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Adhesion Contracts and Arbitration in Argentina: A New Case Ruling

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Introduction

Since the enactment of the Argentine Civil and Commercial Code (the "CCCN"),[1)] Argentina counts on a national statute to regulate the "arbitration agreement". This legislative milestone has been mostly welcomed by the arbitral community, although some of its provisions have been subject to criticism. Article 1651 of the CCCN is definitely among the latter, since it tightly regulates "objective arbitrability" or "arbitrability *ratione materiae*" by excluding a wide variety of legal issues such as adhesion contracts "regardless of its purpose".[2)]

In regards to the adhesion contracts, the controversy has not been raised by the vagueness of the wording but the straightforward approach of Article 1651(d) instead: if there is adhesion, then arbitration agreements are prohibited. The case at hand discusses the question of how Article 1651(d) should be interpreted, approaching the validity of arbitration agreements in Argentina when contained in adhesion contracts.

A thumbnail sketch of *Vanger S.R.L. v. Minera Don Nicolas S.A.* [3)]

On April 6, 2018, Vanger S.R.L. ("Vanger") filed a complaint against Minera Don Nicolas S.A. ("Minera"), with the commercial courts of the City of Buenos Aires. According to the plaintiff, Minera breached certain obligations related to the construction of a truck shop and a warehouse, and claimed damages for ARS 3.628.903 (at that time, USD 177,000 approximately).

Even though Vanger recognized the existence of arbitration agreements contained in the contracts concluded to carry out the aforementioned operations, it considered the agreements to be null and void since they had been allegedly exclusively drafted and imposed to Vanger by Minera. At this stage, Vanger did not raise Article 1651(d), which is the "key" to unlock the judicial court jurisdiction since, as mentioned, it provides that adhesion contracts are excluded from arbitration.

Minera answered the complaint raising a lack of jurisdiction defense based on the existence of the arbitration agreements. Minera "took the bull by the horns" and addressed the prohibition in Article 1651, by arguing that the scope and purpose of it shall be interpreted in coherence with the

Argentine legal system as a whole. Minera emphasized that, the mere fact of concluding contracts by adhesion is not enough to deprive the arbitration agreements contained therein of their validity. In addition, Minera highlighted that the plaintiff was a corporation with business transactions' experience and, therefore, it could not be depicted as a "weak" party. Finally, pursuant to the *competence-competence* principle, Minera argued that the arbitral tribunal was empowered to hear the case.

Blowing in the wind: here today, gone tomorrow?

At first sight, Article 1651(d) seems to undo what case law (*MC Servicio de Consultora S.R.L. v. MC Minera Argentina Gold S.A.*, Supreme Court of the Province of San Juan, Argentina, 6/12/2014; and *Bear Service v. Cervecería Modelo S.A.*, Chamber of Commerce, Panel D, 2/22/2002) had done prior to the enactment of the CCCN, given that it was widely accepted that "the arbitration clauses contained in the adhesion contracts are not [necessarily] abusive or harmful to the adherent, and [should] be considered valid and binding unless the existence of abuse was demonstrated".[4)]

In this regard, it is inevitable to dwell on the legal implications of this rule since it might not only limit the number of potential "local" and "international" arbitrations, but also may prevent a local recognition or enforcement of awards. This last implication responds to the fact that, under the New York Convention (Article V), the Panama Convention (Article 5) and the Argentine International Commercial Arbitration Law, No 27.449 (Articles 104 and 98), the recognition or enforcement of a foreign award may be refused if under Argentine law the agreement is not valid.

Following this reasoning, some scholars have considered that Article 1651(d) becomes excessive and unjustifiable in certain cases where the adherent holds a position similar to that of the proponent, mainly because not all adhesion contracts imply an economic dominance of the proponent, or a lack of autonomy of the adherent.

