Kluwer Arbitration Blog

Another Good News for International Commercial Arbitration in Chile: Short Comments on the Supreme Court Decision of January 24, 2024

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The Supreme Court decision of January 24, 2024 granted the *exequatur* of a foreign arbitration award and authorized it to be enforced in Chile (the "Decision"). The Decision reaffirms the basic "*pro-international arbitration*" and "*minimal intervention*" principles, that posit Chile as an arbitral-friendly jurisdiction so that it could be selected as the seat of many more international arbitration agreements.

The Decision joins many other decisions recently issued by Chile's highest Court that confirm solid and well-founded jurisprudence (see, for example, CS of July 27, 2023, Rol 133.313-2022; CS of October 5 of 2023, Rol No. 71,508-2022; CS of January 16, 2023, Rol 3,545-2022; CS of July 29, 2021, Rol 104,262-2020).

Background

On January 21, 2020, a company that produces and markets "chicken legs" (the "Seller") signed an international contract for the sale and supply of the said product (the "Contract"), with another foreign company (the "Buyer") for its distribution in Brazil. The agreed price was USD 337,500 per month, at a rate of USD 2,500 per ton, resulting in a total of USD 4,050,000, payable in 12 months.

On February 6, 2020, the Buyer paid the Seller – as an advance payment and against the fixed price – the total amount of USD 101,250. However, upon arrival of the date stipulated in the Contract, the Seller did not deliver any product or merchandise.

After lengthy negotiations, on June 29, 2020, the parties agreed to annul the Contract, signing an agreement called "Termination and Cancellation Notice". In this instrument, the Seller recognized the debt for the advance payment and agreed to return it, in the manner and within the terms indicated therein.

On September 14, 2020, and under the "Termination and Cancellation Notice", the Seller made a first payment of USD 12,150. However, this payment was the first and last since no new payments were made by the Seller thereafter.

On May 10, 2021, and following the provisions of clauses 12 and 18(2) of the Contract, the Buyer commenced arbitration proceedings, under the rules of the ICC, before a sole Arbitrator, in an abbreviated procedure, in which it demanded the restitution of the paid advance balance, plus interest, and costs. The seat of the arbitration was Singapore.

By award dated March 10, 2022, the Arbitration Tribunal ordered the Respondent to pay US$ 89,100, plus interest, costs (reimbursement of fees paid to the claimant's local attorneys), and payment of the ICC administrative fees. The tribunal issued a default award.

On March 8, 2023, under the Chilean exequatur procedure, the Buyer requested before the Chilean Supreme Court the recognition of the award.

Once the request for recognition was notified, the Seller opposed it for several reasons. The most relevant were:

- The Buyer did not obtain a "prior official approval" or "official authenticity" certificate of the foreign award, from a superior court of Singapore, as it is required by article 246 of the Code of Civil Procedure ("CPC").
- The Seller was not notified of the arbitration proceedings, failing to comply with the requirement in Article 36 of Law No. 19,971 on International Commercial Arbitration ("LACI" in Spanish) and in Article 245 of the CPC. The Seller argued that the award was only communicated to it by email but that no information was provided regarding the notification of the arbitration proceedings and during the same.
- According to the Seller, the subject matter of the dispute was the restitution of the unpaid balance, a claim under the "*Termination and Cancellation Notice*" agreement of June 29, 2020, which does not contain an arbitration agreement. Furthermore, it argued that the termination agreement rendered void the Contract that did contain the arbitration clause. So, the foreign arbitral award under the exequatur proceeding in Chile would have been contrary to the Chilean *ordre public* since the arbitral award ruled on a controversy that arose out of a contract that did not include a written arbitration agreement, which is required by article 7 of LACI.

The Supreme Court's Findings

The Supreme Court rejected each of these allegations, and defenses based on the following considerations.

