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The Chilean Supreme Court's Heart Is In The Right Place, But Its Arguments Are Not

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The Chilean Supreme Court recently issued a decision that, on its face, respects party autonomy in international arbitration. But, it could do more harm than good.

On September 14, 2020, the Chilean Supreme Court (the "**Court**") entered a final judgement in the case *CCF SUDAMERICA SPA, Rol Nº 19568-2020* ("**CCF Sudamericana**" or the "**Decision**"). The Court's judgement decided a complaint appeal (*recurso de queja*) brought by Sudamérica SpA and CCF Sudamérica SpA ("**Sudamérica**") against the Appellate Court of Santiago's rejection of an appeal lodged by Sudamérica against a final award issued by an arbitral tribunal constituted under the rules of the Mediation and Arbitration Centre of the Santiago Chamber of Commerce (the "**CAM Santiago**") on February 12, 2020.

Under Chilean Law, international arbitration is regulated by Law 19.971 (the "*Ley de Arbitraje Comercial Internacional*" or "**LACI**"). The LACI is inspired in the 1985 UNCITRAL Model Law on International Commercial Arbitration. In particular, articles 1.3 and 1.4 of the LACI that determines when an arbitration is international are exact copies of articles 1.3 and 1.4 of the 1985 UNCITRAL Model Law.

Facts of the case

The parties entered into a Share Purchase Agreement ("**SPA**") of several companies known in Chile as *Farmacias Cruz Verde*. The law applicable to the contract was Chilean law and at least one party to the contract set domicile in Mexico. The arbitration clause contained in the SPA submitted all controversies relating to the contract to arbitration in accordance with the International Arbitration Rules of the CAM Santiago, seated in Santiago, Chile. According to the Decision, the terms of reference of the arbitration provided that the final award could be challenged through appeal and certiorari (*casación*).[1)]

During the course of the proceedings, the parties established the rules applicable to the procedure, expressly agreeing that (i) an appeal and certiorari would be admissible against the final award; and (ii) the Civil Procedure Code and the Court Organization Code (*Código Orgánico de Tribunales*) applied in a subsidiary fashion.

The appeal

After the arbitration tribunal issued its award, Sudamérica filed an appeal against it. Under Chilean Law, the appeal is first submitted to the arbitral tribunal directly, and only then the appeal is brought to the attention of the judicial appellate body. In this case, the arbitral tribunal sent the appeal to the Appellate Court of Santiago.

The Appellate Court of Santiago dismissed the appeal, correctly noting that the appeal was inadmissible, since international arbitration in Chile is regulated under Law No. 19.971 (inspired in the 1985 UNCITRAL Model Law on International Commercial Arbitration), which provides in Article 34 that final awards can only be challenged through annulment.

The appellant then filed a complaint appeal against the Appellate Court of Santiago's judgement. The Supreme Court proceeded to reject the complaint appeal but invalidated the Appellate Court of Santiago's judgement. The Court reasoned as follows. First, that the intent of the parties is quintessential in arbitration. Second, that the parties agreed that the applicable remedies against the final award in both the arbitration clause as well as the procedural rules of the case, would be appeal and certiorari. Third, that regardless of the international or domestic nature of the arbitration, the courts must take into consideration the intent of the parties. Fourth, it would be against the parties' prior acts to disregard the fact that the parties did not mention Law No. 19.971 while drafting the procedural rules applicable to their arbitration. Fifth, in other disputes relating to the same contract, the parties eliminated the reference to the appeal in order to adequate their terms to Law 19.971. Therefore, the Court concluded that both parties considered that the appeal was a valid remedy against the award.

The decision and comment

The best intentions pave the way to hell. As most things in life, the Decision has a bright side, and a dark side.

On the one hand, the Decision defends the basic premise in arbitration that consent is its cornerstone. In this case, the parties (adequately represented by counsel) expressly agreed that, even though one of the parties was domiciled outside Chile (thus fulfilling the internationality requirement of Law 19.971), that (i) appeal and certiorari would be admissible against the final award, and (ii) the Civil Procedural Code (and the Court Organization Code) applied in a subsidiary fashion, without reference to Law 19.971.

On the other hand, the decision ignores basic principles of international arbitration. The fact that annulment is the sole remedy against an international arbitration award is one of the mainstays of international arbitration practice. More so, the fact that this is specifically mentioned in Law 19.971, should be hard to argue that parties could, in this case, contract away from such provision. Having said this, the Decision does not go into whether article 34 of the LACI can be contracted away from, as discussed in other jurisdictions.[2)]

Between a rock and a hard place. It appears that the Court found itself between the will of the parties, and the text of Law 19.971. The decision will hopefully be treated as a highly fact specific

case and will not be treated as an authority in future cases.[3)]

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References

?1 Decision, ¶ 3. ("*Todas las disputas que surjan de o que guarden relación con el presente Contrato o la ejecución de los actos aquí pactados o respecto de cualquier motivo relacionado con el presente Contrato, se resolverá mediante arbitraje, de acuerdo con el Reglamento de Arbitraje Comercial Internacional del Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago, vigente al momento de su inicio*").

?2 See for instance, *Popack v. Lipszyc*, 2015 CarswellOnt 8001, 2015 ONSC 3460 discussed here.

?3 Under Chilean Law, prior court decisions do not constitute precedent.

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