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Does Multiparty Arbitration Lose Its International Nature When the Only Foreign Party Exits? A Critical Analysis of a Landmark Ruling by the Chilean Supreme Court

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On 28 May 2024, the Chilean Supreme Court rendered a landmark ruling in *Albemarle Limitada v Emaresa Ingenieros y Representaciones S.A. & Or* (*see* Case No. 10854-2024). The case concerned an international arbitration seated in Chile under the Law No. 19,971 on International Commercial Arbitration ("LACI"), which follows the UNCITRAL Model Law. This case raised an intriguing question: Does multiparty arbitration lose its international nature if the sole foreign party successfully challenges the arbitral tribunal's jurisdiction and exits the proceedings? In its judgment, the Supreme Court stated that this is an issue of interpretation not addressed by the law, and subject to different views. Chile's highest Court held that the Santiago Court of Appeals' judges did not commit any serious fault or abuse in declaring inadmissible a complaint recourse brought by the claimant against the final award, endorsing the continued applicability of the LACI to the dispute.

Background

This dispute originated when Albemarle Limitada ("Albemarle"), a Chilean company involved in the production of lithium, called for tenders for the supply of geomembranes and geotextiles. Eventually, the tenders were awarded to Emaresa Ingenieros y Representaciones S.A. ("Emaresa"), another Chilean company, and the parties signed a purchase and supply contract. A Brazilian company, Cipatex Impregnadora de Papéis e Tecidos Ltda. ("Cipatex"), also participated in these tenders but ultimately withdrew. However, Cipatex supplied materials indirectly through Emaresa, leading Albemarle to include Cipatex in the arbitration proceedings brought against both suppliers, after claiming that the materials were defective.

The arbitration was conducted under the procedural rules of the Centre of Arbitration and Mediation of the Chamber of Commerce of Santiago ("CAM Santiago"), and the arbitral tribunal decided on the application of the LACI to the dispute at the initial procedural meeting, due to the involvement of the Brazilian party Cipatex.

The key issue arose when Cipatex challenged the arbitral tribunal's jurisdiction with respect to Cipatex arguing that it was not a party to the arbitration agreement. The first challenge was dismissed by the arbitral tribunal, exercising its competence to decide upon its own competence.

To support his decision, the sole arbitrator argued that Cipatex tacitly agreed to the contract and the arbitration agreement when it received the tender documents. Afterwards, a second challenge was brought before the President of the Santiago Court of Appeals under Article 16(3) of the LACI. This time, the challenge was upheld and the domestic court declared the arbitral tribunal's lack of competence in respect of Cipatex, finding that the Brazilian company was not a party to the arbitration agreement (*see* Case No. 922-2022, dated 24 June 2022).

With Cipatex excluded, only two Chilean parties remained, and the arbitral tribunal eventually issued its final award applying the LACI to the dispute.

Against this backdrop, Albemarle tried to challenge the final award with domestic arbitration recourses, raising the question of whether the arbitration still qualified as international under the LACI.

First, Albemarle brought a complaint recourse against the arbitrator who issued the final award, before the Santiago Court of Appeals. Pursuant to Article 545 of the Chilean Organic Code of Courts ("COT"), the sole purpose of the complaint recourse is to correct serious faults or abuses contained in decisions of a jurisdictional nature. This type of relief is intertwined with the superior courts' disciplinary powers and entitles such tribunals to set aside jurisdictional decisions and impose disciplinary measures. Under Article 545 of the COT, the complaint recourse is only available in the absence of any other remedies, except where the award is issued by an arbitrator in equity, in which case cassation also proceeds.

Eventually, the Santiago Court of Appeals declared the complaint recourse inadmissible because the LACI's application to the dispute was agreed upon on the applicable procedural rules. Therefore, the final award could only be challenged through an application for setting aside under Article 34 of the LACI (*see* Case No. 1474-2024, dated 7 March 2024).

