ARGENTINA: Four decisions affirm pro-arbitration tide

After a blip, the tide in Argentine court rulings has swung back in the pro-arbitration direction. By **Federico Godoy** and **Juan Sonoda** of Beretta Godoy in Buenos Aires

In four recent cases, Argentine courts have limited the review of arbitral awards to the narrow grounds permitted by the Argentine Federal Procedural Civil and Commercial Code, have supported the power of arbitral tribunals to hear disputes about constitutional points, and have confirmed the exclusion of judicial jurisdiction after a case is submitted to arbitration.

Regarding the review of arbitral awards, section 760 of the Federal Procedural Civil and Commercial Code sets forth that if the parties to the arbitration have waived their right to appeal against the award, the only ground to vacate an award is to request its annulment. Under the Code, the grounds for annulment are:

- fundamental procedural defects (ie, violations of due process rights);
- the award contains decisions incompatible between each other;
- the arbitrators exceeded their powers;
- the arbitrators exceeded the term granted to issue an award, or
- the arbitrators rendered an award over matters not submitted to arbitration.

Mobil Oil Argentina v Gasnor

In the first case, *Mobil Oil Argentina v Gasnor* (08/08/2007, CN Com, Division D), Division D of the City of Buenos Aires Commercial Court of Appeals found that generic allegations related to public policy are insufficient to ground the annulment of an award. Gasnor, relying on a Federal Supreme Court's ruling in *Cartellone* (*CSJN, José Cartellone Construcciones Viales v Hidronor* (1/06/2004, Lexis No. 20042281)), sought the annulment of the arbitral award alleging that it was arbitrary and contrary to public policy. The Court of Appeals rejected Gasnor's request and ruled that a waiver of a right to appeal is not contrary to public policy, since the right to appeal lacks constitutional status in civil litigation. Moreover, the Court of Appeals stated that the scope of the petition for annulment is limited to the revision of matters related to "due process" and that other types of error cannot be reviewed if the appeal was waived.

Red de Monitoreo SRL v ADT Security

In a similar vein, in *re Red de Monitoreo v ADT Security* (02/05/2008, CN com, Division A, Lexis No. 70047111), Division A of the same Court of Appeals ruled that the rejection of a compensation item, no matter the grounds given in the award to support it, is not a procedural matter but relates to the merits of the case. Hence, it can never be construed as an "essential fault in the proceeding". Therefore the grounds alleged by the party in its request fell outside the scope of a motion for annulment.

In addition, two other recent decisions, though not strictly related to judicial review, show a decisive support to arbitration by Argentine courts.

Arc & Ciel v Sky Argentina & Sky Argentina Dgh Management

Arc & Ciel v Sky Argentina & Sky Argentina Dgh Management (04/03/2008, CN Com, Division D, Lexis No. 35022088), Division D of the same Court of Appeals ruled that arbitrators are empowered to decide all matters submitted to them, including constitutional issues. In this regard, the Court of Appeals stated that arbitrators "can decide any matter submitted to them, as long as such a matter is not excluded by law, be it a purely legal, factual or a mixed matter, and in their wide scope of decision, they can take into consideration all the matters that they see fit, legal as well as constitutional".

Papel de Tucumán v BANADE

In this case (07/09/2007, CN Com, El Dial AA30E), Division A of the Court of Appeals ruled that by submitting the dispute to arbitration, the parties waived the jurisdiction of the intervening judicial court and thus extinguished a judicial proceeding between the parties.

The dispute began in 1990, when Papel de Tucumán filed a claim against BANADE seeking the annulment of certain public deeds. In 1996, both parties suspended those judicial proceedings and submitted the dispute to arbitration. However, 11 years later, in 2007, the notary public, Alejandro Agustin Terán (who had been joined as an "interested third party" to the judicial proceedings because of his intervention in the execution of the deeds), attempted to re-open the judicial proceeding alleging a denial of justice. He requested the court to set a three months deadline for the conclusion of the arbitration. The court replied that by submitting their dispute to arbitration the parties had precluded court jurisdiction over the case, and that a supervisory court can set a timeframe for the issuance of an arbitration award only if such a timeframe is not agreed by the parties to the arbitration.

