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Peru

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Summary

IN SUMMARY

In this article we explain the criteria of the Peruvian courts related to the concept of 'foreign award' in order to demonstrate the possibility of favouring the recognition and execution of final decisions (whether final awards or not) in Peru. In the same way, we discuss what is the concept of 'international public policy', according to the Peruvian courts, as a cause for denying the recognition of a foreign award. Finally, we look at how the Peruvian courts accept the possibility of the ***iura novit curia*** principle being applied in arbitration, as long as the guarantees of due process are respected.

DISCUSSION POINTS

- Recognition and enforcement of foreign awards
- Concept of 'foreign award' in the Peruvian context
- Concept of international public policy in Peruvian law
- Application of the ***iura novit curia*** principle in arbitration

REFERENCED IN THIS ARTICLE

- Peruvian Arbitration Law, approved by Legislative Decree No. 1071
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, approved in New York, 1958

INTRODUCTION

Peru is a signatory to the New York Convention[1] and the Panama Convention.[2] The Peruvian Arbitration Law (PAL), approved by Legislative Decree No. 1071, establishes that, unless otherwise agreed by the parties, the most favourable treaty applies to the party who requests recognition of a foreign award, or even the rules provided in the PAL if these are more favourable than any treaty. The PAL's objective is to optimise and make recognising and enforcing foreign awards in Peru easier.

In this chapter, we will present the approach of the Peruvian courts regarding the concept of an 'award', international public policy (as a ground for denial of recognition) and the principle of ***iura novit curia*** within arbitration procedures.

PERUVIAN COURTS' UNDERSTANDING OF FOREIGN 'AWARD'

The New York Convention does not contemplate a definition of 'foreign arbitral award'. It only refers to the criterion of territoriality, that is, to recognise awards issued outside the territory.[3] The Convention does not specify whether the concept of award exclusively relates to a decision on the merits or whether it can be extended to other arbitral decisions (eg, the competence of the arbitral tribunal or interim measures).

Notwithstanding the discussion this caused within academic arbitration forums or the international arbitration jurisprudence,[4] Peruvian courts have established a broadly held view on this issue.

For instance, in *Energía Eólica SA v Montealto Peru SAC and Vestas Perú SAC*[5] one party requested recognition and enforcement of a partial award that excluded Energía Eólica SA from the case, ordering the payment of costs and expenses in its favour.

The Second Commercial Chamber of Lima assessed international arbitration doctrine and jurisprudence and articles 41 and 54 of the PAL to conclude that the concept of 'award' should be interpreted broadly enough to allow the recognition and enforcement of decisions over the merits and other ones that resolve particular issues. The court reasoned as follows:

> The court considers that for an arbitration decision to be considered an 'award' that can be recognised as such, it must imply the reasoned exercise of the jurisdictional authority of the arbitrators, with a final and definitive character in relation to those specific issues that it resolves; regardless of the time it is issued (in the course of the arbitration or at the end of it) and its content: that it resolves the merits of the dispute by putting an end to the dispute and the jurisdiction of the arbitrators ('final' award stricto sensu), resolves part of it (properly, 'partial award' according to article 54 of the national law), or resolves preliminary issues 'that prevent entering the merits of the dispute' (article 41 of the Peruvian arbitration law), even if said pronouncement falls on some incidental controversy derived from the arbitration itself (that is, not the one that originates the arbitration itself), as would be the case, for example, of an exception or previous question.[6]

To the court, an 'award' is a reasoned decision that finally and definitively resolves an arbitral issue regardless of the moment it is issued (in the middle or at the end of proceedings). Accordingly, awards may be decisions on the merits but also partial awards or decisions on jurisdiction. This decision is consistent with the position of the courts regarding their duty to collaborate in the recognition and enforcement of foreign precautionary measures.[7] Although we are not aware of recent decisions to enforce emergency arbitration decisions, the broad approach to the concept of an 'award' taken by Peruvian courts suggests they might consider such a request.

