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RECENT DEVELOPMENTS

EMILIO J. CÁRDENAS*

Argentina—A Judicial Court Intervenes in an Arbitration Started Under the International Chamber of Commerce Rules

The rule of [public policy] which takes precedence of all other in a case like this, is that people must be bound by the arrangements they have made; a principle which the Judges are most reluctant to apply to arbitration.¹

For the past two decades private companies from all over the world have substantially increased their activities and participation in the various segments of the Argentine oil and gas sector. Concurrent with such developments, private parties involved in oil and gas activities have demonstrated a growing interest in arbitration (normally the result of a contractual arrangement between the parties) as a dispute resolution mechanism. The increased attraction towards arbitration as a private way to settle commercial disputes and to deliberately avoid ordinary state jurisdiction (in fact, contracting out of ordinary state jurisdiction) has generated an initial preference for arbitration to be governed by the International Chamber of Commerce Rules of Conciliation and Arbitration (ICC Rules). Recently, in *Perez Companc v. Ecofisa S.A.*,² the Commercial Court of Appeals of the City of Buenos Aires had to decide on the limits of the applicability of the ICC Rules to a domestic arbitration.

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1. *Appleson v. Littlewoods*, [1939] 1 All E.R. 464 (Scott, L.J.).

2. Reported in 143 EL DERECHO, Sept. 17, 1991, at 436.

I. The Background

In 1977 Perez Companc S.A. (PC) and Bridas S.A. (B) entered into an agreement with Yacimientos Petroliferos Fiscales (YPF), the Argentine state-owned oil and gas enterprise. PC and B agreed to perform various production services for YPF. One year after entering into the agreement, PC and B hired Ecofisa S.A. (E) and Petrofisa S.A. (P) to collaborate on the performance of certain services required of PC and B in connection with their contract with YPF. Under the corresponding agreement PC and B paid \$2,500 to E and P as a downpayment and also agreed to pay them additional fees based on output increases of the oil and gas produced for YPF.

Six years later, a new administration led by President Alfonsín decided by decree 3870/84 to terminate various YPF contracts, including (but not limited to) the one that was approved by decree 18.852/77. E and P's point of view was that PC and B, notwithstanding the termination, still had available a commercial option or possibility to continue rendering the services under the 1977 contract by specifically including them in a new contract with YPF. PC and B, in fact, entered into a new agreement with YPF that was later approved by decree 23.338/84.

In short, PC and B apparently felt they had the opportunity to rid themselves of E and P since the 1977 contract was terminated by decree 3870/84. E and P argued, instead, that PC and B could and should have avoided the frustration of their old service agreement by including them in the new contractual framework bargained with YPF. This dispute could not be solved by direct bargaining.

The agreement between PC and B and E and P contained a specific clause through which all disputes had to be settled by arbitration under the system of administered arbitration governed by the ICC Rules, by one or more arbitrators appointed in accordance with such Rules. The selected arbitration mechanism, therefore, contained an element external to the Argentine legal system. Reference to the ICC Rules, it could be argued, thus made the arbitration an international one.

II. The "Terms of Reference"

As the contractual arbitration procedures progressed, the parties could not agree upon the specific subject that was to be arbitrated. They could not, therefore, decide on the contents of the so-called "Terms of Reference," a procedural document that (inter alia) must contain the definition of the specific issues to be arbitrated. This document (also known as *compromis*) is the one that, inter alia, gives some protection against subsequent attacks on an award that claim the arbitrators exceeded their authority. This is important since it relates to the possible resort to a well-known defense, that of *ultra petita*.

PC and B claimed that the dispute involved not only a business dispute, but also the interpretation of an "act of state" (decree 3870/84, they argued, was

clearly a noncontractual matter), and because of its nature, the arbitrators could not decide the dispute. PC and B, thus, directly raised the issue of the arbitrability of the subject of the dispute (not all disputes are arbitrable since legal systems do not allow unlimited submission of disputes to arbitration).

The fundamental (positive) condition of arbitrability is that the parties must be able to dispose of the matter in dispute. Such alienable matters are those connected with contractual and commercial relations and also with property rights. The barrier, that is, the negative condition to arbitrability, is public policy (*ordre public*) whenever it is involved.³

PC and B refused to accept or execute the Terms of Reference. At E and P's request and pursuant to article 13.2 of the ICC Rules, the arbitrators determined the respective Terms of Reference. From there they moved forward with the arbitration procedures as they had contractually agreed.

