Arbitration in Argentina - The Judicial Court’s Review on the Arbitration Awards

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Arbitration in Argentina

By Leandro Javier Caputo and Felipe Eduardo Zabalza (M. & M. Bomchil)

The nullity recourse against an arbitration award is not aimed at challenging alleged errors in *indicium*, nor is it possible to use it to obtain elliptically a judicial revision of an adverse award, since that would imply the degeneration of arbitration, depriving it of one of its most precious benefits.

A recent decision in re Decathlon España S.A. vs. Bertone, Luis, handed down by the National Court of Appeals on Commercial Matters, Chamber D, stated that “the higher or lesser amount of said control depends on the same will which gave rise to arbitration: it will be of a maximum extension if the parties hold the appeal for not having waived it, or it will be limited to certain formal fields in the case the contracting parties have waived such appeal and only hold the nullity appeal in relation to the award”.

The Judicial Court’s Review on the Arbitration Awards

Under the Argentine National Civil and Commercial Procedural Code (“NCCPC”), all parties shall agree on proceeding with the arbitration.

Argentina is a federal state, so the NCCPC governs proceedings heard before federal courts while the provincial codes do so in the provinces. Despite this, most provincial codes of civil procedure follow the provision of the national code and contain the principles of the law on arbitration described in this paper. (Said code is not based on UNCITRAL Model Law.)

If the parties do not waive their right to appeal the award, they can appeal it for the same reasons and bases as judicial judgments within five (5) judicial days of the issuance of it.

Certain institutional arbitration rules establish that the awards are not suitable (e.g., article 64 of the Organic Regulations of the Arbitral Tribunal of the Buenos Aires Stock Exchange, among others). Nevertheless, the parties are free to agree on their own terms on this regard, and in fact frequently do so.

Usually the parties provide that the award shall be definitive and not suitable for appeal. Notwithstanding the foregoing, an award may be challenged by means of a nullity action or recourse on the basis of limited grounds set down by the Law (as found in article 760 and 771 of the NCCPC).

If the arbitration procedure was heard as amiable compositeur, the award must be challenged through an action of nullity while the recourse of nullity must be used vis-à-vis awards handed down in procedures heard as law ones.

The recourse of nullity only proceeds upon the following grounds:
1. Violation of due process in Law principle;
2. The award was rendered after the time limit in which to issue it;
3. The award contains contradictory rulings;
4. The award decides *extra petita* (beyond the terms of dispute).

This recourse shall be filed within five (5) judicial days from the notification of the award, before the Court of Appeals of the court that would have decided the dispute if it had not been submitted to arbitration. Notice of this recourse shall be served upon the counterparty, who shall respond it within five (5) days. After this deadline the Court of Appeals shall rule on the validity or nullity of the award (see articles 243 to 246 of the NCCPC).

If it is an arbitration heard as amiable compositeurs, the party is entitled to file a nullity action, which is only admitted when the award has been rendered beyond the deadline set or on matters that were not included in the terms of dispute (Article 771 of the NCCPC).

According to the Court in the quoted case, “even if the Law provides for the challenge of the award through the nullity recourse, such appeal does not entitle the parties to request a revision of said award in relation to the law of the decision, but the judge shall only decide in relation to the existence of the specifically established causes, affecting the validity of the award, i.e., to control the effective performance of the requirements the legislation has considered as essential for a proper administration of justice”.

Besides, the Court has decided that, “in order to solve the nullity of an award, the arguments leading to prove its injustice lack any validity, since the procedural aim of the judicial jurisdiction is completely different from that entailed by the appeal. The ordinary judges are only entitled to revise the award in relation to its justice when an appeal which opens the general jurisdiction is filed with space specifically for that. But when a question related to validity is exclusively submitted, it is not entitled

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to consider the manner in which the disputes have been solved, since that would mean the opening of an unexpected appeal, thereby granting the judges an unexpected jurisdictional power”.

Within this, in re Cacchione, Ricardo Constantino vs. Urbaser Argentina S.A., the Argentine Federal Supreme Court rejected an extraordinary appeal against the decision of the Arbitral Tribunal of the Buenos Aires Stock Exchange2.

While overruling the claim, the Court declared that when the parties have expressly waived the right to file judicial recourses, the intervention of said kind of judges should become admissible only through the nullity recourse.

Conclusion

The extended use of arbitration procedures as alternative means for resolving commercial disputes has significantly increased in the last few years, mostly because of the delays involved in local judicial courts proceedings.

Upon the foregoing bases, the Argentine Federal Supreme Court has handed down in a line of principle that it shall not hold jurisdiction to hear appeals with the sole view of modifying the criteria of the arbitrators nor the fairness of their decisions, as the parties have decided by themselves to waive the authority of the judiciary courts.

We see as probable that the Argentine courts will maintain these criteria in future judgments.

ARGENTINA

Argentine Supreme Court Extends Emergency Laws to Refinancing Mortgages

By Carlos E. Alfaro (Alfaro-Abogados)

In a landmark case, Rinaldi v. Guzman, the Federal Supreme Court of Argentina upheld the application of emergency laws dictated after the financial crisis of 2002 to mortgage debts.

Until this decision was rendered (15 March 2007), the Supreme Court mainly decided on the validity of these emergency laws in matters related only to bank deposits in US dollars that were compulsorily converted into Argentine pesos (ARP) during the crisis (the so called “peso-ification”), upholding the constitutional validity of such measures (i.e., in the Bustos and Massa cases, among others).

Mortgage Refinancing Program

This recent decision resolved the pending issue of mortgage debts that were converted into pesos at a 1:1 rate and subsequently refinanced, under which it was called “Mortgage Refinancing Program”, created by Law 25.798 (the “Program”). This Program was conceived to aid small debtors who contracted mortgage-secured loans of less than ARP 100,000 destined to buying or renewing home buildings, and that were defaulted before or during the worst period of the crisis.

Before the Program was launched in 2003 all debts denominated in US dollars contracted before January 06, 2002 were converted into ARP on a 1:1 basis, even those that had defaulted before such date. The Program entitled eligible debtors to transfer the “peso-ificated” debt to an independent trustee designated by the executive power, which surrogated the original debtor in the lending relationship with the creditor.

After the debt assignment, the original debtor continued obligated to the trustee, but under more favorable conditions of repayment. The trustee was empowered to issue short- and medium-term bonds to cancel the assigned debts with lenders. The damages to creditors arising from the peso-ification were “compensated” by applying an indexation coefficient (the “Salaries Variation Coefficient”) plus a 2.5% interest rate on the amounts due.

As expected, the Program was strongly rejected by creditors as they saw their credits repayment significantly postponed, apart from the peso-ification issue that was the main matter of dispute.

The Theory of Shared Effort

The Court of Appeals, which hears the appeal of judgments rendered at the lower court level, upheld the validity of the peso-ification, but in an effort to find a solution, allocated the “damages” of the peso-ification

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