DENYING RECOGNITION OF FOREIGN AWARDS ON PUBLIC POLICY GROUNDS

It is not easy to define public policy. For instance, Pierre Lalive affirmed that 'few subjects are more vague, more difficult to seize and more controversial than that of the existence, contents and function of a public policy.'[8]

Despite its vagueness, Julian Lew asserts that public policy is related, reflects, ensures, achieves or pursues 'the fundamental economic, legal, moral, political, religious and social standards of every state or extra-national community'.[9] Therefore, public policy contains (or should contain) the foundations of each particular community. Hence, it is like a chameleon-[10] varying – slightly or significantly – from one national state to another and in time. However, such a relative concept can be favourable for each state when requested to enforce foreign decisions.

If public policy reflects each community's changeable foundations, then it is likely to be a general principle that spreads all over its state. Thus, it may be used as a 'shield' against foreign legislation or decisions and even against domestic legislation. The latter situation occurred, for instance, in the *Mitsubishi* case, where international public policy (arbitrability of antitrust disputes) prevailed over domestic public policy (non-arbitrability of American antitrust disputes) or mandatory rules.[11]

Different communities' concerns that can affect each state's public policy were assessed by the International Law Association's (ILA) Committee on International Commercial Arbitration. In its 2002 Final Report,[12] the ILA concluded that there are three categories of public policy: domestic, international and transnational.

Domestic public policy safeguards the state's political, economic and other governmental concerns through principles and legislation (mandatory rules) that have effect within its territory. Therefore, domestic public policy applies to a vast scope of situations concerning each state's legal system.

International public policy refers to the most basic foundations of a particular community or state. Such foundations contain mainly fundamental principles related to moral values, the most essential political, social and economic concerns, and the international obligations undertaken by each state.[13] It is impossible to predetermine a particular international public policy because basic foundations vary from state to state. Nonetheless, they express the 'hardcore' of each community's legal or moral values.[14] Therefore, international public policy refers to what each particular state considers as those unwaivable principles that reflect the fundamental values of its social organisation.[15]

Transnational public policy refers to an 'even more international' approach that protects or attempts to protect the most essential legal and ethical principles of the international community. Within a transnational approach, what should be considered are those fundamental rules shared by different communities or states, that is, a sort of 'common' public policy that, although not universal, contains the same or very similar principles and values to various legal systems.[16]

This difference in categories is essential if we consider that article V(2)(b) of the New York Convention establishes grounds for denying the recognition of a foreign award if it is contrary to the public policy of the country in which recognition is sought. For its part, article 75 of the PAL establishes as grounds for refusal that the award was contrary to 'international public policy'.

In Peru, the PAL uses the concept 'international public policy' for the recognition of foreign awards. In ***Energía Eólica SA v Montealto Peru SAC and Vestas Perú SAC***[17] (***Energía Eólica***) and S***SK Ingeniería y Construcción SAC v Técnicas Reunidas de Talara SAC***[18] (***SSK Ingeniería***) Peruvian courts have analysed the term and consider it as part of the internal public policy of Peru.[19]

Peruvian courts[20] assessed Resolution 2/2002 adopted by the LXX Biennial Conference of the International Law Association (New Delhi, April 2002) (Resolution 2/2002) which, in accordance with doctrine,[21] states that three categories are part of te international public policy:

- the fundamental principles related to justice and morality that the state wishes to protect (both substantive and procedural);
- the rules designed to serve the political, social or economic fundamentals of the state, which include police laws (such as antitrust laws, monetary or exchange control regulations, environmental protection laws, among others); and
- the international obligations contracted by the state where recognition of the award is requested.

