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Annulment Recourse against Partial Award

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In past contributions to *The Arbitration Review of the Americas* we remarked that it would be important for Argentina to have an updated legislation in order for it to be considered an attractive place of arbitration. Nevertheless, most Argentine courts respect the parties' agreement to arbitrate their disputes and follow the principles of modern arbitration. Even so, certain issues do not have a clear-cut answer, such as whether the Argentine Civil and Commercial Procedural Code (CCPC) admits the annulment recourse against partial awards, and the time limit to apply for it.

In the recent case *Pluris Energy Group Inc (Islas Vírgenes Británicas) y otro c/ San Enrique Petrolera S A y otros*,[1] the Commercial Court of Appeals, Section B (the Court) decided that the time limit to apply for the annulment recourse of the partial award issued on 26 December 2008 (the partial award) had expired, because the recourse was filed after the entry of the final award issued on 4 March 2011 (the final award). The Court considered that the aggrieved party had to apply for the annulment recourse within five working days after receiving notice of the Partial Award, which is the time for filing an annulment recourse against an award under the CCPC,[2] and not afterwards.

Since partial awards are becoming more common in arbitral proceedings as a means of saving time and costs in arbitration (see section a, Appendix IV – Case Management Techniques of the ICC Arbitration Rules,[3] article 34 paragraph 1 and 2 of the UNCITRAL Arbitration Rules),[4] it is of vital importance to have a clear rule on whether they are subject to annulment recourse or not under Argentine law, and the time frame within which the party may apply to the court to annul a partial award.

The Court in *Pluris Enegry Group* provides a clear answer to the issue; however, other courts may decide the issue on the opposite direction.[5] In view of the fact that Argentina does not follow the stare decisis doctrine, the definitive answer must come from the enactment of arbitration legislation.

Meanwhile, a party which seeks to annul a partial award shall have to apply for the recourse within the time limit set forth by the CCPC or the applicable treaty after receiving notice of the partial award. In this case, the worst possible scenario would be that a court may stay its decision until the final award is rendered, if it considers that a partial award is not subject to annulment recourse. Otherwise, the aggrieved party may be losing its right to challenge the partial award.

Is a partial award subject to annulment recourse under Argentine law?

The Pluris Energy Group principle

The CCPC does not provide a definition of an 'award'. Only article 754 of this procedural code refers to the content of the award as follows: 'arbitrators shall render the award on all the claims submitted to their decision... including related issues'.

Argentine scholars define the award as a final decision on the matters of the dispute rendered by an arbitrator or panel of arbitrators, equivalent to a judicial court judgment;[6] but there is no uniform criterion as to whether partial awards are subject to annulment recourse.

On one hand, Rivera explains that although the award is a decision rendered by an arbitrator or panel of arbitrators, not every decision rendered by them is an award. The author makes a distinction between preliminary decisions, partial awards, interlocutory awards, procedural orders and final awards, emphasising the relevance of the decisions that conclude the arbitral proceeding. Rivera seems to consider that only those awards that conclude the arbitration proceeding are subject to recourse.[7]

On the other hand, Caivano states that the concept of 'final award' includes the definitive decision on 'all' substantial matters submitted to the arbitration (final total award), and the definitive decision on 'some' of the substantial matters (partial final award). And, therefore, he affirms that partial final awards are subject to annulment recourse.[8] The *Pluris Energy Group* case shares Caivano's views.

In *Pluris Energy Group*, Teresa Rosa Giustinian de Malenchini, Roque Malenchini, Fernando Malenchini y San Enrique Petrolera SA (the defendants) applied for annulment recourse against the partial and final award. They also challenged, in a separate motion, the legal standing of *Pluris Energy Group* to move forward with the claim based on the breach of a stock purchase agreement executed on 18 August 2006, and its assignment to a third party (the separate motion).

The Court in an elaborated decision summarised some of the principles of modern arbitration (eg, respect for the parties' agreement to submit their disputes to arbitration, court support within the arbitration proceeding, non-judicial interference or review of arbitrator's decisions, among others).

In relation to the separate motion, the Court remarked that, under the ICC Rules of Arbitration, applicable to the case, the parties consented the interlocutory award of the panel of arbitrators that decided those challenges. Hence, the interlocutory award could not be reviewed by the Court.

As regards the partial award, the Court pointed out that the parties authorised the panel of arbitrators in the terms of reference to render a partial award. The partial award decided that the stock purchase agreement was terminated, and that both parties were liable for said termination (allocating a different share of responsibility on them). In deciding so, the Court also dismissed the claim of the specific performance of the stock purchase agreement, and postponed for a future award the decision as to the costs of the arbitration. The Court also commented that the parties agreed that points 4 and 5 of the terms of reference (ie, the plaintiff's claim for damages and the defendants' counterclaim for damages, respectively) would be decided in the final award.

