



School of International Arbitration

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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London

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Decision Name, Date and Court:

Republic of Argentina vs. AWG Group Ltd – Civil Action No. 15-1057 (BAH) Date: 09/30/16 - United States District Court for the District of Columbia

Case Report by:

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Summary:

The Republic of Argentina (“Argentina”) filed a lawsuit before the United States Court for the District of Columbia (“the Court”) seeking vacatur of an international arbitration award against the country in the amount of \$20, 957, 809, plus interest in favor of the respondent AWG Group Ltd. (“AWG”). AWG, for its part, seeks confirmation, recognition and enforcement of that same award. The Court denied Argentina’s request to vacate the Tribunal’s award and granted AWG’s cross-petition to confirm the award.

Main issues: Vacatur of arbitral award, investment, investors, partiality of an appointed arbitrator, excess of powers of the Arbitral Tribunal, FAA, New York Convention.

Judge: Judge Beryl A. Howell, United States District Court for the District of Columbia

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Digest:

1. Relevant Facts of the case

The Court started the memorandum of opinion by giving an account of the facts of the case regarding the legal relationship and the arbitration proceedings between the parties. The arbitration award at issue in this case arose from a now-terminated thirty-year contract between Argentina and a private consortium, which included AWG, to operate the water distribution and treatment systems serving the city of Buenos Aires. AWG alleged that Argentina breached its obligation to grant foreign investments “fair and equitable treatment” and “full protection and security” under the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (“UK- BIT”).

1.1. The Concession Contract

On December 28, 1992, Argentina awarded a concession for the provision of water and sewage services to Buenos Aires and surrounding municipalities to a private consortium, which included AWG, a British corporation. The Buenos Aires water and sewage concession was granted to a consortium comprised of AWG and other foreign and Argentine companies, which together formed and operated as an Argentine company named Aguas Argentinas S.A. (“AASA”). Under this scheme, concessionaires would provide services, new capital and technology, and in turn, would be entitled to the payment of tariffs.

In 2001, after AASA had invested \$1.7 billion in the framework of the Concession Contract, Argentina began experiencing a financial crisis that prompted the adoption of a series of measures aimed at abolishing the currency board that linked the Argentine peso to the U.S. dollar and the adjustment of public services contracts according to the agreed indexations. Furthermore, Argentina authorized the Executive Power to renegotiate all public service contracts.

Due to the ruinous effect of these measures on AASA’s cash flows, in March 2002 Argentina and AASA engaged in negotiations but were unable to come to an agreement.

In September 2005, AASA requested termination of the Concession Contract, which Argentina refused. Several months later, in March 2006, Argentina terminated the Concession Contract for fault by AASA.

1.2. The Arbitration

On April 17, 2003, the foreign investors in AASA requested arbitration against Argentina. The International Center for Settlement of Investment Disputes (“ICSID”) administered the case under the United Nations Commission on International Trade Arbitration Rules (“UNCITRAL Rules”), as provided for in the UK-Argentina BIT.

The Claimants appointed as arbitrator Professor Gabrielle Kaufmann-Kohler; Argentina appointed Professor Pedro Nikken and the ICSID appointed Professor Jeswald W. Salacuse to preside over the Tribunal.

Over the course of the arbitration, the Tribunal issued five decisions. Firstly, on August 3, 2006, the Tribunal rejected Argentina's objection to the Tribunal's jurisdiction over the claims. Secondly, the Tribunal responded to Argentina's request to remove Professor Kaufmann-Kohler from the Tribunal by rejecting the challenge raised by Argentina against the latter. Thirdly, the Tribunal issued an additional decision responding to a second request from Argentina to remove Professor Kaufmann-Kohler from the Tribunal, which was also rejected by the two unchallenged Arbitrators. Fourthly, on July 30, 2010, the Tribunal found Argentina liable for failing to provide the investments "fair and equitable treatment". Fifthly, the Tribunal rendered on April 9, 2015 a decision on damages, known as the "Final Award", granting damages for a total amount of \$404, 539, 050, plus interest in favor of Claimants, including \$20,957,809, plus interest, in favor of the AWG Group.

AWG alleged that Argentina has not yet complied with the award.

2. Legal Analysis of the Court

Argentina urged vacatur of the arbitration award under two provisions of the FAA's §10; i) Professor Kaufmann-Kohler's position in the UBS Board and ii) The Tribunal allegedly awarded damages outside of the legal boundaries afforded by the UK-Argentina BIT and allegedly failed to apply international legal principles as required by the latter.

AWG discounted these arguments as "groundless" and contented that the arbitration award must be confirmed because none of the statutory bases for vacatur exist.

2.1. Legal standard of analysis

The Court emphasized the narrow standard of review of arbitral awards, in particular the unauthorized merits analysis.

According to the Court and *Oxford Health Plans LLC vs. Suter*, where the Supreme Court stated that if parties could take "full-bore legal and evidentiary appeals", arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial review process".

2.2. Statutory Framework

The Court applied Article V.1.e of the New York Convention, through which parties may seek vacatur of the arbitration award under the FAA provisions applicable to domestic awards.

2.3. Argentina's Claim of Evident Partiality by a Tribunal Member

The Court assessed that Argentina has not demonstrated that Professor Kaufmann-Kohler's position or her failure to disclose her potential for conflict amounted to "evident partiality" to refuse recognition and enforcement of the award.

