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Latin American Arbitration

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This edition contains a summary of some of the most important arbitration news in Latin America between September 1 and December 31, 2018.

ARGENTINA

Case 12732/2009/CS1: EN - PROCURACIÓN DEL TESORO NACIONAL. The *Corte Suprema de Justicia de la Nación* reiterated that an annulment petition excludes the review of the merits of the award.

Case 32212/2017: FIDEICOMISO LLERENA V. BOUWER'S. The *Cámara Nacional de Apelaciones en lo Civil* concluded that the request for an interim measure before a court of law does not imply a waiver of the arbitration clause.

BRAZIL

Case 2018/0076990-4: VOLKSWAGEN V. METALZUL. The *Superior Tribunal de Justiça* ruled that the existence of an arbitration clause did not affect the executive nature of debt instruments and did not prevent the initiation of bankruptcy proceedings.

Case 2015/0257748-2: PARANAPANEMA V. BANCO SANTANDER. The *Superior Tribunal de Justiça* decided to extend the arbitration agreement contained in a contract to other related contracts, even though the parties had included a choice-of-court clause in the latter.

Case 2015/0171807-9: FISCHER V. EULER ALVES BRANDAO. The *Superior Tribunal de Justiça* concluded that a partial award extending the arbitration agreement to a non-signatory third party could be challenged as null and void, and suspended the effects of the partial award until the petition for annulment was resolved.

Case 2017/0274999-3: FERNANDO AMARAL MARTINS V. G4. The *Superior Tribunal de Justiça* held that the signing of an arbitration clause by a consumer who in turn was a lawyer was not sufficient to compel him to submit the dispute to arbitration.

Case 2016/0145366-5: DAMPSKIBSSELKABET NORDEN V. ZAMIN AMAPÁ. The *Superior Tribunal de Justiça* decided to recognize a foreign arbitral award issued after one of the parties decided to abandon the proceeding due to insolvency problems.

COSTA RICA

Case 14-000090-0183-CI: INMOBILIARIA PALACIO ORIENTAL V. CHINAFECC. The *Tribunal Segundo Civil* recognized that an award had *res judicata* authority and, therefore, reversed a judicial decision that resolved a dispute previously settled through arbitration.

DOMINICAN REPUBLIC

Case TC-05-2018-0171: THE STONHARD GROUP. The *Tribunal Constitucional* declined an *amparo* action for judicial tribunals to determine whether a non-signatory third party had been duly joined into an arbitration.

PERÚ

Case 360-2018: PETRÓLEOS DEL PERÚ V. REFINERÍA LA PAMPILLA. The *Corte Superior de Justicia de Lima* dismissed a petition for annulment against an arbitration award that recognized the binding effect of an expert report.

Case 00145-2018-0-1817-SP-CO-01: COMPACT MAQUINARIAS V. MINISTERIO DE AGRICULTURA. The *Corte Superior de Justicia de Lima* annulled an award because the arbitrator quoted verbatim the statements of one of the parties, instead of assessing and analyzing the arguments of the parties and the evidence.

Case 160-2017-0: MUNICIPALIDAD DE CAJAMARCA V. CONSORCIO FRONOCCA. The *Corte Superior de Justicia de Lima* ruled that an agreement that conditioned the filing of a petition for annulment against an award to the submission of a bond in favor of the winning party affected the constitutional right of access to justice.

Case 12210-2017-0-1817-JR-CO-14: MATEO FUERTES V. CENTANO FLORES. The *Corte Superior de Justicia de Lima* upheld a decision refusing to enforce an arbitral award issued in unclear circumstances and on the basis of an arbitration agreement that had not been proven.

ARGENTINA

Case 12732/2009/CS1: EN - Procuración del Tesoro Nacional

The Secretariat of Small and Medium Enterprises and the Joint-Venture 'Propyme' entered into a management contract. Shortly after, the Secretariat unilaterally terminated the contract and Propyme initiated arbitration against it. In 2009, the arbitrator ordered the Federal State to compensate Propyme.

The Federal State sought to set aside the arbitral award. Based on articles 760 and 761 of the National Code of Civil and Commercial Procedures and the 'Cartellone' decision, it argued that the award was null because the arbitrator (i) had departed from the applicable law and the contract to set the compensation amount; (ii) had erroneously assessed the evidence; and (iii) had failed to apply Argentine emergency rules on State debts consolidation.