Second, Albemarle brought a complaint recourse before the Supreme Court, against the Santiago Court of Appeals' judges who declared the first complaint recourse inadmissible. This time, Albemarle argued that the LACI was no longer applicable to the dispute because Cipatex -the only foreign party- was removed from the arbitral proceeding when Cipatex's jurisdictional challenge was granted.

The Supreme Court Ruling

Chile's highest Court held that the continuing applicability of the LACI to the dispute was a matter of interpretation, pointing out that there was no dispute concerning the arbitration's international nature enshrined in the procedural rules agreed upon at the beginning of the proceedings.

Additionally, the Supreme Court held that no serious fault or abuse could be attributed to the Santiago Court of Appeals' judges in their interpretation of a complex issue, unforeseen by the parties and not settled by law. Put differently, Chile's highest Court endorsed the Appeals Court's position on the matter. Moreover, the Supreme Court stated the complaint recourse was inadmissible because there was another available remedy, *i.e.*, the application for setting aside the award under Article 34 of the LACI.

For all these reasons, the Supreme Court of Chile dismissed Albemarle's complaint recourse.

Commentary

The case at hand raises a rare question in international commercial arbitration concerning multiparty proceedings.

Under Article 1(3) of the LACI, an arbitration is *international* if (a) the parties to an arbitration agreement have, at the time of the conclusion of this agreement, their places of business in different States; (b) the place of arbitration, or any place where substantial part of the obligations is to be performed, are situated outside the State in which the parties have their place of business; or (c) the parties have explicitly agreed that the subject matter of the arbitration agreement relates to more than one country.

In the initial procedural conference, there was an agreement between Albemarle and Emaresa on the *international* nature of this arbitration because these parties had their place of business in Chile, whereas Cipatex had theirs in Brazil.

However, Cipatex failed to appear in that hearing. Plus, Cipatex challenged the arbitral tribunal's jurisdiction because it did not sign the arbitration agreement. Hence, it could be argued -as Albemarle did- that this arbitration lost its international component during the course of the proceedings.

Does Article 1 of the LACI require the arbitration to remain *international* throughout arbitral proceedings? Or is this requirement to be fulfilled at the beginning of arbitral proceedings, when discussing the applicable procedural rules?

To begin with, the LACI does not expressly address the issue. However, Article 1(3)(a) provides an important clue: the arbitration is international if the parties to the arbitration agreement have their places of business in different States "at the time of the conclusion of that agreement". Likewise, Article 1(3)(c) contains another hint: the arbitration is international if the parties "have expressly agreed that the subject matter of the arbitration agreement relates to more than one country". Again, the past tense employed by the LACI indicates that the international component must be present at the outset of arbitration.

On the contrary, nothing in Article 1 of the LACI suggests that the international component must be maintained throughout arbitral proceedings. In my view, this is rightfully so, as any other solution would subject the continued application of the *lex arbitri* to a myriad of unpredictable circumstances, leaving room for plenty of uncertainty.

In the present case, the sole foreign party indeed exited the arbitral proceeding. However, the remaining parties did not modify the procedural rules, nor did they ask the arbitral tribunal to address the issue. Consequently, any objection should have been deemed waived under Article 4 of the LACI. Given the lack of timely objections, I believe the arbitral tribunal was bound to apply the LACI to resolve the dispute.

This approach was endorsed by the Chilean courts in the present case. As a matter of fact, both the Santiago Court of Appeals and the Supreme Court adopted a deferential approach toward the arbitral tribunal. Indeed, both Courts suggested that the LACI remained applicable to the dispute despite Cipatex's successful jurisdictional challenge. Given that the issue was considered a matter

of interpretation, the complaint recourses brought by Albemarle were dismissed. In other words, both domestic courts held that the final award could only be challenged through the application for setting aside outlined in Article 34 of the LACI.

Conclusion

Overall, the Supreme Court's decision reinforces Chile's long-standing position as an arbitration-friendly jurisdiction, an approach that has been commented before in this Blog. By affirming that the subsequent exclusion of the sole foreign party does not alter the international nature of multiparty arbitration, the Court has strengthened the predictability of international arbitration seated in Chile, maintaining consistency with the principles of the UNCITRAL Model Law.
