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Finality of Domestic Arbitral Awards: Two Important Decisions From Argentina

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In *Fiambalá Solar S.A. c/Compañía Administradora del Mercado Mayorista Eléctrico*, the Court of Appeals on Commercial Matters of the City of Buenos Aires, Argentina ("Court of Appeals"), ruled that domestic awards rendered under the UNCITRAL Arbitration Rules were final and not subject to appeal. The Court held that such awards can only be challenged by the parties through set aside proceedings. This decision was based on Article 34(2) of the UNCITRAL Arbitration Rules (as revised in 2010). In a related domestic arbitration case, *Tinogasta Solar c/Compañía Administradora del Mercado Mayorista Eléctrico*, the same Court reached a similar conclusion, but with different reasoning. In this case**,** the Court found that the parties had waived their right to appeal (and, consequently, to seek a review of the merits of the award) by signing a Procedural Order, which stipulated that any award rendered in the arbitration would be final, binding, and not subject to appeal by the parties.

The post will: (1) summarize the relevant facts of the two cases; (2) provide a brief overview of the scope of judicial review of awards in Argentina; and (3) discuss the significance of the Court of Appeals' decisions in the context of arbitration under the UNCITRAL Arbitration Rules.

Relevant Factual Background

Compañía Administradora del Mercado Mayorista Eléctrico S.A. ("Cammesa"), the entity responsible for managing Argentina's wholesale power grid, entered into over 180 Power Purchase Agreements ("PPAs") for the construction and operation of renewable power plants. These agreements were designed to supply renewable energy to Argentina's wholesale market for a period of 20 years, in exchange for payments in US dollars. The PPAs were part of the Argentine government "RenovAr Program," which included fiscal incentives and other benefits to encourage the development of new projects. The government's goal is for renewable energy to account for 20% of the market's demand by the end of 2025.

Under the PPAs, Fiambalá and Tinogasta were each tasked with constructing a solar plant in the Province of Catamarca —an 11 MW plant for Fiambalá and a 15 MW plant for Tinogasta. As both companies failed to meet their respective commercial operation dates ("COD") within the contractual timeframe, Cammesa imposed significant penalties. After unsuccessful negotiations to

resolve the dispute amicably, the two companies filed arbitration proceedings under the UNCITRAL Arbitration Rules (as revised in 2010) against Cammesa, claiming that certain events and additional costs had prevented them from meeting the COD and seeking a reduction in the penalties. Both arbitrations were seated in Buenos Aires and administered by the Permanent Court of Arbitration.

Limited Scope of Judicial Review of Arbitral Awards in Argentina

Argentina adopts a dualistic approach to arbitration. Domestic arbitration is governed by the Civil and Commercial Code, which includes a chapter on arbitration agreements (though not applicable to disputes involving the Argentine state), in conjunction with local procedural codes that regulate various aspects of arbitration as a process, including actions and remedies against awards. Domestic arbitration applies to cases that lack relevant international elements. For example, situations where the parties' places of business and the performance of the underlying business agreement are all located in Argentina.

In contrast, international commercial arbitration is regulated by the International Commercial Arbitration Law ("ICAL"), which is based on the UNCITRAL Model Law, as amended in 2006. The ICAL adopts an objective criterion for determining the international character of an arbitration. Notably, the ICAL excludes Article 1(3)(c) of the Model Law, which provides that an arbitration is international if the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country. Under the ICAL, relevant factors to determine that an arbitration is 'international' include whether: (1) the parties have their places of business in different countries; (2) the seat of the arbitration is located outside of Argentina; or (3) the place of performance of the agreement or the place with which the subject matter of the dispute is most closely connected is outside of Argentina.

In the cases of *Tinogasta* and *Fiambalá*, since both arbitrations were deemed domestic, any remedy against the awards was governed by the National Code of Civil Procedure ("Procedural Code") and not the international statute.