The relevant fact that the Court took into consideration is the appointment of Professor Kaufmann-Kohler, on April 19, 2006, to the Board of Directors of UBS ("UBS Board") and her ownership of shares in the private consortium of the Claimants. The Court noted that,

although UBS is not a shareowner of AWG, Argentina cited the compensation for her services with USB stock as evidence for the partiality of this tribunal member.

Professor Kaufmann-Kohler explained that until Argentina's challenge was lodged, "she had no knowledge of the business relations alleged to exist between Claimants and UBS". Further, she requested UBS to verify the accuracy of the UBS shareholdings in the Claimants. UBS confirmed, "all shareholdings are fairly small, if not fractional. They do not have strategic meaning of any kind (...)".

Argentina tried to further bolster its challenge by offering expert reports. On their part, the unchallenged arbitrators reasoned that the alleged connection is insufficient to give rise to doubts regarding independence and impartiality.

Professor Kaufmann-Kohler resigned from the Board prior the issue of the Final Award.

The Court sought guidance in FAA's § 10 (a) (2), Supreme Court's *Commonwealth Coatings Corp. vs. Continental Co.* and DC Circuit's *Al – Harbi v. Citibank*.

According to these grounds, the Court reasoned that i) in the context of UBS's overall business, that company's interests in AWG's consortium partners, Suez and Vivendi, was inconsequential; ii) the fact the UBS among its other activities conducts research and develops financial products related to the water sector is insufficient to overcome the fact that very often arbitrators get called upon from relevant industries because of their expertise and iii) the challenged arbitrator had no duty to disclose this fact due to the attenuated nature of the business connection between UBS and AWG.

Thus, the Court agreed with the two unchallenged arbitrators in the sense that the objective analysis of this issue does not lead a reasonable, informed person to conclude that a justifiable doubt exists as to Professor Kaufmann-Kohler's impartiality or independence with respect to AWG.

2.4. Argentina's Claim that the Tribunal Exceeded its Powers

Argentina claimed that the Tribunal exceeded its powers by failing to apply applicable law in its computation of damages and its evaluation of the necessity defense, warranting vacatur under the FAA's §10 (a) (4). The Court reasoned that close examination of these claims demonstrates that the Tribunal acted well within its powers and no vacatur is warranted under these grounds.

The Court cited FAA §10 (a) (4) and Supreme Court case law, which state the priority of the arbitral awards merits unless the arbitrators' judgment is so far from the parties' choice of arbitration and construction of the agreement that they "dispensed [their] own brand of justice" (*Major League Baseball Players Ass'n v. Garvey*).

2.4.1. The Tribunal did not exceed its powers when it awarded damages

Argentina argued that the Tribunal exceeded its powers in awarding damages because it lacked authority to do so i) arising after the Concession Contract's lawful termination in 2006 and ii) assuming that Argentina was required to ensure AASA's viability. AWG countered

that these are nothing more than quarrels with the way the Tribunal assessed the evidence and applied the law.

The Court explained that the Tribunal did not award damages for the termination of the Concession Contract itself, but instead determined that the UK-Argentina BIT violations entitled the Claimants to future lost profits post-dating 2006, regardless of whether the Concession Contract had been lawfully terminated in 2006.

Regarding Argentina's argument that the Tribunal awarded damages based on the requirement to ensure AASA's viability, the Court cited *Kanuth*, where the Circuit held that "where nothing on the face of the panel's lump – sum award suggests that the panel failed to construe the contract, any inquiry into precisely how and why the panel derived the lump-sum award is clearly outside the court's limited scope of review". Thus, the Court reasoned that merely because Argentina does not agree to how the Tribunal calculated damages does not mean that the Tribunal lacked jurisdiction to do so.

The Court confirmed the jurisdiction of the Tribunal to award damages for violations under the UK-Argentina BIT and for Argentina's wrongful acts occurred well before the contract termination of 2006.

2.4.2. The Tribunal did not exceed its powers when it applied the principle of necessity

Argentina claimed that the Tribunal had exceeded its powers when it chose not to apply the exculpatory customary international law principle of necessity and instead dispensed its own policy choices. AWG dismissed the claim as nothing more than a disagreement with the Tribunal's factual and legal findings.

The Court agreed with AWG and held that The Tribunal was "arguably construing or applying the contract" when it applied its interpretation of international law and therefore did not exceed its power when rejecting the necessity defense. Additionally, the Court concluded that even if the Tribunal's interpretation or application was in error that would still be insufficient to vacate the award.

As a consequence, the Court held that because Argentina has failed to demonstrate evident partiality and excess of powers under the FAA, its admittedly redundant claims under the New York Convention must also fail.

3. Decision

The Court concluded that Argentina has failed to establish any grounds for vacatur either under Article V.1.e of the New York Convention or under FAA §10-11.

The two grounds for refusal of recognition or enforcement of the award are; i) Argentina's purported inability to present its case due to the evident partiality of Professor Kaufmann-Kohler and ii) failure to demonstrate that the Tribunal acted outside their scope of submission to arbitration.

The Court verified that AWG had complied with the requisites of the New York Convention to obtain confirmation of an arbitral award, and consequently, AWG's petition to confirm the award was granted.