ENFORCEMENT IN CHILE OF INTERNATIONAL ARBITRATION AWARDS VACATED IN THE SEAT OF THE ARBITRATION

Felipe Nazar[1]

I. SUMMARY

In its decision of September 8, 2011, in the case *EDFI International S.A. v. ENDESA International S.A. and YPF S.A.*, 4390-2010, the Supreme Court of Chile (the "Supreme Court") held that an award set aside in the seat of the arbitration (arbitral *situs*) is not entitled to recognition and enforcement in Chile.

In deciding *EDFI*, the Supreme Court followed the trend of the vast majority of countries party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[2]

EDFI presented an opportunity for the Supreme Court to adopt a position on the issue of the recognition and enforcement of awards set aside in Chile. However, its reasoning was tainted by domestic considerations, and did not properly address the hierarchy and content of domestic and international regulations regarding the recognition and enforcement of international awards, and the New York Convention in particular; thus calling into question the strengths and consistency of the outcome.

II. FACTS

By a Sale and Purchase Agreement dated March 30, 2001 ("SPA"), EDF International S.A. ("EDFI") purchased the shares of two Argentinean companies from ENDESA International S.A. ("ENDESA") and from the predecessor of YPF S.A. ("YPF"). In addition to the SPA, the parties entered into two supplementary agreements establishing a modification to the purchase price if certain contingencies contemplated in them would take place.

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[1] Attorney at Law admitted in Chile. LL.M. Candidate at New York University School of Law.

[2] In the United States *see* TermoRio S.A. ESPE v. ELECTANTRA SP, 487 F3d 928 (DC Cir 2007); Baker Marine (Nig.) v. Chevron (Nig.) Ltd., 191 F.3d 194 (2d Cir.1999). Conversely, in France the Cour de Casation has held "Lastly, the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy", *Hilmarton Ltd. v. OTV*, Tribunal de Grande Instance, Nanterre, 22 September 1993, in *Albert Jan van den Berg*, Yearbook Commercial Arbitration 1995 - Volume XX, Volume XX (Kluwer, 1995) pp. 194 – 197.

The SPA, governed by Argentinean law, included an arbitration clause under the ICC Rules. A dispute arose out of the SPA and the parties submitted it to arbitration.[3] EDFI acted as plaintiff and YPF and ENDESA as defendants.

In October 2007, the tribunal rendered a decision (the "Award"), finding for EDFI in the amount of $40 million and for YPF in the amount of $11,066,150. Thus, the net amount of the Award was $28,933,850 in favor of EDFI.

Interestingly enough, both parties to the arbitration sought to have the Award set aside by the Court of Appeals of Buenos Aires (arbitral *situs*), and that court declared the Award to be null. Notwithstanding this decision, EDFI then sought for the recognition and enforcement of the Award before the United States District Court for the District of Delaware, the Tribunal de Grande Instance of Paris, and the Supreme Court of Chile.

III. THE CHILEAN SYSTEM OF ENFORCEMENT OF INTERNATIONAL AWARDS

The Supreme Court explained in *EDFI: "the regime adopted by Chilean law is one of 'relative recognition.'" Id.* at 10. This means that the recognition of the effectiveness of an international award in Chile requires a prior declaration that it fulfills the requirements of the *lex fori.* This recognition proceeding is known as "exequatur".

From a procedural point of view, the exequatur proceeding can be equated with an adversarial process, in which the party seeking for recognition/enforcement of an award acts as petitioner and the party opposing to it, as a respondent. The proceedings include the issuance of an opinion by the Court's Attorney (*"Fiscal Judicial"*), oral arguments by the parties, and a final decision by the Supreme Court.

As for the law applicable, Chile is a signatory of the New York Convention. Moreover, in 2004 Chile enacted the law 19.971 of International Commercial Arbitration, adopting the UNCITRAL Model Law on International Commercial Arbitration (the "International Arbitration Law").

On this basis, it would appear that the Chilean enforcement system is well defined and in line with the most modern arbitration approaches. However, in practice, the above

[3] Case reference No. 1231/KGA/CCO/JRF. Tribunal: Jean Paul Béraudo (chairman); Rafael Illescas and Henri C. Alvarez (co-arbitrators).

norms interact with outdated regulations contained in the Code of Civil Procedure (1903), which results in unwanted ambiguity.