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These cases show a healthy current within Argentine courts in support of arbitration, either by restricting the judicial review of awards to the narrow limits set forth in the applicable procedural codes, or by recognising the power of arbitrators to decide all matters submitted to them and that state courts' jurisdiction is precluded after a matter is submitted to arbitration.

On the other hand, one can't overlook that during 2008 Argentine courts rendered rulings such as *Rivadeneira v ABN Amro Bank* (see *GAR*, Volume 3 Issue 5) in which Division D of Commercial Court of Appeals stated that unforeseeable disputes do not fall within the scope of an arbitration clause; or that in *Deputy Attorney General of the Argentine Republic v International Chamber of Commerce* (see *GAR*, Volume 4 Issue 1) Division IV of the Federal Contentious and Administrative Court of Appeals granted an anti-arbitration injunction ordering an UNCITRAL tribunal to stay arbitration proceedings in which the Argentine Republic was respondent. Thus there remain decisions in the opposite direction.

CONSTRUCTION: What's the value of a DAB's "binding" decision?

A recently published ICC award has helped to answer this important question. By **Christopher Seppälä***(partner) of White & Case LLP in Paris

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An ICC arbitral tribunal has unanimously decided that an engineer's non-final decision on a dispute under clause 67 of the FIDIC Conditions of contract for works of civil engineering construction (FIDIC Conditions, fourth edition, 1987) should be enforced by an arbitral award. Since the Dispute Adjudication Board (DAB) has replaced the engineer as a decider of disputes under the current (1999) editions of the FIDIC forms of contract for major works, the author can see no reason the same principle should not apply to a non-final decision of a DAB under the current editions.

The long-standing question

Traditionally, international construction contracts, such as those published by FIDIC, have provided for the referral of disputes between the contractor and the employer to the engineer for decision. They have also provided that only if a party expressed dissatisfaction with the decision, in a specified way, could the dispute be referred to arbitration. Unless and until revised

in arbitration (or by an amicable settlement) that decision was deemed to be binding on the parties and, thus, settled the matter provisionally at least. In the 1999 FIDIC Books, FIDIC replaced the engineer as the decider of disputes by a DAB. But otherwise the pre-arbitral procedure for the settlement of disputes is essentially unchanged.

However, as construction arbitrations frequently take several years and are often not even begun until near the end of a project, an issue of considerable concern (and uncertainty) under both procedures has been what value, if any, is to be given to the binding decision of an engineer or a DAB? If such a decision is not respected, are there any means by which the decision can be enforced?

The tribunal's answer

A recently published ICC award expressly addresses the issue and provides a most welcome solution (see the *ICC International Court of Arbitration Bulletin*, Volume 19, No. 2 – 2008, pp85-90).

By an interim award in ICC Case No. 10619, the arbitrators, sitting in Paris, unanimously held, at the request of the claimant or contractor, that certain decisions of the engineer under the FIDIC Conditions, fourth edition, 1987 that awarded sums to the claimant or constructor, could be enforced by an interim award under the ICC Rules of Arbitration, even though one of the parties (the same party in fact who was seeking to enforce the decisions – the claimant or contractor) had given a notice of intention to commence arbitration with respect to the decisions. The arbitrators held that such decisions can be given effect to by such an award because clause 67 expressly provides that a decision of the engineer under that clause is binding on the parties notwithstanding that either or both of them have given a notice of intention to commence arbitration. On that note, the second paragraph of sub-clause 67.1 provides:

> *[…] the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.*

The tribunal said:

> *If the above Engineer's decisions have an immediate binding effect on the parties so that the mere fact that any party does not comply with them forthwith is deemed a breach of contract, notwithstanding the possibility that at the end they may be revised or set aside in arbitration or by a further agreement to the contrary, there is no reason why in the face of such a breach the arbitral tribunal should refrain from an immediate judgment giving the Engineer's decisions their full force and effect. This simply is the law of the contract. [Paragraph 22, emphasis added]*

Thus, an arbitral tribunal may, and indeed (when requested to do so) should, enforce decisions of the engineer under clause 67 by an interim or partial award under the ICC Rules ordering the other party immediately to pay their amount even if one or both parties have expressed dissatisfaction with them. In this author's view, this is entirely consistent with the way clause 67 of the FIDIC Conditions was intended to operate.