The Supreme Court reiterated – as a general principle in force in the Chilean legal system – that all judgments issued by foreign courts, including arbitration tribunals, require exequatur to be enforced in Chilean territory but the request for judicial proceedings (exequatur) must be resolved as provided (i) in the provisions of LACI; (ii) in the norms established in the "New York Convention"; and (iii) in articles 242 et seq. of the CPC.

It is also indicated that the so-called "*Exequatur"*, as a special recognition procedure, does not constitute an "instance" to discuss the case or review the merits of the dispute. This consideration is made under the principle of "international regularity of rulings".

Also, in this particular case – and even though the agreement "*Notice of Termination and Cancellation*" legally terminated the purchase and supply contract and did not contain an

arbitration agreement -, the Supreme Court noted that the dispute arose not only out of the Termination Notice but of the original Contract that contained an arbitration clause. It highlighted that the whole controversy was submitted to arbitration under Clause 12 and Clause 18.2 of the Contract and that the parties did not agree to any modification to said arbitration agreement.

Regarding the alleged lack of a prior *"official approval"*, or any other evidence of authenticity of the foreign award, emanating from a higher court of the country where the ruling was issued (Singapore), the Supreme Court clarified that, although this requirement is provided in article 246 of the CPC for resolutions issued by foreign arbitrators, the applicable statute for this case is the LACI, a special legal body that does not require such "*prior official authorization*".

Regarding the potential lack of notification to the Respondent, the Supreme Court noted that the award itself detailed all the actions and notifications made to the Respondent. Based on this, the arbitrator concluded that Seller was notified of the initiation of the arbitration proceedings and had more than reasonable opportunities to present its allegations and defenses, which shows that the defendant was duly summoned and notified of the arbitration.

Concerning the Seller´s allegations that the award was not within the scope of the arbitration agreement and, therefore, it was contrary to the Chilean *ordre public*, the Supreme Court concluded that the subject matter of the dispute fell within the scope of the arbitration agreement. Therefore, the recognition and execution of the award were not contrary to the Chilean *ordre public*, because the concept of *ordre public* established by the LACI is restrictive and refers only to the fundamental principles of the Chilean legal system and not to all the mandatory rules or regulations of domestic law.

Conclusion

The Decision confirms the "pro-arbitration" trend of our Supreme Court, that provides preeminence, in our domestic legal system, of the regulations stated in LACI, over the provisions of our old CPC and COT.

The Supreme Court has established that to recognize and execute a foreign award the existence of a Treaty between Chile and the foreign State in which the award was issued and which served as its seat (in this case, Singapore), that contains a clause that recognizes the principle of reciprocity between them, not necessary.

It further established that the exequatur is not an instance where the substance or "merit" of the arbitration can be discussed, but rather its purpose – at least within the international commercial arbitration system that governs Chile – is to enforce the principle of international regularity of arbitration awards, with the Supreme Court as the competent Tribunal to verify whether or not the requirements established by LACI and the New York Convention are met to recognize and authorize compliance with a foreign arbitration award.

This Supreme Court ruling emphasizes that it is not necessary to previously obtain the "approval" or other sign of official approval emanating from a higher court or a competent public body of the country where the award was issued – as required by Art. 246 of the CPC for the recognition of resolutions issued by foreign public judges – since the LACI and the NY Convention do not require it. This is a special law that takes precedence or prevails over the CPC and COT.

Our Supreme Court emphasizes again that the concept of *ordre public* established in the LACI is restrictive and only refers to the fundamental principles of the Chilean legal system. Therefore, not all the mandatory rules or regulations of Chilean domestic law form part of said *ordre public*, so not any transgression of mandatory norms of the Chilean law constitutes a violation of the *ordre public* contemplated by the Chilean constitutional and legal order.

Finally, this case is not an isolated example of the "*pro-arbitration*" and "minimal intervention" approach of our Supreme Court. Kluwer's blog has published recent posts (available here) regarding other Supreme Court decisions that confirm that Chile is a reliable jurisdiction that supports international arbitration, positioning Chile as an optimal jurisdiction to be selected as the "seat" of any international arbitration agreement.

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