Indeed, concerning substantive international public policy, the First Commercial Chamber of Lima has stated that this concept refers to the fact that the award does not contain statements that violate fundamental principles of the state where recognition is requested. For instance, the non-abuse of rights, the principle of good faith, the binding force of contracts, the prohibition of discrimination, expropriation without compensation, as well as the prohibition of activities contrary to good customs (piracy, terrorism, genocide, slavery, smuggling, drug trafficking and paedophilia).[22]

Regarding procedural international public policy, the same Commercial Chamber has indicated that this concept is related to the procedural guarantees that ensure the right to a defence and an impartial trial. For instance, the right to due notice, reasonable opportunity to defend, equality between the parties and respect for ***res*** judicata.[23]

As we can see, Peruvian courts have accepted the criteria established in Resolution 2/2002 to delimit the scope of international public policy, which constitutes a cause for denying the recognition of a foreign award under the PAL.

Notwithstanding this, Peruvian courts have recognised the need to define international public policy case by case based on the principles of exceptionality, extensive interpretation and evident feature (criteria also used to analyse the validity of an award in an annulment proceeding).[24] In *SSK Ingeniería*, the First Commercial Chamber of Lima analysed these principles, in the following terms:

- The principle of exceptionality consists in that 'the principle of ***res judicata*** of the awards issued in the context of international commercial arbitration must be respected, unless there is a very exceptional circumstance that prevents it'.[25]
- The principle of restrictive interpretation 'seeks to weaken the risks of the expansive force of the concept of public policy'.[26] Therefore, 'the doctrine recommends that since the principles of public policy have a high level of abstraction, they should be constructed and interpreted in a restrictive manner'.[27]
- The principle of interpretation of an evident feature 'refers to the level of review of the award that is necessary to determine that it is contrary to public policy. In this sense, the doctrine indicates that the level of review undertaken by the judge must be minimal'.[28]

Accordingly, Peruvian courts have recognised the need to reduce the possibility of reviewing and controlling the substantive opinions of the arbitrators based on a restrictive and exceptional interpretation of the concept of international public policy.

THE APPLICABILITY OF IURA NOVIT CURIA TO INTERNATIONAL ARBITRATION

The arbitral community has different points of view regarding whether to apply the ***iura novit curia*** principle within international arbitration procedures. In this respect, Peruvian courts admit applying this principle, safeguarding the guarantees of due process, that is, the facts alleged by the parties and the object of the dispute, as well as the principle of contradiction.

For instance, in *Empresa Municipal de Mercado SA v Petramás SAC* (referring to a national award annulment process), the Second Commercial Chamber of Lima stated that the ex officio application of the law will be allowed if the arbitrators did not incorporate new relevant facts that have not been alleged by the parties, and the arguments on the claim or controversy have not been altered.[29]

This same approach was followed in ***SSK Ingeniería*** corresponding to a process of recognition and enforcement of a foreign award. In this case, the First Commercial Chamber of Lima explicitly analysed the possible violation of the right to a defence, due to the possible application of the ***iura novit curia*** principle in arbitration. The Commercial Chamber noted that the need to grant the parties their right to contradiction is not absolute, because not all ex officio application of the law generates the deviation of the debate produced between the parties. This must be evaluated depending on each circumstance.[30]

In ***SSK Ingeniería***, the Commercial Chamber considered that an arbitral tribunal could quote jurisprudence ('legal authorities') that the parties did not invoke, but as an argumentative element to corroborate and complement the conclusion adopted, based on the legal authorities provided by the parties.[31]

In this case, the Commercial Chamber considered that, in terms of jurisprudence, there was no need for the arbitral tribunal to grant the parties the possibility of pronounce on them because the tribunal can evaluate them ex officio,[32] and that this is not a case of application of ***iura novit curia*** in arbitration, because the analysis of the jurisprudence is not a new element of the debate.[33]

In a nutshell, the current approach of Peruvian courts related to the applicability of the ***iura novit curia*** principle in international arbitration favours the recognition and execution of foreign awards. It is an arbitral practice for the parties to submit doctrine and jurisprudence to support their positions; however, this does not mean that the arbitral tribunal is limited to 'legal authorities'. Arbitral tribunals are empowered to invoke new jurisprudence or doctrines regardless of violation of the principle of ***iura novit curia*** or the parties' right to a defence.

