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| Milantic Trans. S.A. v. Ministerio de Producción – Astillero Río Santiago y otro  |  |  | | --- | --- | | Court | National Supreme Court of Justice | | Date | 5 August 2021 | | Summary | The company Milantic Trans S.A. ("Milantic") sought the enforcement of an arbitration award rendered by a London-based arbitral tribunal before the contentious administrative courts of the City of La Plata. The defendant was the Province of Buenos Aires and the State entity “Ente de Administración del Astillero Rio Santiago ("Astillero Rio Santiago")”, Milantic's counterparty in the construction contract that gave rise to the dispute and which contained the arbitration clause that gave rise to the international arbitration and subsequent award sought to be enforced.  The defendant challenged the award enforcement on the grounds that Astillero Río Santiago did not have the capacity to enter the contract with Milantic because it had not been authorized to do so by a provincial law. The defendant also challenged the contents of the arbitration award for being contrary to public policy.  The First Instance Judge dismissed the defendant's opposition, recognized the arbitration award and ordered its enforcement, and imposed costs on the defendant. Against this decision, the defendant filed an appeal only with respect to the costs therein imposed, leaving the remaining decision firmed.  The Court of Appeals reversed the judgment rendered by the Judge of First Instance on the grounds that there was no valid arbitration agreement proferring jurisdiction on the arbitration tribunal. The Court of Appeals held that such arbitration agreement had not been ratified by provincial law, which -in its opinion- affected the existence and validity of the alleged arbitration agreement invoked by claimant in the foreign arbitration proceeding. Therefore, the Court of Appeals rejected the enforcement of the foreign arbitration award, even in the absence of an express claim by the appellant-defendant-appellant. The decision was confirmed by the Provincie of Buenos Aires Supreme Court.  The National Supreme Court of Justice reversed the decision holding that the *res judicata* principle impeded the review of the first instance ruling ordering the award enforcement. | |

**Excerpts**

### **Opinion of Justices C. F. Rosenkrantz, CJ, and E. I. Highton de Nolasco, AJ[[1]](#footnote-1)**

(….)

[9] “It was correct to allow the extraordinary appeal, because the interpretation and application given by the Supreme Court [of the Province of Buenos Aires] of a rule of an undoubtedly federal nature, such as Art. V(2) of the New York Convention, was at issue, and the challenged decision, … is contrary to the claimant's argument based on that provision.

[10] “First of all, it is necessary to summarize some aspects of the development of the case that are relevant for the decision to be adopted by this Court.

In its initial brief, the defendant [Buenos Aires Province] opposed its counterparty's request for recognition and enforcement, arguing that the shipbuilding contract had not been approved by special law and that the arbitral award violated domestic public policy. (…) the appellate court revoked the recognition of the arbitral award, on the ground that there had been no legislative approval of the contract by the Legislature of the Province of Buenos Aires. The Supreme Court of Justice for the Province confirmed this decision, on the understanding that Art. V(2) of the New York Convention enabled courts to examine a violation of Argentine public policy on their own initiative.

Hence, the central point to be decided is whether the power provided for in Art. V(2) of the New York Convention, which enables local judges to deny a request for recognition and enforcement of a foreign arbitral award on grounds of public policy, authorizes them to reintroduce on their own initiative defenses that were raised and rejected in a final manner by the first instance court.

[11] “As far as it is relevant here, Art. V(2)(b) of the New York Convention provides that ‘Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (…) (b) The recognition or enforcement of the award would be contrary to the public policy of that country.’ The Convention does not define the meaning of ‘public policy’, but leaves it to the judges of the State where recognition and enforcement of the arbitral award is sought.

Beyond the scope to be given to the notion of public policy in the context of the recognition and enforcement of foreign arbitral awards, the interpretation of the New York Convention, as that of any international treaty ratified by our country, must always be made in accordance with the public law principles set out in the National Constitution (Art. 27). This has been repeatedly held by this Court (…).