Relevance to DABs

ICC arbitral tribunals had previously ordered payment of "final and binding" decisions of the engineer under clause 67 of the FIDIC Conditions, second edition, 1969; in other words, decisions that had not been the subject of any notice of intention to commence arbitration within the contractually stipulated time limit of 90 days under the second edition (see ICC Case Nos. 3790/3902/4050/4051/4054 (joined cases), summarised in Abdul Hamid El-Ahdab's *Arbitration with the Arab Countries* (Kluwer, Deventer, 1990) p889-891). However, the interim award in this matter, Case No. 10619, is the first example of a published award of which this author is aware where an arbitral tribunal has ordered payment by an interim award of the amount of an engineer's decision which is "binding" but not "final"; that is, which had been challenged, within the contractually stipulated time period, by one or other or both of the parties.

What's more, the same result should be reached in the case of a decision of a DAB under clause 20 of the 1999 FIDIC Books as was reached here, where the decision was that of the engineer under clause 67 of the FIDIC Conditions, fourth edition, 1987. This should be so because the relevant language of clause 67 of the fourth edition (quoted above) and of clause 20 of the 1999 FIDIC Books is to the same effect. Sub-clause 20.4 of the 1999 FIDIC Books provides:

> *The decision [of a DAB] shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below.*

Accordingly, even if a party has given a notice of dissatisfaction (which is equivalent to the notice of intention to commence arbitration under the fourth edition of the FIDIC Conditions) with respect to a decision of a DAB, each party is bound to give effect to that decision (unless and until overturned by a subsequent amicable settlement or arbitral award). Furthermore if that decision calls, for example, for a payment to be made by one party to the other, then that decision may be enforced directly by an interim award pursuant to the ICC Rules of Arbitration. That is the logical conclusion to draw from the interim award in Case No. 10619.

ENERGY CHARTER TREATY: Russia proposes "new" Energy Charter Treaty

What, if anything, should be read into Russia's recent proposal to replace the Energy Charter Treaty? **Sophie Nappert**, arbitrator, of 3 Verulam Buildings in London looks at some options

The Russian Federation has recently published a "Conceptual Approach to the New Legal Framework for Energy Cooperation (Goals and Principles)" (available at http://kremlin.ru), in which it seeks to revisit certain principles enshrined in the Energy Charter Treaty (ECT). This follows several high-profile declarations by President Medvedev and Prime Minister Putin (notably at the 2009 Davos World Economic Forum) that the Energy Charter Treaty should be rethought given its "failure" to assist in resolving the intractable conflict between Russia and Ukraine over transit tariffs, a problem that resurfaced again in January.

Russia has signed the ECT, but never ratified it. Under article 45 of the ECT, Russia is arguably applying the ECT provisionally (see S Nappert, "Russia and the Energy Charter Treaty: The Unplumbed Depths of Provisional Application", *Global Arbitration Review*, Volume 3 Issue 2 p34), although it denies being bound by the ECT's terms without ratification. This issue is awaiting adjudication by the arbitral tribunal hearing the case brought against Russia by the Yukos shareholders.

A comparison with the ECT

The Russian proposal is broadly worded and in the form of a statement of principle. It is based on the following main policies:

- the new agreement should be universal and open to adherence by any country;
- it should cover all energy sectors, including oil, gas, nuclear, renewables and power trade;
- it should recognise a state's "unconditional sovereignty" over its natural resources;
- it should be based on the concept of non-discrimination, including at the pre-investment phase;
- it should not conflict with other international agreements; and
- it should aim to provide an effective crisis management mechanism.

These principles appear for the most part uncontroversial at international law, and some of them can be found in the ECT itself. However, there are