CONCLUSIONS

In accordance with the majority doctrine and jurisprudence, Peruvian courts have acknowledged the possibility of recognising and executing any definitive decision (such as a partial award) issued during the arbitration process (not only the final awards that resolve the controversy).

Considering the concept used by the PAL, Peruvian courts have used the 'international public policy' (considered as a part of the 'internal public policy') to assess the recognition of a foreign award. To Peruvian courts, the content of the international public policy must be determined, considering the guidelines of Resolution 2/2002, and the principles of exceptionality, restrictive interpretation and evident feature. The objective is to reduce the possibility of reviewing and controlling the substantive criteria of the arbitrators based on a restrictive and exceptional interpretation of the concept of international public policy.

Finally, Peruvian courts have had the opportunity to analyse the application and possible violation of the principle of ***iura novit curia*** in arbitration. In this regard, courts have considered its application while guaranteeing due process and the right to contradictory proceedings, depending on the circumstances of the case.

Endnotes

1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, approved in New York on 10 June 1958. ^ Back to section

2 Inter-American Convention on International Commercial Arbitration, approved in Panama on 30 January 1975. Back to section

3 Article I of the New York Convention establishes that the Convention 'shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.' Back to section

4 Within the jurisprudence that restricts the recognition of foreign awards only to final or definitive decisions, we can mention the ruling of the Civil and Agrarian Cassation Chamber of the Supreme Court of Justice of Colombia, dated 1 March 1999, file No. E-7474 (***Merck & Co Inc and others v SA***). In the judgment, it was pointed out that 'not any order that decides a controversy can be enforceable in the State where its recognition is requested, but only the one that totally or partially resolves the "differences between natural or legal persons", understanding, of course, by "differences" those that originate the conflict of interests, that is, those that determine the resistance to the claim and are proposed in the respective demand as an object of the heterocomposition', available at: http://newyorkconvention1958.org/doc_num.php?explnum_id=1400. Back to section

5 File No. 45-2016. Back to section

6 Legal Ground 49 of the ruling of 19 October 2016 (***Energía Eólica SA v Montealto Peru SAC and Vestas Perú SAC*** (File No. 45-2016). Back to section

7 For instance, in ***Haug SA v Maple Ethanol SRL*** (File No. 02818-2012), the 13th Commercial Court of Lima, through Resolution No. 2 dated 18 June 2012, stated: 'regardless of the submission of the parties to the arbitral jurisdiction abroad, the Peruvian national judiciary is competent to assess requests for judicial collaboration when the obligations involved in the arbitrable dispute had to be executed in Peruvian territory'. Back to section

8 Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', in Pieter Sanders (ed), ***Comparative Arbitration Practice and Public Policy in Arbitration*** (ICCA Congress Series, Vol. 3, Kluwer Law International 1987), 258. Back to section

9 Julian D M Lew, ***Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*** (Dobbs Ferry, NY, Oceana Publications 1978) 532. Back to section

10 Dámaso Ruiz-Jaro Colomer, 'L'inclusion du droit de la concurrence dans l'ordre public communautaire: en effeuillant la marguerite', 3 Concurrences (2006), 29 (as cited in Olivier Van Der Haegen, 'European Public Policy in Commercial Arbitration: Bridge Over Troubled Water?' (2009) 16 Maastricht Journal of European and Comparative Law, 458). Back to section

11 Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', in Pieter Sanders (ed), ***Comparative Arbitration Practice and Public Policy in Arbitration*** (ICCA Congress Series, Vol. 3, Kluwer Law International 1987); 260. ^ Back to section

12 Pierre Mayer and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 Arbitration Int., 249, available at https://doi.org/10.1093/arbitration/19.2.249. ^ Back to section