In this regard, Fernández Arroyo and Vetulli propose that "although the adherent is in a position of certain disadvantage (for not drafting the contract), this does not necessarily mean that they are 'weak', or that the arbitration means for them an impairment of its rights".[5)]

This concern has also been raised by Caivano, as well as other local scholars, who remark that within commercial relations the rule is to recognize the full operability of arbitration agreements, even if contained in adhesion contracts.[6)]

In concordance with the aforementioned comments, in re *Servicios Santamaria S.A. v. Energía de Argentina S.A.* (5/24/2018) and *Telcel S.A. v. Cablevisión S.A.* (3/21/2019), the Chamber of Commerce, Panel C, considered that the incorporation of an arbitration agreement in an adhesion contract was not invalid *per se*. However, not all roads lead to Rome: in re *Yasa S.R.L. vs. Telecom Personal S.A.* (8/30/2016), the Chamber of Commerce, Panel F, pointed out that Article 1651 "d" constitutes a principle of public policy and declared void the arbitration agreement contained in an adhesion contract.

The controversy raised around this issue has reached the legislative branch. In this regard, a Commission created to partially reform the CCCN has already prepared a preliminary draft, which

includes an amendment to Article 1651. Such amendments tend to harmonize with Articles 736 and 737 of the Argentine Civil and Commercial Procedural Code (the "CPCCN" after its acronym in Spanish), which state that any matter concerning the parties may be submitted to arbitration, except those that cannot be the subject of transactions.

In the meanwhile

When adjudicating the case at hand (*Vanger v. Minera*), the First Instance Court stated that, in case of doubt, the arbitration agreement must be deemed valid pursuant to Article 1656 of the CCCN, which stipulates that "[i]n case of doubt, the effectiveness of the arbitration agreement shall be granted". Moreover, it considered that adhesion contracts do not always involve a "weak" party. Hence, within the scope of adhesion contracts, the burning issue befell to identifying whether the arbitration agreement was unfair, or if a "weak" party signed the arbitration agreement as a result of the dominant position of the counterparty. In this regard, the Court highlighted that the arbitration agreement was not evidently unfair nor was the alleged dominant position. For this reason, the Court upheld the lack of jurisdiction defense and stated that the arbitral tribunal was empowered to decide about its own competence over the case.

Even though Vanger appealed the first instance ruling, the latter was confirmed by the Commercial Chamber on June 6, 2019. The Second Instance Court considered that rules must be interpreted according with their purpose (Article 2, CCCN). Therefore, the arbitration agreement could not be declared void pursuant to Article 1651(d) without contravening its own purpose, since the contracts were concluded by *pari passu* companies and no difference in negotiating ability, legal advice, the amount of assets or economic power was evidenced between them.

Conclusions

The Article 1651(d) of the CCCN has faced severe criticism from the arbitral community, up to the point that some amendments were officially proposed to modify it. From a case law perspective, however, the approach is of two minds.

On the one hand, some case law considered that an arbitration agreement cannot be deemed void by the mere fact of being incorporated in an adhesion contract, but only when there are other circumstances that demonstrate an economic dominance of the proponent, or a lack of autonomy of the adherent.

On the other hand, certain case law has interpreted that Article 1651(d) constitutes a rule of public policy and, therefore, an arbitration agreement contained in an adhesion contract must be declared void regardless of its purpose or any other circumstance.

The judicial decision at hand ruled according to the first line of thought, stressing that Article 1651(d) should be interpreted in the light of its purpose rather than of its wording, and declared valid an arbitration agreement contained in an adhesion contract.

This post is an expression of the authors' personal opinion, and do not necessary reflect Marval, O'Farrell & Mairal's position.

References

?1 The CCCN, Law No. 26.994, is in force since August 1, 2015.

?2 Article 1651 also excludes consumer matters, but in a different subsection ("c").

?3 Chamber of Commerce, Panel C, *Vanger S.R.L. v. Minera Don Nicolas S.A.* (6/6/2019).

?4 Amallo, Francisco, "Las reformas al régimen jurídico del arbitraje: la nueva ley y los proyectos de ley", Revista del Colegio de la Ciudad de Buenos Aires, v. 79, n. 2, 2018. Link: https://www.eldial.com/nuevo/home.asp.

?5 Fernández Arroyo, Diego P., Vetulli, Ezequiel H., "El nuevo contrato de arbitraje del Código Civil y Comercial: ¿un tren en dirección desconocida?", RCCyC, 2015. Link: https://informacionlegal.com.ar.

?6 Leiva Fernández, Luis F. P., “Contrato de Arbitraje”, in Alterini, Jorge (dir.), *Codigo Civil y Comercial Comentado Tratado Exegético*, 2nd ed., v. 7, Buenos Aires, La Ley, 2016, p. 1022.