III. A Move to Restrain Arbitration

PC and B, in view of the foregoing, went to court. They appeared before a Buenos Aires trial commercial judge requesting that he lead the parties in the process of defining the contents of the Terms of Reference. PC and B maintained that (notwithstanding the reference to the ICC Rules) the arbitration was an internal or domestic one. They maintained that it was subject to the Argentine Code of Procedures, which requires (in the event of disagreement on the Terms of Reference) the Terms of Reference to be determined by the parties or by the court through an ad hoc regulated procedure.

PC and B's underlying argument was that judicial control over the arbitrability of the subject matter to be decided by arbitration cannot be waived under Argentine law. They claimed that in domestic arbitration total insulation of the arbitration procedures from the procedural rules of the *lex loci arbitri* is not possible. In other words, in view of the type of contract (an entirely internal one, at least from a pure geographical criterion), delocalization was not possible.

The defendants stated, instead, that the Argentine Code of Procedures was not applicable since the Arbitral Tribunal endorsed by the ICC had already determined the Terms of Reference according to ICC's specific procedural rules. In addition, the parties had formally accepted these procedural rules. They therefore requested the trial judge to declare that he lacked jurisdiction to decide on the issue.

The trial commercial judge agreed with the defendants and refused the stay. As requested by E and P, the judge declared that the arbitration agreement deprived him of jurisdiction to decide the case. The judge further held that, as the law

3. Anghelos C. Foustomos, *Conditions Required for the Validity of an Arbitration Agreement*, J. INT'L ARB., Dec. 1988, at 120.

permits any person to subject himself to arbitration, and since the subject matter of the arbitration was of a patrimonial nature, the jurisdiction of state judges could not go beyond analyzing whether the disputes that the parties wanted decided by the arbitrators were of the kind forbidden by the law.

PC and B appealed the decision. They based their position on four main arguments:

- (a) First, they criticized the judge's failure to recognize that the discussions were part of an internal or domestic arbitration, and, as such, were subject to the provisions of the Argentine Code of Procedures;
- (b) second, they argued that, under the Code, the judge necessarily had to, in case of disagreement, intervene and define (together with the parties) the Terms of Reference of the arbitration;
- (c) third, they claimed that sovereign acts (precisely like decree 3870/84) could not be subject to review in arbitration, and that nobody other than a judge could make a decision on its validity as a matter of public policy; and
- (d) fourth, they took the position that the trial judge had not issued an opinion on whether the arbitrators could decide on the existence of the contracts that had been terminated by governmental acts, such matter not being an arbitrable one under the Argentine Code of Procedures.

Although the arbitration was not subject to the Argentine procedural law (but instead to ICC Rules), it nonetheless has a duty to respect the procedural public policy rules of Argentina as the place of arbitration. If the public policy is disregarded by the parties or by the arbitrators, the arbitration procedures may become null and void regardless of whether the arbitration rules were sufficient to settle the dispute without the need to apply Argentine procedural law.

IV. The Point of View of the Commercial Court of Appeals

According to the Commercial Court of Appeals' final decision, the matters to be decided by it were limited only to the following:

- (a) whether the arbitrators could, when confronted with a disagreement between the parties, draft the Terms of Reference themselves;
- (b) whether the ICC Tribunal was empowered to decide any and all disputes among the parties; and
- (c) whether the Argentine judiciary had jurisdiction to decide matters submitted to the arbitrators of the kind the Argentine Code of Procedures forbids to be submitted to arbitration on public policy grounds.

In short, the controversy was then limited to determining whether, in the event the parties could not agree on the contents of the Terms of Reference, the judge should apply the Argentine Code of Procedures or respect the ICC Rules. Since an internal arbitration confronted the Court of Appeals, it decided that the va-

lidity of the laws and regulations enacted by the Argentine Government could not be submitted to arbitrators. The defendants had not expressly objected to the validity of decree 3870/84. That notwithstanding, the manner in which the Terms of Reference were drafted did not assure that the arbitrators could not be forced to do precisely that.

The court considered the arbitrators' absence of jurisdiction to be obvious, and the arbitrators could not decide *per se* on the arbitrability of the matters objected to by the plaintiffs. Therefore, in the absence of an agreement on the matters to be arbitrated, the court decided that it should intervene with the parties to determine the specific contents of the Terms of Reference; thus, it would ensure that the contents did not violate Argentine public policy. Once the Terms of Reference were determined, the court stated that the arbitration procedures should continue as originally agreed by the parties.

The court further found that even if the 1977 contract was, in fact, frustrated by a supervening impossibility (its termination by decree 3870/84), the arbitration clause contained therein (with the public policy caveat mentioned above) had autonomy and was still enforceable. The court, nevertheless, did not allow arbitrators to decide an issue of public law. A constructive approach was used and a healthy outcome resulted, evidencing some restraint and reluctance by the court to unnecessarily interfere in the arbitration proceedings.