An apparent case of the said ambiguity is found in the "double exequatur" requirement: Whereas *"the fact that no double exequatur is needed under the [New York] Convention is universally recognized by courts and commentators;"*[4] Article 246 of the Code of Civil Procedure sets forth that *"...the award authenticity and effectiveness shall be proved by its approval by a superior court of the seat of the arbitration."* The inconsistency is evident.

IV. DISCUSSION

EDFI raised several issues, namely: (i) the law applicable to the recognition and enforcement of an international award; (ii) the jurisdiction of a Chilean court to enforce an international award in arbitration among non-Chilean parties; and (iii) the recognition and enforcement in Chile of an international award set aside in the arbitral *situs*.

a) The Law applicable

In the third section of its decision, the Supreme Court stated that the rules applicable to the exequatur proceedings are those established under Title XIX of Book I, par 2º (articles 242-251) of the Code of Civil Procedure "Judgments issued by foreign tribunals."[5]

The Court went on to state that the principles established for the enforcement of international judgments (i.e. observance of treaties and alternatively, reciprocity and international regularity) are also applicable to international awards, subject to Article 246 of the Code of Civil Procedure ("double exequatur" requirement).[6]

Eventually, in the Sixth and Seventh sections of its decision, the Supreme Court listed the New York Convention and the International Arbitration Law as also governing this area, but it did not conduct any substantive analysis of those normative bodies,

[4] *ICCA's Guide to the Interpretation of the 1958 New York Convention,* at 101.
[5] The referred rules to are those termed outdated in section III of this report.
[6] In arbitrations under the ICC rules, article 246 has been interpreted by the Supreme Court as requiring the moving party to furnish the former with a copy of the award duly signed by the Secretary of the International Court of Arbitration *EDFI* at 15. The case law is insufficient to anticipate the Court's position facing an *ad hoc* arbitration

ignoring that both instruments establish a self-sufficient enforcement regime[7] that, to some extent, is incompatible with the regulations of the Code of Civil Procedure.

In this author's opinion, when entertaining a recognition/enforcement request of an international arbitration award, the Supreme Court should resort only to the regime established by the New York Convention and the International Arbitration Law, omitting any reference to the Code of Civil Procedure.[8]

b) Jurisdiction of the Supreme Court to decide the exequatur

Both EDFI and YPF argued before the Supreme Court that there was a territorial limitation to the latter's jurisdiction since *"all of the parties involved are domiciled without the boundaries of Chile, and even if the only connection were that the defendants* [respondents] *have assets in Chile, that circumstance would be still insufficient to file this exequatur". EDFI* at 6. The Court's Attorney reached the same conclusion.[9]

This line of reasoning does not make any sense in the context of international commercial arbitration,[10] where it is common for parties of different nationalities to agree on a neutral seat of arbitration as New York, London or Paris, with which they do not have any association.[11] In addition, it is equally common that those parties seek to enforce the arbitral award in a country other than the seat, regardless of their countries of origin.

Considering this, neither the New York Convention, nor the International Arbitration Law establishes any domicile requirement. In fact those instruments set forth

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[7] Furthermore, the former bodies are subsequent regulations to the latter and are also more specialized.

[8] In the same sense, it has been argued that the Supreme Court shall resort directly to the International Arbitration Law, based on the More Favorable Law principle contained in Article VII of the New York Convention. *See 'La evolución de las normas de exequatur de laudos extranjeros en Chile', in Carlos A Soto Coaguila (Director), Arbitraje Comercial y Arbitraje de Inversión, Tomo 2: Convención de Nueva York de 1958. Reconocimiento y Ejecución de Laudos Arbitrales Extranjeros (Instituto Peruano de Arbitraje, 2009).*

[9] The Court's Attorney stated in her opinion: "*For an award issued in a foreign country, in which the plaintiff EDFI was domiciled in Paris, France; and as defendants ENDESA, incorporated in Madrid, Spain; and YPF, domiciled in Buenos Aires, Argentina, no court in Chile has jurisdiction to entertain the enforcement of the referred award. Thus, according to Article 76 of the Constitution of Chile, the Supreme Court lacks jurisdiction to decide the exequatur."*

[10] The Supreme Court did not finally consider this defense. However, the sole fact that it was raised and affirmed by the Court's Attorney confirms the incompatibility among the enforcement regimes established by New York Convention and the International Arbitration Law on the one hand, and the domestic regulations set forth in the Civil Procedure Code, on the other hand.