The *Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal* annulled the arbitral award partially because the arbitrator had failed to apply the emergency rules on State debts consolidation, which it considered to be of public policy. The rest of the award was not annulled because the Court of Appeals concluded that the Federal State had not proved the existence of arbitrariness and that the arguments related to the interpretation of the contractual provisions and the assessment of the evidence were characteristic of an appeal and not of a petition for annulment.

The Federal State filed an appeal with the purpose of obtaining the total annulment of the award. It argued that the decision not to annul the entire award was arbitrary because it lacked foundation and omitted to deal with issues that were relevant to the resolution of the dispute. It also argued that, in deciding in that way, the Court of Appeals unfoundedly departed from the 'Cartellone' decision, according to which the waiver to appeal an arbitral award does not extend to cases in which the arbitral award is contrary to public policy, unconstitutional, illegal or unreasonable.

On November 6, 2018, the *Corte Suprema de Justicia de la Nación* upheld the Court of Appeals' ruling. It concluded that (i) the petition for annulment excluded the review of the merits of the arbitral award; (ii) the grounds for annulment contained in the Nacional Code of Civil and Commercial Procedures were exhaustive, and the Federal State did not prove any of them; and (iii) the Federal State did not prove that the decision of the arbitrator had violated public policy.

Case 32212/2017: Fideicomiso Llerena v. Bouwer's

Fideicomiso Llerena Studio Aparts ('FLSA') entered into a trust agreement with Bouwer's S.A. FLSA initiated legal proceedings against Bouwer's, and the latter challenged the court's jurisdiction because the contract had an arbitration clause.

FLSA argued that the parties had waived arbitration because, after signing the agreement, both had unveiled their intention to settle their disputes in a court of law. It argued that FLSA unveiled its intention by initiating the judicial proceedings against Bouwer's, and that the latter unveiled its intention by requesting an interim measure before a court of law and by initiating a mandatory pre-judicial mediation.

The court asserted jurisdiction. It concluded that Bouwer's had waived its right to arbitration because it had requested an interim measure to a court of law to secure the outcome of the claim that it would eventually file against FLSA, and because it had initiated a mandatory pre-judicial mediation for that purpose.

On December 10, 2018, the *Cámara Nacional de Apelaciones en lo Civil* reversed the decision. It stated that the parties could request interim measures to a court of law without that implying a waiver of their right to arbitration. It also noted that when Bouwer's requested the interim measure, it expressly stated that had no intention to waive said right.

BRAZIL

Case 2018/0076990-4: Volkswagen v. Metalzul

Metalzul Industria Metalúrgica y Comercio Limitada filed a bankruptcy petition against *Volkswagen de Brasil Industria de Vehículos Automotores Ltda*, claiming approximately BRL 617,000 under certain debt instruments (*duplicatas protestadas*). Volkswagen challenged the court's jurisdiction because the parties had included an arbitration clause in the contract that gave rise to the debt instruments. It also said that it had already paid approximately BRL 425,000 and made a judicial deposit of the amount owed to avoid bankruptcy.

The court considered that Metalzul's petition was premature because the parties had agreed to arbitration. However, the *Tribunal de Justiça do Estado de São Paulo* reversed that decision because it considered that the petition had the purpose of declaring the bankruptcy of the debtor and no disposable economic rights were at stake.

On November 6, 2018, the *Superior Tribunal de Justiça* concluded that the right of the parties to submit a dispute to arbitration is not absolute and does not permanently prevent the courts from exercising jurisdiction, especially when the claim of one of the parties is based on an instrument of an executory nature. In this case, the right of the creditor can only be exercised through the intervention of the Judiciary because the arbitrator lacks *imperium.*

It also stated that it is not reasonable to require that the creditor initiate arbitration to obtain a certainty judgment about a debt that, in its opinion, already appears in the debt instruments. As it is a bankruptcy application, it is enough for the creditor to prove the probable insolvency of the debtor.

The *Superior Tribunal de Justiça* considered that the fact that Volkswagen had made a deposit to avoid the declaration of bankruptcy did not change the outcome because, after the deposit, the process was transformed into a collection action and arbitrators could not enforce the debt against the debtor's assets.