The annulment recourse filed by the defendants comprised a challenge to the partial and the final award. The plaintiffs answered the annulment recourse and argued that since the partial award

was final, the defendants should have filed the annulment recourse within five working days after receiving notice of it.

The Court analysed the issue as follows:[9]

> *[T]he Partial Award was final in relation to the matters decided in the Award… and they were decided in advance as means to avoid costs and with the agreement of the Parties […]*
>
> *Since the Partial Award took a decision on liability and postpone for a future stage the award on damages, it cannot be said that it would be necessary to wait for the Final Award to apply for the annulment recourse. Therefore, the annulment recourse against the Partial Award had been filed in excess of the time limits set forth in the law and should be dismissed on this ground[…]*
>
> *The Parties admitted the bifurcation of the proceedings, and they did so to avoid time and unnecessary costs. Had the Partial Award dismissed the liability of Defendants, the arbitration would have concluded at that time.*
>
> *The main disadvantage of the partial award is that it allows judicial review (and delays the proceedings). The courts may intervene during the arbitration proceedings to annul or confirm the partial award.* (Alan Redfern and Martin Hunter '*Teoría y Práctica del Arbitraje Comercial Internacional*' reference 8-45 and case cited on footnote 93, p524, 4th edition, La Ley, 2007)

Afterwards, the Court also dismissed the annulment recourse against the final award considering that none of the grounds that would allow said decision were present in the case.

That the Court in *Pluris Energy Group*, clearly stated the principle that a partial final award is subject to annulment recourse, and that the aggrieved party must apply for the annulment recourse within five working days after receiving notice of it.

Was the result in Pluris Energy Group correct or desirable?

As mentioned above, Argentine law does not provide a definition of award, nor does it answer whether partial final awards are subject to annulment recourse.

In the *Pluris Energy Group* case, the Court showed its support for arbitration when it summarised its modern principles, and respected the arbitration rules chosen by the parties (in this case, the ICC Arbitration Rules). It also performed a comparative examination by referring to foreign scholars' opinions[10] that sustain the result of the case on the issued analysed. However, the Court did not analyse whether any article of the CCPC or any other analogous statute or comparative law could have lead to a different result.

When referring to the content of an award, article 754 of the CCPC reads as follows: 'arbitrators shall render the award on "all" the claims submitted to their decision [...] including related issues'. And, the annulment recourse is admitted only against the arbitral award mentioned in the CCPC (article 758 and 760). Therefore, if the only award subject to annulment recourse is the one that decides 'all' the claims submitted to the arbitrators, partial final awards shall not be subject to recourse.

Furthermore, the Mercosur Agreement on International Commercial Arbitration and the International Commercial Arbitration Agreement between Mercosur and Bolivia and Chile[11] – not applicable in *Pluris Energy Group*, but applicable to other international commercial arbitrations in Argentina – also suggest that the final award, subject to the annulment recourse, is the one that 'completely' decides the dispute (articles 20.1,[12] 20.4.c and 22). Therefore, the Court could have construed the rule by analogy with this other statute to decide the case with the opposite result.

We do not ignore that institutional and ad hoc arbitration rules allow the arbitrator or panel of arbitrators to bifurcate the arbitral proceedings or to render partial final awards,[13] but those rules do not deal with the judicial annulment recourse.

In relation to foreign law, there is no uniform criterion on whether a partial final award should be subject to appeal – as shown by the dissenting opinion in *Metallgesellschaft AG v M/V Capitan Constante and Yacimientos Petroliferos Fiscales*[14] and other papers from foreign legal scholars – that I find applicable to Argentine law in the sense that only the arbitrators' final decision on 'all' the matters submitted to the dispute is subject to a recourse of annulment. The Court in *Pluris Energy Group* did not find this issue highly controversial.

In *Metallgesellsaft*, Judge Feinberg expressed in his dissenting opinion:

> *As the majority recognizes, arbitration is designed 'to permit relatively quick and inexpensive resolution of contractual disputes…' The majority points out that appellees could have obtained summary judgment on their claim for freight, had they chosen to submit it to a court rather than to an arbitration panel, and suggest that appellant might then have been able to appeal to this court immediately. The majority therefore believes that its decision is necessary to encourage use of arbitration rather than litigation similar situations in the future. Even if the courts were the appropriate source of such an exception to the requirement of finality embodied in section 10(d), I do not agree that confirmation of partial final awards ultimately furthers the goals of arbitration. Indeed, the function of arbitration should make considerations of finality even more compelling in arbitration than they are in conventional litigation.*
>
> *It is true that allowing the district court to confirm a partial award of freight would provide appellees here with a speedier resolution of one of their counterclaims than if they had to await a decision on the remaining claims. Nevertheless, in the long run, I fear that confirmation of such separate and independent claims will make arbitration more complicated, time consuming and expensive. After this decision, use of partial final awards will doubtless increase and, if the successful parties can get partial awards confirmed by the district courts, it stands to reason that they will do so… Just as piecemeal review disrupts and delays ongoing litigation in courts; confirmation of partial awards will inevitably interrupt and extend arbitration proceedings. It will make arbitration more like litigation, a result not to be desired. It would be better to minimize the number of occasions the parties to arbitration can come to court; on the whole, this benefits the parties, the arbitration process and the courts.*

