760 and 761 of the Civil and Commercial Procedural Code, the Supreme Court put an end to the possibility of a broad and mistaken interpretation of Article 1656 of the Civil and Commercial Code of Argentina.

In sum, the new Supreme Court's decision is in line with arbitral standards and procedure that Argentina has recently adopted and clarifies previous mistaken and inaccurate interpretations. Such pro-arbitration case law, together with the legal certainty accompanying the enactment of the International Commercial Arbitration Act, paves the way for further positive development of arbitration in Argentina, both relating to the resort to arbitration within the users in the country, along with setting Argentina up as a possible hub for international arbitration in the region.