Case 2015/0257748-2: Paranapanema v. Banco Santander

Paranapanema S.A. entered into a line of credit agreement with Banco Santander S.A. and Banco BTG Pactual S.A. Paranapanema then canceled the agreement by handing over shares to the banks. The parties also entered into swap agreements, which established a supplementary payment in favor of the banks if the value of the shares reached a lower level than that stipulated. The line of credit contract contained an arbitration clause, and the swap contracts contained a choice-of-court clause.

The banks initiated arbitration to claim the supplementary payment under the swap agreements. The arbitral tribunal ordered Paranapanema to compensate the banks. Paranapanema sought to set aside the arbitral award, alleging, among other things, that the swap agreements did not contain an arbitration clause, but a choice-of-court clause.

The judge denied the request. He concluded that the arbitration clause of the line of credit agreement was extendable to the swap agreements because the obligations set forth in the latter derived from the former and, therefore, all the agreements were interconnected and interdependent. He also stated that the choice-of-court clause constituted a subsidiary path, but not the main one, for the settlement of disputes, and both clauses could coexist perfectly. The *Tribunal de Justiça do Estado de São Paulo* upheld the decision.

On September 18, 2018, the *Superior Tribunal de Justiça,* by majority, upheld the ruling. It concluded that the agreements were related agreements that instrumented a single economic transaction and, therefore, should be jointly interpreted. Since the line of credit agreement was the main agreement, it considered that its rules were also applicable to the ancillary swap agreements, including the arbitration clause.

In his dissenting vote, justice Luis Felipe Salomão stated that the contracts did not lose their autonomy due to the fact of being connected. He also noted that the extension of the arbitration agreement in related contracts could not be done automatically in all cases, without analyzing the intention of the parties. Although he recognized that the choice-of-court clause was not always incompatible with the arbitration clause because the scope of application of both clauses could be different, in this case, he considered that the inclusion of a choice-of-court clause in the swap agreements showed that the parties intended to waive their right to arbitration under the line of credit agreement in respect of disputes arising from the swap agreements.

Case 2015/0171807-9: Fischer v. Euler Alves Brandao

In a multi-party arbitration, the arbitral tribunal issued a partial award whereby it decided to join *Fischer América Comunicação Total S.A.* to the proceeding. Fischer stated that it was a third party non-signatory to the arbitration agreement and, therefore, requested an injunction before a court of law with the purpose of staying the arbitration until the petition for annulment that it would file in due course against the partial award was resolved.

The judge issued the injunction because he considered that Fischer had not clearly and expressly consented to the arbitration. The *Tribunal de Justiça do Estado de São Paulo* reversed the decision because it considered that the arbitral tribunal should decide first on its competence, and the parties could request the annulment of that decision after the final award was issued.

Fischer appealed this decision arguing, among other things, that partial awards could be challenged as null and void and that it could not be joined to the arbitration because the arbitration law required that the arbitration clause be made in writing. The petition for annulment was suspended until the appeal was resolved. In the meantime, the arbitral tribunal continued with the proceeding and issued a final award against Fischer.

On September 25, 2018, the *Superior Tribunal de Justiça* considered that the existence of a final award did not render moot the object of the appeal and the injunction, but, on the contrary, confirmed the need to resolve it. According to the high court, the partial award had *res judicata* authority over the part of the dispute that it resolved, and, therefore, could not be subject to ratification or modification by the final award. They were awards with different content and the only thing that was required of both, for logical reasons, was consistency. Consequently, the high court concluded that the partial award could be challenged as null and void, ordered the annulment proceeding to continue, and suspended the effects of the partial award until such petition was resolved.

Case 2017/0274999-3: Fernando Amaral Martins v. G4

Fernando Amaral Martins entered into a real estate financing contract with *G4 Empreendimentos Imobiliarios S.A.* ('G4'). The plaintiff filed an action against G4 before the court and G4 challenged the court's jurisdiction because the contract contained an arbitration clause.

The judge declined jurisdiction because (i) the clause was drafted in 'bold' and had been specifically signed, as required by article 4(2) of the arbitration law for standard form contracts; (ii) there was no evidence that the arbitration clause had been compulsorily imposed on one of the parties, in accordance with the provisions of article 51(VII) of the consumer law; and (iii) the plaintiff was a lawyer and could not claim legal vulnerability, since he was fully aware of the consequences of the arbitration clause. The Court of Appeals upheld the decision, but the *Superior Tribunal de Justiça* reversed it on November 27, 2018.