In her paper 'Judicial Review of Partial Arbitral Awards under Section 10(a)(4) of the Federal Arbitration Act',[15] Rhodes, a US legal scholar, states that

> *courts should adhere to the long-standing rule forbidding interlocutory review and not loosen the finality requirement embodied in Section 10(a)(4) [of the Federal Arbitration Act]. First, the analogy between the courts' review of a partial arbitral award and an appellate courts' review of a district court's partial judgment is inapt… Second, the relaxed approach to arbitral finality undermines the goal of deference to arbitrators. Third, arbitration is a creature of contract, and courts should not rewrite the contract ex post.*

She also explains the definition of 'final award' as follows:

> *A 'final' award means that arbitration must be 'complete' and 'not interlocutory' which in terms means that the arbitrator must have already decided all issues presented, including both liability and damages.*

> *Combined with the word 'mutual', it means that all issues involving all parties have been decided. 'Define' means that 'the award is sufficiently clear and specific to be enforce should it be confirmed by the district court and thus made judicially enforceable.*

If we come back to the content of the award under article 754 CCPC ('arbitrators shall render the award on "all" the claims submitted to their decision'), it is easy to conclude that this requirement under Argentine law is very similar to the 'final' requirement of the Federal Arbitration Act thus forbidding the annulment recourse against a partial award.

In relation to bifurcation agreements, Rhodes cites *Hart Surgical, Inc v Ultracision, Inc*,[16] where the First Circuit of the United States Court of Appeals decided a case very similar to the *Pluris Energy Group* case:

> *The specific issue presented is a complicated one that is sure to recur in different contexts. There is very little case law in point and the Second Circuit cases that are the most relevant are seemingly at odds. Though we hold that the district court can review the partial award in this case, we think it best to limit our holding to the situation in which there is a formal, agreed-to bifurcation at the arbitration stage. We reserve judgment on what would happen if, for example, in the absence of bifurcation the arbitrator issued an initial decision on liability and one party then sought district review. The outcome in such a scenario might depend on the circumstances, and we prefer not to prejudge that result.*
>
> *Another important consideration is the risk that, in moving away from the concept of final judgments that prevails when review is sought of district court decisions, we may create situations at the arbitration level in which the losing side may forfeit an appeal (e.g., as to liability) by waiting until all arbitration proceedings are complete. One could imagine a rule that would allow the loser to seek review at once, but also retain the option of waiting until the completion of all phases at the arbitration level. These are not problems that we must resolve now, but ones that we will no doubt confront in future cases.*

As we see, in *Pluris Energy Group* the Court reached the result of *Hart Surgical*, that is, when the parties to the arbitration agree to bifurcate the proceedings (ie, award in liability and damages), partial awards shall be subject to review. However, in *Pluris Energy Group* the Court went further to decide that the defendants had forfeited their right to apply for the recourse of annulment of the partial award. Although the court in *Hart Surgical* has not decided this issue, it suggested in obiter dicta that a probable rule would be that the aggrieved party may choose to apply for the review when it receives notice of the partial award or when it receives notice of the final award.

In *Hart Surgical*, the First Circuit departs from the more restrictive view of the finality requirement developed by the Second Circuit in *EB Michaels v Mariforum Shipping SA*,[17] which considers that

> *In order to be 'final' and arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them… Generally, in order for a claim to be completely determined, the arbitrators must have decided not only the issue of liability of a party on the claim, but also the issue of damages.*

Rhodes also criticises the decision in *Hart Surgical*:

> *One reason why parties may agree to bifurcate liability and damages but not agree to piecemeal judicial review is because it is not clear that allowing judicial review of the liability phase before the arbitrator decides damages is quicker than allowing the arbitrator to determine both liability and damages before the district court reviews the awards.*[18]

And, there is no doubt that under Argentine law the admission of recourse of annulment against a partial award shall cause undesirable effects that parties might not have foreseen when drafting the arbitration clause or at the outset of the arbitration proceedings.

The cumbersome annulment recourse procedure contemplated in the CCPC is likely to bring judicial intervention and delays in the arbitration proceeding against the will of the parties, the arbitrators and the courts.

