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Ratification by Argentina of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards

Horacio A. GRIGERA NAÓN*

On 28 September 1988, the Argentine Congress passed law 23619 whereby it ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). This law was promulgated by the executive Branch of the National Government through Decree 1524/88 dated 21 October 1988,¹ and the President of the Republic has already signed the ratification instrument, which was deposited at the U.N. in New York on March 14, 1989. The Convention will take full effect with respect to Argentina as of 12 June 1989.² This will be the culmination of the long process of having Argentina join a convention it signed over thirty years ago on 26 August 1958.

Upon ratifying the Convention, Argentina made both reservations authorized under article 1(3). It will be applied, on a reciprocal basis only, to awards rendered in another member country and to disputes arising from commercial transactions. It is hard to justify the latter distinction, since under Argentinian law, any dispute subject to compromise or settlement is arbitrable, whether commercial or not³ and Argentina is at present developing a procedure for unifying its substantive law on civil and commercial obligations.⁴

Argentina has also declared that it will apply and interpret the Convention in accordance with the Argentinian Constitution. The purpose of this declaration, responding to a principle known as *Fórmula Argentina*, is to safeguard inalienable sovereign rights, vital national interests or constitutional principles provided for under the Argentinian Constitution and, accordingly, whose validity or exercise cannot be abandoned to a decision under foreign arbitration.⁵ However, there is nothing in the Convention which preordains the submission by Argentina or the Argentine State of specific disputes to foreign arbitration and no provision which

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¹ Official Bulletin Nr. 26.501; November 4, 1988, 1-3.

² Information supplied by the Department of International Treaties of the Argentine Ministry of Foreign Affairs.

³ H. A. Grigera Naón, *UNCITRAL Model Law on International Commercial Arbitration and Argentine Law*, paper submitted to the IBA Buenos Aires Biennial Conference, September 25-30, 1988, Section of International Business Law—Committee "D", 6-7.

⁴ *Proyecto de Código Civil—Orden del Día 1064*, as approved by the House of Representatives (1987).

⁵ See *Dictámenes, Procuración del Tesoro de la Nación* (Argentine Attorney-General, October-December (1967), Vol. 103, 321-325).

might be considered as unconstitutional. On the other hand, the wide power of national courts to reject the validity of arbitration agreements under Article II (3) and resort to non-arbitrability or public policy reservations under Article V (2) of the Convention should certainly dissipate any apprehension that the latter renders inevitable the recognition of effects of international or foreign arbitration actually or potentially impinging on state sovereign rights, vital national interests or constitutional principles.

The Convention has introduced at least three innovations in Argentinian law within the Convention's sphere of application, certainly improving the legal context regarding the effect of foreign arbitrations in Argentina:

- (i) In contradistinction to the provisions of Argentine internal procedural law⁶ (and except when the award is contrary to the forum's public policy or concerns a non-arbitrable issue according to forum law), the party objecting to the recognition or enforcement of a foreign award under the Convention has the burden to allege and prove the existence of grounds on which such objections are based.
- (ii) The Convention provides for the recognition of foreign awards which are merely "binding", whereas the local procedural laws in Argentina require foreign awards to have reached *res iudicata*.⁷ Some treaties to which Argentina is a party even subordinate recognition and enforcement to the "homologation" [confirmation] of the foreign award in the country where rendered through a court decree declaring that it has reached *res iudicata* or that the rights of defense were not violated in the course of arbitration proceedings.⁸ An isolated court decision even required double-*exequatur*.⁹ In view of the broad scope of application of the Convention resulting from the large number of countries having ratified it, the above shortcomings in Argentine local and treaty law may be now considered to a large extent to be an episode in the past.
- (iii) By ratifying the Convention, Argentina has "federalized" the system governing the recognition and enforcement of foreign awards as far as the relations of Argentine provinces and foreign countries having ratified it are concerned. By so doing, within the sphere of application of the Convention, Argentine provincial code provisions cease to apply. This is to be considered a significant step forward, since some of such codes still contain obsolete reciprocity requirements

⁶ Art. 517/518, National Code of Civil and Commercial Procedure, applicable by federal courts throughout the country and by national courts sitting in the federal district of Buenos Aires and in National Territories, or by federal courts with jurisdiction on certain facilities subject to the authority of the National Government.

⁷ *W. Goldschmidt, Derecho Internacional Privado* (1988), 487.

⁸ Arts. 3, 6 [c] 1889 Montevideo Treaty; Arts. 3, 6 [c] 1940 Montevideo Treaty; Art. 3 [c] 1979 Montevideo Interamerican Convention.

⁹ *Cám. Nac. Com., Sala "B", Schnabel, Gaumer & Co. vs. Sepselon E.* 41, E.D., 691.

or deny recognition of foreign awards rendered *ex parte* against a person or entity domiciled in Argentina.¹⁰

The 1958 Convention must be then considered a significant improvement of the Argentine attitude regarding foreign and international arbitration and a substantial effort aimed at inserting Argentina in the modern web of international commercial and economic relations.

¹⁰ *Córdoba Province*: arts. 984-985, 986 (2) Proc. Cod.; *Santa Fé Province*: arts. 269 (2), 270 Proc. Cod.; *Tucumán Province*; Art. 589 (2) Proc. Cod.