The *Superior Tribunal de Justiça* held that the validity of the arbitration clause contained in standard form contracts, in consumer relations, is conditional on the consumer actually consenting to the arbitration after the dispute arises, and that the initiation of an action before the court of law shows that the consumer does not intend to submit the dispute to arbitration. It also considered that the fact that the plaintiff was a lawyer did not imply that he ceased to be a consumer and that his vulnerability was not necessarily technical, but mainly economic and legal.

Case 2016/0145366-5: Dampskibsselkabet Norden v. Zamin Amapá

Dampskibsselkabet Norden AS ('Norden') requested the recognition of an arbitral award issued in London against *Zamin Amapá Mineração S.A.* ('Zamin').

Zamin argued that the award was contrary to public policy and violated due process because the arbitral tribunal had decided to continue with the proceeding and issue the award, even though its insolvency prevented it from paying the costs associated with the continuation of the proceeding. Norden alleged that Zamin simply had abandoned the arbitration and had not requested the suspension of the proceeding, despite the long periods granted by the arbitral tribunal to submit the required guarantees.

On November 21, 2018, the *Superior Tribunal de Justiça* decided to recognize the award. It stated that Zamin's insolvency crisis occurred after the initiation of the arbitration and that it could have remained in the proceeding in various ways, and without the need of hiring English lawyers. It pointed out that English law did not require that lawyers represent the parties, and that both the hearings and the submission of documents could have been done through the internet. It also noted that Zamin, because of its insolvency status, could have requested the arbitral tribunal to reduce the required guarantees or could have requested the suspension of the proceedings, but did not do so.

COSTA RICA

Case 14-000090-0183-CI: Inmobiliaria Palacio Oriental v. Chinafecc

Inmobiliaria Palacio Oriental S.A. ('IPO') entered into a construction contract with *Chinafecc Central América S.A.* ('CCA'). CCA initiated arbitration against IPO for breach of contract. The arbitral tribunal ordered IPO to pay compensation to CCA.

IPO then initiated a court proceeding against CCA for breach of contract. Although it acknowledged the existence of the award, it argued that the award resolved only part of the dispute and that IPO did not wish to file a counterclaim in the arbitration because the construction project was still ongoing. The court ordered CCA to compensate IPO.

CCA appealed the decision and held that there was a valid arbitral award that had *res judicata* authority, addressing the same issues that IPO had presented before the court. It also argued that IPO was precluded from initiating a claim because, if it wanted to do so, it should have filed a counterclaim in the arbitration.

On September 14, 2018, the *Tribunal Segundo Civil* held that the arbitrators have jurisdictional functions and their decisions have the same binding force as a judicial ruling. Therefore, since both proceedings involved the same parties and dealt with the same issues, it accepted the *res judicata* defense.

DOMINICAN REPUBLIC

Case TC-05-2018-0171: The Stonhard Group

Centro de Diagnósticos, Medicina Avanzada y Conferencias Médicas y Telemedicina ('CEDIMAT') initiated arbitration against *Ciprián Ingeniería & Terminaciones S.R.L.* ('CIT') before the *Centro de Resolución Alternativa de Controversias de la Cámara de Comercio y Producción de Santo Domingo* ('CRC'). The arbitral tribunal joined The Stonhard Group ('TSG') into the arbitration because of the active role it had with CIT in the negotiation, execution, and performance of the contract.

TSG filed an amparo action against CEDIMAT and CRC. It claimed that it was a non-signatory third party and that its joinder to the arbitration affected certain constitutional rights. The judge dismissed the action because TSG could present its arguments before the arbitral tribunal and the *amparo* action can only be filed when there is no other procedural way to resolve the dispute.

TSG filed an appeal for constitutional review against the ruling. On November 30, 2018, the *Tribunal Constitucional* held that arbitration, as a private dispute settlement mechanism, was not an appropriate process for resolving public policy matters, such as the protection of constitutional rights. However, it dismissed the appeal because, in its opinion, there was no conflict of fundamental rights. The dispute was about the existence, interpretation, scope, and validity of the arbitration clause contained in the contract between CEDIMAT and CIT, and the arbitral tribunal had priority to decide on its competence.