Unlike other modern legislations (ie, the UNCITRAL Model Law on International Commercial Arbitration) the CCPC has an inconvenient procedure to apply for the annulment recourse of an award.

In relation to the procedural issues of the annulment recourse, the CCPC sets forth that the annulment recourse must be filed with the arbitration panel within five working days after receiving notice of the award, and that the aggrieved party must state with particularity the grounds for the motion, the relief sought, and the legal argument to support it (article 759).[19] The annulment recourse shall be decided by the court of appeals that would have had jurisdiction in the case if the parties had not submitted the dispute to arbitration (763). Although article 760, final paragraph, sets forth that the appellee shall not be heard, most Argentine courts of appeal would allow the reply of the recourse within five working days after the appellee receives notice of the appellant's brief.

If the court of appeals decides to admit the annulment of the award, the CCPC provides the following alternatives:

- the arbitrator or panel of arbitrators shall be replaced;
- the court of appeals may decide to partially annul the award, if the award is severable; and
- the parties may request that a lower court issue a new award, that would be subject to a recourse of appeal before the competent court of appeals, even if the recourse of appeal had been waived by the parties (article 761).[20]

Finally, we should point out that under Argentine law the annulment recourse stays the arbitration proceedings.

It is clear that under these circumstances, this outdated regulation of the annulment recourse of an award in the CCPC shall inevitably cause a substantial delay in the arbitration proceeding. This is why the result in *Pluris Energy Group is* not only incorrect but also undesirable for any party involved in arbitration.

Conclusion

The Commercial Court of Appeals, Section B, decided a highly controversial issue in Argentina and abroad in *Pluris Energy Group* – that is, whether a partial final award is subject to the annulment recourse, and the time frame, within which the aggrieved party may apply for it.

Although the Court showed clear support for arbitration, *Pluris Energy Group* reached the incorrect result. In our opinion the Court neither critically analysed the CCPC, analogous statutes and foreign law, nor the undesirable consequences of its decision.

Parties and arbitrators choosing Argentina as a place of arbitration shall have to focus their attention on the issue of partial awards when drafting the arbitration clause or at the outset of the arbitration proceedings to avoid undesirable delay or consequences they might not have foreseen. Any benefit that a partial

award might have brought to speed the arbitration proceeding shall likely be offset by the *Pluris Energy Group* case doctrine.

It is thus clearly desirable that a future arbitration legislation or court decision should reverse the *Pluris Energy Group* case.

Notes

1 Court of Appeals in Commercial Matters, Section B, 21 April 2014, elDial.com – AA876C.

2 As we will show in this article, the CCPC does not make a distinction between partial and final awards.

3 'The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute. a) Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case.'

4 'Article 34. 1. The arbitral tribunal may make separate awards on different issues at different times. 2. All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.'

5 In *Harz Und Derivate y otra c/Akzo Nobel Coatings SA y otras s/ organismos externos*, Court of Appeals in Commercial Matters, Section D, 28 October 2009, *elDial.com* AA5B45, the court decided that in Argentina the annulment recourse could only be applied against an award that puts an end to the arbitration proceeding. Although this case refers to an interlocutory award dealing with jurisdiction, we might not dismiss the possibility that a court may construed the CCPC as denying the right to file and annulment recourse against a partial award.

6 Palacio, Lino Enrique, *Derecho Procesal Civil*, Tomo IX, Segunda Edición, Abeledo Perrot, 2003, p113); Rivera, Julio César, *Arbitraje Comercial – Internacional y Doméstico*, Lexis Nexis, 2007, p569); Caivano, Roque J, *Control Judicial en el Arbitraje*, Abeledo Perrot, p46.

7 Rivera, supra note 6, at 569, 573 and 644.

8 Caivano, supra note 6, at 120.

9 We provide a free translation of the case.

10 Alan Redfern and Martin Hunter, *Teoría y Práctica del Arbitraje Comercial Internacional*, reference 8-45 and case cited on footnote 93, p524, 4th edition, La Ley, 2007.

11 Law 25,223.

12 20.1. 'The award or arbitral judgment must be written, reasoned and shall decide the dispute completely'; 20.4.C. 'The award or arbitral judgment shall be signed by the arbitrators and shall include [...] c) the decision upon all the matters submitted to arbitration.'

13 See, supra notes 3 and 4.

14 Cited by Redfern and Hunter, supra note 10; United States Court of Appeals, Second Circuit, 790 F.2d 280.

15 Rhodes, Jennifer M, 'Judicial Review of Partial Arbitral Awards under Section 10(a)(4) of the Federal Arbitration Act', 70 *U. Chi. L. Rev.* 663.

16 244 F.3d 231.

17 624 F.2d 411.

18 Rhodes, supra 15.

19 Palacio, supra note 6 at 136.

20 Palacio, supra note 6 at 146.

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