[11] *International Arbitration Survey: Choices in International Arbitration*, Queen Mary University of London. www.arbitrationonline.org/research/2010/index.html

very straightforward requirements for the recognition and enforcement of an award in a third country, this being especially true within the Convention countries.[12]

In summary, a challenge to the Supreme Court's jurisdiction based on the sole fact that the parties have their domicile outside Chile is fundamentally flawed.

c) Recognition and enforcement of an award set aside in the country of the seat

As summarized by Christopher R. Drahozal, there are two distinct approaches to this matter within the United States: Jan Paulsson contends that *"the annulment of an award by the courts in the country where it was rendered should not be a bar to enforcement elsewhere unless the grounds for that annulment were ones that are internationally recognized,"* whereas William Park urges that a judgment vacating an award should be recognized on grounds of comity, unless the vacating judgment is *"procedurally unfair or contrary to fundamental notions of justice."*[13]

Following the increasing interest existing in Chile in international arbitration matters, in March 2012, the ICC Young Arbitration Forum[14] held a conference in Santiago, Chile, focusing on the question presented in this article. At that conference, this author stated that, in deciding *EDFI*, the Supreme Court had not done its work properly, because it failed to take a stand on this relevant subject.[15]

Specifically, the Supreme Court ignored the permissive nature of the rule contained in Article V (1)(e) of the New York Convention, as well as in Article 36 of the International Arbitration Law, when setting forth that recognition and enforcement of the award *may* be refused, as opposed to *shall* be refused, recognizing, in consequence, the discretionary power of the courts on the matter.

Indeed, in *EDFI,* the Supreme Court simply quoted the mentioned provisions to state *"Having been proved the Award being null, it should be considered as fulfilled, in accordance to the examined norms, specific ground to deny the legal effect and enforceability of the Award within our country, since it does not fulfill the requirement of effectiveness established in Article 246 of the Code of Civil Procedure."* Two comments on this holding:

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[12] *See* articles IV of the New York Convention and 35(2) of the International Arbitration Law.
[13] Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, The American Review of International Arbitration, p. 453.
[14] Discussion group created under the auspices of the ICC International Court of Arbitration.
[15] *Les Cahiers de l'Arbitrage. The Paris Journal of International Arbitration,* No. 2, 2012, p. 473

Firstly, the use of the word *"examined"* by the Supreme Court is, at least, an overstatement. Indeed, the Court appears to simply have read *"shall"* instead of *"may"* in the relevant provisions, assuming that it was forced to decide the way it did. That is not correct.

Secondly, one could ask: was the decision of the Court grounded on the Convention, on the International Arbitration Law or, simply, on the Code of Civil Procedure?

Article 246 of the Code of Civil Procedure invoked by the Court establishes that the effectiveness of the award shall be decided by a superior court of the seat of the arbitration. What would happen then in case of an *ad hoc* arbitration? Is the Court requesting a "double exequatur"? What if none of the parties had sought an annulment before the Argentinean court?

These questions draw attention to the undesirable effects of the mixture of two enforcement regimes that are not entirely compatible.

V. CONCLUSIONS

The trend in Chilean courts is to recognize and enforce arbitration agreements and international awards, confirming Chile's long-standing tradition of arbitration. The real question is the validity of the rationale put forward by the courts for pursuing this approach. The fact that the courts may have reached the right outcomes in the cases before it does not excuse their lack of clear and coherent reasoning behind their ultimate decisions.

In *EDFI*, the Supreme Court failed to clarify key issues such as (i) the difference between *may* and *shall,* in connection with its discretion to enforce an award vacated in the arbitral *situs*; (ii) the mixture of two enforcement regimes that respond to different goals and necessities reflecting the different periods of time in which each was established; and (iii) the consideration of parochial issues such as the rules of domicile when facing exequatur proceedings.

Reaching a stage of consolidation on this matter will require further exposure of Chilean courts and practitioners to international arbitration practice. Nevertheless, the results reached by the Supreme Court on international arbitration matters so far indicate that Chile is at least moving in the right direction. This is, doubtless, a promising start.