Under the Procedural Code, a party may challenge an arbitral award through appeal or set aside proceedings. While the right to appeal may be waived, parties cannot waive their right to seek the annulment of an award on the specific grounds outlined in the Procedural Code (Sections 760 and 761), which are designed to safeguard due process. Pursuant to these provisions, an award may be set aside on the following grounds: (i) a fundamental flaw in the proceedings; (ii) the award was rendered beyond the legal timeframe; (iii) the award decides matters not submitted to arbitration; or (iv) the award contains conflicting decisions. Most recently, in *López* and *EN-Procuración del Tesoro Nacional*, the Argentine Supreme Court reaffirmed that the grounds for annulment of the award specified in Sections 760 and 761 of the Procedural Code are exhaustive and do not permit the courts to review the merits of the arbitrators' decisions.

The Court of Appeals' decisions

Tinogasta and *Fiambalá* filed appeals against the final awards rendered in the arbitrations, but also sought the annulment of the awards. Regarding the appeals, both companies argued in their

submissions that they had not waived their right to challenge the awards on the merits. In Argentina, under the Procedural Code, appeals and annulment remedies are filed with the arbitrators, who may grant or deny them from a formal standpoint. The decision on the merits of the appeal or annulment is made subsequently by the Court of Appeals. If the arbitrators deny the appeal or set aside the petition, the party may petition the Court of Appeals to have it granted.

In *Tinogasta's* case, the arbitral tribunal determined that Tinogasta had waived its right to review the merits of the award by signing a first procedural order, which stated that any award rendered in the arbitration would be final, binding, and unappealable. In *Fiambalá's* case, the arbitrators found that, pursuant to Article 34(2) of the UNCITRAL Arbitration Rules, the award was binding and not subject to appeal. Dissatisfied with these decisions in the arbitrations, both companies submitted the matter to the Court of Appeals.

Fiambalá and Tinogasta's main argument was that they did not waive their right to file an appeal. They contended that there was no express waiver in that regard in the arbitration agreement contained in the PPA, nor thereafter in the proceedings.

Fiambalá also argued that Article 34(2) of the UNCITRAL Arbitration Rules does not constitute a waiver of the right to appeal domestic awards. Fiambalá based its argument on the changes introduced to the Spanish version of Article 34(2) of the 2010 revised version of the UNCITRAL Arbitration Rules compared to the 1976 version of former Article 32(2), in which the word "unappealable" ("*inapelable*" in Spanish) was deleted from Article 34(2). Fiambalá, contended that this change indicated that Article 34(2) does not preclude the right to appeal. In contrast, the arbitrators considered that Article 34(2) clearly and unequivocally established the final, definitive, and binding nature of the award, which implicitly entailed the waiver of available judicial remedies, to the extent permitted by law. They also concluded that by committing to "*carry out the award without delay*", the parties reinforced the conclusion that they had waived the right to appeal.

In this regard, Argentine case law establishes that the agreed-upon arbitration rules are an integral part of the arbitration clause. Therefore, the waiver of the right to appeal may stem from either the arbitration agreement itself or the arbitration rules agreed upon by the parties. Regarding Article 34(2) of the UNCITRAL Arbitration Rules, the Court of Appeals concluded, based on an examination of the preparatory work for the 2010 reform, that the UNCITRAL Arbitration Rules reaffirm the principle that the award is non-appealable, meaning that once its substantive content is issued, it is not subject to review in an arbitral instance or before national courts. This derives from the "final" nature of the arbitral award rendered under the UNCITRAL Arbitration Rules (Article 34(2)).

In Tinogasta´s case, the Court of Appeals rejected Tinogasta's argument that it had not waived the right to appeal by signing the procedural order. Although Tinogasta did not request a review of the arbitrators' decision on this matter, the Court of Appeals agreed with the arbitral tribunal that the right to appeal had been waived by the parties by signing the procedural order. Therefore, it was made clear that there had been an express waiver of the appeal, as the procedural order reflected the intention of both parties.

The Court of Appeals also rejected both annulment petitions filed by Fiambalá and Tinogasta, upholding the validity of the awards.

Conclusion

The Court of Appeal's decisions confirm the limited scope of judicial review of arbitral awards in Argentina. The interpretation made by the Court regarding the finality of domestic awards rendered under the UNCITRAL Arbitration Rules is of utmost importance, as it holds that by agreeing to submit their disputes to arbitration under these Rules, the parties are waiving their right to review the merits of the award. In other words, an express waiver to that effect is not required in the arbitration clause or later during the arbitration process. Undoubtedly, this interpretation reinforces the final and binding nature of a domestic award, which aligns with international arbitration practice.

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