13 Id, 255. ^ Back to section

14 Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', in Pieter Sanders (ed), Comparative Arbitration Practice and Public Policy in Arbitration (ICCA Congress Series, Vol. 3, Kluwer Law International 1987), 264. ^ Back to section

15 Eduardo Ferrero Costa, 'Reconocimiento y ejecución de laudos extranjeros' in Carlos Soto Coaguila and Alfredo Bullard González (eds), Comentarios a la Ley Peruana de Arbitraje (Instituto Peruano de Arbitraje, Vol. II, Lima 2011), 29. ^ Back to section

16 Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', in Pieter Sanders (ed), Comparative Arbitration Practice and Public Policy in Arbitration (ICCA Congress Series, Vol. 3, Kluwer Law International 1987), 276-278. ^ Back to section

17 File No. 45-2016. ^ Back to section

18 File No. 207-2021. ^ Back to section

19 Legal Ground 30 of the ruling of 29 October 2016 in ***Energía Eólica SA v Montealto Peru SAC and Vestas Perú SAC*** (File No. 45-2016] and Legal Ground 37 of the ruling of 15 February 2022 in ***SSK Ingeniería y Construcción SAC v Técnicas Reunidas de Talara SAC*** (File No. 207-2021). 'In this sense, international public policy is a subset of the group of norms that make up internal public policy, with a gender–species relationship existing between the two, by virtue of which international public policy fulfils a different function specifically limited to the conflictual, of the application of foreign law in the domestic sphere. However, whether or not there is a distinction in the concepts is highly debatable.' ^ Back to section

20 Peruvian courts have had the opportunity to analyse the concept of international public policy, considering the content of Resolution 2/2002 issued in New Delhi, in various judicial pronouncements. See, for instance, ***Energía Eólica SA v Montealto Peru SAC and Vestas Perú SAC*** (File No. 45-2016) and ***SSK Ingeniería y Construcción SAC v Técnicas Reunidas de Talara SAC*** (File No. 207-2021). ^ Back to section

21 Pierre Mayer and Audley Sheppard, 'Final report of the International Law Association on public policy as a prohibition for the execution of international arbitral awards' *International Arbitration Review*, June-December 2004, cited in Andres Mezgravis, 'The substantive public policy, the procedural policy and arbitrability as grounds for denial of the award: special reference to Venezuela and other Latin American countries', *Commercial arbitration and investment arbitration. 2. New York Convention of 1958. Recognition and Enforcement of Foreign Arbitration Sentences.* Peruvian Institute of Arbitration. (2009), 811-812. Back to section

22 Legal Ground 39 of the ruling of 15 February 2022 issued by the First Commercial Chamber of Lima in *SSK Ingeniería y Construcción SAC v Técnicas Reunidas de Talara SAC* (File No. 207-2021). Back to section

23 Id. Back to section

24 Legal Ground 40 of the ruling of 15 February 2022 issued by the First Commercial Chamber of Lima in *SSK Ingeniería y Construcción SAC v Técnicas Reunidas de Talara SAC* (File No. 207-2021). Back to section

25 Id. Back to section

26 Id. Back to section

27 Id. Back to section

28 Id. Back to section

29 Legal Ground 21 of the ruling of 7 November 2017 issued by the Second Commercial Chamber of Lima (File No. 256-2017). Back to section

30 Legal Ground 32 of the ruling of 15 February 2022 issued by the First Commercial Chamber of Lima in *SSK Ingeniería y Construcción SAC v Técnicas Reunidas de Talara SAC* (File No. 207-2021). Back to section

31 Legal Ground 34 of the ruling of 15 February 2022 issued by the First Commercial Chamber of Lima in *SSK Ingeniería y Construcción SAC v Técnicas Reunidas de Talara SAC* (File No. 207-2021). Back to section

32 Id. Back to section

33 Legal Ground 35 of the ruling of 15 February 2022 issued by the First Commercial Chamber of Lima in *SSK Ingeniería y Construcción SAC v Técnicas Reunidas de Talara SAC* (File No. 207-2021). Back to section

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