PERÚ

Case 360-2018: Petróleos del Perú v. Refinería La Pampilla

Petróleos del Perú S.A. ('PetroPerú') entered into a stock purchase agreement with *Refinería La Pampilla S.A.* ('Refinería'). The contract stated that any dispute between the parties regarding liability for environmental pollution would be submitted to the decision of a technical expert to be appointed by the parties, and in the absence of agreement on the expert, the dispute could be submitted to arbitration.

In 2011, the parties appointed an expert to settle a dispute over environmental damage and the latter issued a report concluding that PetroPerú was liable. In 2015, Refinería initiated an arbitration demanding PetroPerú to assume the costs of the environmental remediation, in the percentages established in the expert report.

In 2018, the arbitral tribunal ordered PetroPerú to comply with its contractual obligations within the terms established in the expert report, as the parties had not only entrusted the expert to decide on a technical issue but also on the liability for the pollution, and its decision was binding on the parties under the provisions of article 13 of legislative decree 1071. Article 13 establishes that, unless otherwise agreed, the decision of the experts will be binding on the parties and must be observed by the judicial authority or arbitral tribunal that hears a legal dispute that includes the issues decided by the experts.

PetroPerú sought to set aside the arbitral award, alleging, among other things, that the arbitral tribunal had no competence to transform an expert report into an arbitral award. On November 28, 2018, the *Corte Superior de Justicia* de Lima dismissed the petition. It stated that the arbitral tribunal had followed the expert report and that the report was mandatory because the parties had agreed on the competence of the expert and article 13 of legislative decree 1071 said so.

Case 00145-2018-0-1817-SP-CO-01: Compact Maquinarias v. Ministerio de Agricultura

Compact Maquinarias S.A.C. ('Compact') entered into a service contract with a body associated with the Ministry of Agriculture. After Compact provided the service, the Ministry determined that the price agreed in the contract was higher than that foreseen in the budget for the provision of the service and, therefore, decided to pay Compact only the price established in the budget.

Compact initiated arbitration against the Ministry claiming the difference. The arbitrator issued an award in favor of Compact. The Ministry requested the annulment of the award based on lack of motivation because the arbitrator had not considered the evidence presented in the arbitration and had rejected one of the arguments with an apparent motivation.

On October 16, 2018, the *Corte Superior de Justicia* de Lima annulled the award. It considered that the motivation was apparent because the arbitrator quoted verbatim what Compact stated in its claim instead of assessing and analyzing the arguments of the parties and the evidence.

Case 160-2017-0: Municipalidad de Cajamarca v. Consorcio Fronocca

The Provincial Municipality of Cajamarca filed a petition for annulment against an arbitral award, which was admitted by the court. *Consorcio Fronocca* replied the petition for annulment and, in parallel, requested the annulment of the decision that had admitted the Municipality's petition. It argued that the Municipality had not submitted a bond, even though the parties, in the arbitration clause, had agreed, as a requirement for filing a petition for annulment, the submission of a bond in favor of the winning party.

Consorcio Fronocca considered that this agreement was valid because article 231 of the Regulation of the Government Procurement Law expressly allowed such agreements. It also noted that the terms of reference also stated that, for the filing of a petition for annulment, the party seeking the annulment had to submit the bond established in article 231 of said regulation.

On September 4, 2018, the *Corte Superior de Justicia de Lima* dismissed *Consorcio Fronocca's* annulment petition. It stated that the right to access to justice could not be conditioned by requirements not provided for in the Government Procurement Law and, therefore, article 231 of the Regulation of that law, which was a norm hierarchically inferior to the law, affected a fundamental constitutional right.

Case 12210-2017-0-1817-JR-CO-14: Mateo Fuertes v. Centano Flores

Francisca Mateo Fuertes sought the enforcement of a domestic arbitral award before the courts of Lima. The judge asked her to submit the arbitration agreement, and she argued that the agreement had not been concluded in writing. In the absence of proof of the existence of an arbitration agreement, the court refused to enforce the award.

On September 5, 2018, the *Corte Superior de Justicia* de Lima upheld the decision. It considered that, although to enforce an award it is only necessary to submit a copy of it, the judge can exceptionally request the document containing the arbitration agreement to be certain that the arbitrator had the competence to settle the dispute.

It also stated that the judge's request was reasonable because (i) the arbitration had been administered by an unknown arbitral institution; (ii) the award did not indicate which document contained the arbitration agreement; and (iii) it was striking that the defendant had not replied the arbitral claim and that the award had not indicated the manner in which the defendant had been served.

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