Court of Appeals of Santiago, Chile
Case No. 1420-2010 of 9 October 2012

Decision to uphold ICC Award

Dyala Jimenez F.[1]

On 25 January 2010 the sole arbitrator of ICC Case 15013 rendered a final award declaring that Chilean company Ann Arbor Foods S.A. ("Ann Arbor") breached the franchise agreement entered into with US company Domino's Pizza International ("Domino's") and ordering the former to pay the latter damages. The award also declared that Domino's was entitled to rights that survived the franchising agreements, including the option to purchase certain assets.

Ann Arbor moved to set aside the award before the Santiago Court of Appeals, per Article 34 of the Chilean statute that governs Internacional Commercial Arbitration ("Law 19.971")[2], raising the two sets of grounds. The first, of a procedural nature, are the following: a) that the arbitral tribunal was constituted in a seat different from that agreed by the parties, b) that the sole arbitrator did not notify Ann Arbor of certain procedures, in violation of Chilean domestic procedural provisions, c) the award was rendered by an arbitrator whose appointment had been suspended, d) the arbitrator accepted comments from third persons in his award, e) the arbitrator granted Domino's in excess of what it claimed, f) the arbitrator failed to apply certain Chilean provisions as regards evidence, applicable per the arbitration clause, g) the arbitrator omitted certain procedures, and h) the arbitrator violated the *onus probandi* principle.

Ann Arbor also argued that violations of substantive law and Chilean public policy render the award null. In that sense, Ann Arbor alleged that the arbitrator: a) failed to apply the contractual statute of limitations provision, b) ignored the applicable law to the contract, thereby allowing the contract to be performed in bad faith by the franchisor, in violation of Chilean Civil Code provisions, c) upheld an option to purchase that violates Chilean law, d) upheld a contract that is abusive according to the Consumer Protection statute, e) permitted the transfer of inalienable assets, which transfer is subject solely to the price determined by Domino's, and which transfer is based on bad faith and is unconstitutional, and f) allowed Domino's to conduct acts that are violations of antitrust laws and unfair competition.

Domino's sustained in essence that the sole arbitrator –and the ICC— did not breach the applicable procedural rules agreed to by the parties, i.e., the ICC Rules of Arbitration. It also invoked Art. 33 of such rules to allege that, since Ann Arbor did not timely raise objections to what it now claims was invalid, it is barred from doing so now. Finally, Domino's argued that Ann Arbor was in reality seeking, with its action for setting aside, a revision of the contract as well as of the award, which goes entirely against Art. 34 of Law 19971 and the purpose of the policies behind said law.

All the allegations of violation of procedural norms were dismissed by the court. Essentially, the court agreed with Domino's that the ICC Rules of Arbitration were the applicable procedural rules to the case, as chosen by the parties, and held that there was no evidence of breach of those rules.

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[1] www.djarbitraje.com. The author participated in the preparation of Domino's Pizza International's defense in this case while working at the law firm that represented that party, Bofill Mir & Alvarez Jana ("BMAJ"). Dyalá Jiménez left the firm in December 2011 - BMAJ continued with the case.

[2] Law 19971 is virtually word-for-word the UNCITRAL Model Law.

As regards to the alleged violations of substantive law and public policy, the court analyzed the first four arguments and rejected them because it found no violation of the Chilean substantive law. Specifically, the court held that the arbitrator correctly excluded the one-year statute of limitations because it was only provided for in the sub-agreements, and not the main agreement. Further, the court established that since the parties specifically agreed to exclude the investment laws of Michigan, and since the Michigan law (applicable to the contract) otherwise allow for options to purchase provisions, the arbitrator's decision to uphold the option to purchase does not breach the applicable law. In addition, Article 16 of the Chilean Civil Code provides that it is not applicable when parties validly choose foreign laws in foreign contracts. Finally, the court held that since the Consumer Protection Law is not applicable, so the award cannot be set aside for any violation thereof.

The court rejected the remaining arguments without entering into a legal analysis, holding rather that they appeared to be grounds for appeal, which is not a recourse under Art. 34 of Law 19971.

This decision is commendable for two reasons: the court upheld the parties' chosen ICC Rules of Arbitration and gave no space to local procedural norms (other than Law 19971, naturally), and it gave no room for Ann Arbor's attempt to have it review the award on the substance. At a first glance, though, it would appear that the Court of Appeals went too far in the analysis of the issues described in paragraph 6 above. However, one can argue that the court's assessment of the application of the law by the arbitrator was done in the interest of opining on the limitations of Article 16 of the Civil Code in international contracts, an issue that has been discussed in Chilean academic circles for some time. As regards to the issue of the statute of limitations, on that point the court did go unnecessarily far, especially taking into account that in Chile it is a matter of substantive law.

As if it were not enough of a reason to celebrate, the Supreme Court subsequently dismissed a challenge ("recurso de queja") against the Court of Appeal's decision not to set aside the award. On 29 January 2013, the Supreme Court rejected Ann Arbor's attempt to revisit the issue, stating that the "queja" is not an appeals on the substance.[3] These decisions follow the Santiago Court of Appeal's judgment in 2009, where another international arbitration award was upheld[4] and surely pave the way for Chile to become a suitable place of international arbitration, if it is not one already.

[3] Concurring judge Héctor Carreño indicated that the recourse should not proceed as a matter of law, since it is not designed for decisions on motions for setting aside awards.

[4] *See* Johana Klein Kranenberg and Dyalá Jiménez, "Recent International Arbitration Developments in the Chilean Courts IBA Arbitration News", Vol. 15, No. 1 (2010), pp. 161-164.