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Hands off. The Chilean Supreme Court Affirms Chile's Arbitration-friendly Stance. A Look Into Tarascona Corporation v. Oscar Breton Diéguez et al.

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On December 20, 2022, Chile's Supreme Court issued a ruling that has been praised by the arbitral community for its pro-arbitration stance in the face of an apparently pathological arbitration clause. In its decision, the highest court of Chile lent decisive support to key international arbitration principles, such as party autonomy, domestic minimum intervention and *kompetenz-kompentenz*. This ruling adds to a long list of pro arbitration decisions that the Supreme Court has issued since enactment of the Law N° 19.971 on International Commercial Arbitration ("**LACI**").

The facts of the case are the following.

Background

Tarascona Corporation, a legal entity incorporated in the British Virgin Islands ("BVI"), entered into an administration contract with an individual (Daniel Yarur Elsaca), located in Chile.

The Company's bylaws included an arbitration agreement providing that, in the case of any dispute between the Company and its administrators, the dispute shall be resolved by arbitration conducted before two arbitrators, each one appointed by one of the parties, who shall then appoint an umpire before commencing the proceedings. Additionally, if either party failed to appoint its party-appointed arbitrator, the other party had the right to make that appointment on its behalf.

Years later, Tarascona Corporation ("**Claimant**") filed a claim against the administrator of the company ("**Respondent**") before a Chilean court for fraudulent administration and misconduct. The Respondent challenged the Court's jurisdiction arguing that the bylaws contained a valid arbitration agreement and therefore the parties ought to be referred to arbitration. The court dismissed Respondent's argument, but the Santiago Court of Appeals overturned the decision and granted the objection.

Dissatisfied with the outcome, the Claimant filed an annulment application asking the Supreme Court to overturn the Court of Appeals' ruling. The Claimant contended that the arbitration agreement was meant to be enforced in the BVI only. The Claimant advanced two main arguments

in this regard:

- First, the Claimant submitted that arbitration is mandatory under the laws of BVI for disputes between a company and its administrator and the arbitration agreement reflected such compulsory language. But the parties did not intend to exclude litigation in other countries such as Chile.
- Second, the Claimant argued that the procedure for the appointment of the co-arbitrators under the bylaws was unlawful and contrary to Chile's public policy. According to the Claimant, the appointment of one of the parties' co-arbitrator by the opposing party, in the case the former did not make such appointment, was contrary to due process and to the appointment rules contained in Article 231 and 232 of the Chilean Organic Code of Courts.

The Claimant further challenged the enforceability of the arbitration agreement and noted that, according to local statute, if a party does not appoint its arbitrator, the arbitrator shall be appointed by local courts.

The Supreme Court applied Chile's **LACI** , which is modelled after the 1985 version of the UNCITRAL Model law, and it dismissed the Claimant's arguments while endorsing key principles of international arbitration.

The Court looked first into the arbitration agreement to determine whether the parties intended to limit their consent to arbitrate to BVI's territory only, as the Claimant contended. The Court was not convinced that the parties intended any such limitation, which was not spelled out in their agreement. In addition, the Court swiftly dismissed the purported relevance of the appointment rules of the Organic Code of Courts, noting that this was an international arbitration subject to the LACI, which expressly allows the parties to agree on any proceeding for the appointment of arbitrators.

Then, the Court addressed the Claimant's challenges to the enforceability of the arbitration agreement and its alleged pathological nature. The Court reasoned that, for an arbitration agreement to be enforceable, it is sufficient that two conditions are met: (i) the parties should have agreed to arbitrate; and (ii) the subject matter of the dispute should be arbitrable. Accordingly, an apparently pathological arbitration agreement should be enforced provided that these conditions are met, even if it raises applicability issues, which shall be assessed by the arbitral tribunal. The Court found that these conditions were met in this case and therefore it dismissed the annulment application.

Chile's Supreme Court ruling praised for its pro-arbitration stance

The Supreme Court's decision has been welcomed by the arbitral community as it further confirms the arbitration-friendly stance of Chile's highest court. This is reflected in several aspects of the decision:

First, the Supreme Court adopted a clear *pro-arbitration* approach, articulating a restrictive view on pathological arbitration agreements. In the Court's opinion, as long as there is consent to arbitrate and the dispute is arbitrable, Chilean courts should decline jurisdiction and refer the parties to arbitration. This is a high threshold for a domestic court to deny enforcement of an arbitration agreement: the agreement must be invalid or void as a matter of law or demonstrably

impractical, which is rarely the case.

Second, the Supreme Court applied a restrictive approach to the notion of arbitrability, deferring to the parties' right to submit to arbitration disputes that fall within the scope of their private autonomy, as opposed to "public" law issues. Here, the Court ruled that the dispute did not correspond to any of the non-arbitrable matters under Chilean law and, therefore, should be considered arbitrable.

Third, by recognizing Chile's dualist system of arbitration, the Court correctly scrutinized the arbitration agreement in accordance with its international nature (by reference to article 1(3)(a) of the LACI, as both parties had their places of business in different States). In doing so, the Court correctly dismissed the argument of a flawed or impractical appointment procedure, upholding the parties' wide discretion to agree on any such procedure under article 11(2) of the LACI and the value of consent as a cornerstone of international arbitration.

Fourth, by applying a deferential standard of review to assess the validity of the arbitration agreement, the Supreme Court showed a clear commitment to the principle of minimum domestic intervention in international arbitration as set out in article 5 of the LACI. This way, the Supreme Court signalled that it would intervene and declare the invalidity of an arbitration agreement only in limited circumstances where stringent requirements are met.

Finally, by deferring the assessment of any non-threshold issue of the arbitration agreement to the arbitral tribunal (even one that may result in the annulment of the agreement), the Court decisively endorsed the *kompetenz-kompetenz* principle.

Conclusion

This decision is in line with other rulings that evidence Chile's arbitration-friendly stance, such as those upholding the minimum domestic intervention principle (*Gym Chile v Felipe Ossa Guzmán*, Court of Appeals of Santiago, Case No. 3494-2019 and *Publicis Groupe Holdings v Manuel José Vial Vial*, Court of Appeals of Santiago, Case No. 9134-2007); embracing a deferential standard to confirm the validity of an allegedly ambiguous arbitration agreement (*Gold Nutrition Industria e Comercio Ltda*, Supreme Court, Case No. 6615-2007); and recognizing a presumption in favour of the validity of arbitral awards (*Arce Holdings v Matriz Ideas*, Court of Appeals of Santiago, Case No. 11,466-2015).

Here, the question about the validity of an allegedly pathological arbitration clause received a clear and coherent answer: at least for cases where consent is apparent and no issues of arbitrability arise, the Supreme Court of Chile has taken a clear stance: *Hands off!*

This entry was posted on Thursday, February 23rd, 2023 at 8:33 am and is filed under Chile, Competence-Competence, International agreement, Latin America, Party autonomy
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