This general duty, to be complied with when interpreting all international treaties, is reinforced in this case by the fact that the Congress of the Nation, when approving the Convention by Law 23,619, provided that the following declaration should be made when depositing the instrument of ratification: ‘The Convention will be interpreted in accordance with the principles and clauses of the National Constitution in force or those resulting from modification made by virtue of the Constitution.’ (Art. 2) (…).

Thus, the power of local judges to refuse recognition and enforcement of an arbitral award on the ground of public policy (Art. V(2) of the New York Convention) must be exercised in accordance with the public law principles of our Constitution.

Among these principles is due process (Art. 18, National Constitution) which has been qualified as part of Argentine international public policy, to which (…) all proceedings that lead to a decision or resolution issued by a foreign judicial authority having extraterritorial effects in the Argentine Republic must conform (…).

[12] “In this respect, it is important to point out that this Court has ruled that its jurisdiction is limited by the terms in which the procedural relationship was established and the scope of the remedies granted, which determine the scope of [the courts'] decision-making power, and that the disregard of this limitation violates the principle of congruence enshrined in Arts. 17 and 18 of the National Constitution(…).

This Court has similarly ruled that a decision applying public policy rules in disregard of a final decision previously issued in the same proceeding that rejected this claim violates the guarantee of due process and must be disqualified as a valid judicial act (…).

[13] “The constitutional nature of these principles, as an expression of the rights to due process and property, is due to the fact that the system of constitutional guarantees of proceedings aims at protecting, not harming, rights. (…).

In the same vein, it has been pointed out that while it is true that the power to supplement the law authorizes judges to autonomously qualify the facts of the case and to apply to them the legal rules that govern [the case] (iura novit curia), this power recognizes an exception with respect to appellate courts, as to the issues finally resolved in the first instance. The appellate courts cannot exceed – in civil matters – the jurisdiction granted by the appeals filed before them; [this is] a constitutional level limitation (…).

[14] “Finally, it should be recalled that res judicata is one of the fundamental pillars on which our constitutional system is based and therefore, except in the exceptional cases in which a final judicial pronouncement has been found to be null and void, it cannot be altered even by invoking public policy laws, since the stability of decisions, insofar as it constitutes an unavoidable premise of legal certainty, is also a requirement of public policy of a higher level (…).

[15] “In the present case, the reasons given both by the highest local court and by the court which preceded it in its intervention are insufficient to justify a deviation from the guiding principles set forth above. In fact, the appeal filed by the defendant against the first instance decision was exclusively aimed at questioning the imposition of costs ordered by the judge, and does not contain even one passage allowing to argue that it was an attempt to challenge the decision on the merits. In other words, ‘the way in which the challenge was articulated’ – as held by the court in order to justify its decision – did not require that court to examine the main claim, but rather, on the contrary, excluded that possibility and only authorized it to review the issue of costs”.

[16] “The Supreme Court of Justice of the Province of Buenos Aires could not disregard this and validate the decision [of the first instance court] based on a reference to our decision: 335: 2333 (‘Rodríguez Pereyra’), because in that decision, it was held that the *ex officio* review of law constitutionality presupposes a judicial process adjusted to the applicable procedural rules. Among those, the rules which determine the competence of the jurisdictional bodies and, above all, the rules which establish the requirements of admissibility and substantiation of the submissions or allegations of the parties are particularly relevant (see recital 13; this finding was reiterated in decision: 337:179, recital 7). As a consequence, it should have found that those requirements of admissibility and substantiation were not met by the defendant, which, as mentioned, only challenged the first instance decision with respect to the way in which the costs had been imposed, thus excluding any possibility of reviewing other aspects of the decision in subsequent instances”.

[17] “Consequently, in the particular context described above, the *ex officio* intervention of the local courts – based on an alleged violation of public policy – disregarded the principle of congruence and *res judicata*, the constitutional roots of which have been recognized by this Court and respect of which has been understood to be a public policy requirement of a higher level.

[19] “Hence, having heard the Public Prosecutor, we grant the extraordinary appeal and reverse the appealed decision.

(….)

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1. Opinion by Justices Juan Carlos Maqueda and Ricardo Luis Lorenzetti reached out a similar holding. [↑](#footnote-ref-1)