

**INTERNATIONAL MARITIME LAW**  
**SEMINAR 2012 - LONDON**

**RECOGNITION AND ENFORCEMENT OF JUDICIAL**  
**ORDERS AND PROCEDURES IN FOREIGN COURTS**

**General Introduction**

Due to the fast growing progress of International Commerce and the increase in communications, demanding greater cooperation between the different States so as to comply also with the need of greater uniformity due to the undeniable interconnections with the different jurisdictions with the natural consequence of emerging conflicts to be resolved.

The International Private Law, complex by its own nature, requires for us to refer to the faculty that Courts in a particular State, will have to resolve the different controversies when they have to decide regarding to foreign issues. It is then important to determine whether Foreign or Internal Laws should be applied.

The main and primary purpose is to simplify and guarantee the recognition of the procedures as for the Judicial decisions to have a positive dynamic between different States.

Within the State Jurisdiction the different cases that could be presented, could deal with Labor matters, Commercial matters, Civil matters, and at different Court stages (Lower and Higher Court, Supreme Court), and others matters concerning to the amounts involved.

At the same time, the International collaboration could refer to:

- Recognition and execution of Sentences
- Recognition and execution of Arbitration Awards
- Deal with procedure matters related to the production of evidence and information in procedures abroad
- Preliminary and security measures

The acceptance on behalf of the legal system of the State, is of no less importance. It requires, through an internal law to indicate the procedure to be taken, as to determine the local Court that will handle the case.

Then the International Private Law leads us to analyze the following aspects:

- The Local State Power that has to understand and apply local Jurisdiction
- The Foreign State Power and their Courts as to produce a Sentences to be recognized.
- The ability to accept the change of Jurisdiction

The first's matters refer to the issue of the Direct or Indirect Jurisdiction and the last subject refers to the possibility of extending the international jurisdiction in favor of other judges.

The International Doctrine has well referred to the interpretation of these three issues:

- The Jurisdiction, their distribution and powers
- The extraterritoriality, it's compliance and recognition of the procedures
- The recognition and execution of foreign pronouncements

## **Recognition and Execution**

The recognition and execution of Sentences pronounced by the judicial authority, as well as an Arbitration Awards that was duly complied by parties, will need to achieve the corresponding legal requirements on both rulings as to start with.

This takes us to the question whether there is the need for prior control of the pronouncements, or should it occur automatically, thus achieving more efficiency in the system. We shall encounter these principles in the various International Conventions such as the 1968 Brussels Convention thereby validating the judicial resolution resulting from the Jurisdiction from a signatory State.

This presumption of validity does not imply a blind recognition when demanding the compliance of the minimum controls that are stated in their laws that result from the following:

- a) Does not affect the Public order at the required State
- b) When the defendant is on a default of rights
- c) When there is a sentence or decision between the same parties at the required State
- d) The matters regarding to legal capability of parties involved at the State of origin.
- e) If there existed a previous pronouncement or decision between the same parties of a signatory State

The guiding principle is an absence of control on behalf of the required State and the other one establishes the impossibility of the jurisdictional authority to submit a sentence regarding to the grounds of the matter.

We mean to say that the recognition implies the judicial recognition to be examined, concerning the foreign pronouncement, thereby establishing the existence of the needed requirements to have the executive strength of the sentence, subject to recognition and/or execution.

It is of no less importance to ensure the regularity of the judicial process, where the said procedure is correctly applied and that the International Public Order is not be affected.

## **Doctrines in the Control Methods**

The control methods of the International Jurisdiction of a foreign Judge, are divided in Unilateral and Bilateral.

- Unilateral

This may be simple or double. The simple way is a result of the analysis of it's own procedure system and the double way also analyzes it's legislation in it's own procedure system, but also allows the refusal when it affects the Forum exclusivity.

- Bilateral

This is when the jurisdiction has not overcome the exclusive jurisdiction and appears to be a similar criteria as those of the Judge's Forum.

## Argentine Judicial System

Argentina lines up its Positive Legislation with the Bilateral concept in its Internal source as well as in its International Conventional source.

Our National Civil and Commercial Procedure Code, is our source of internal Law through its articles it directly refers or differs to International Treaties on specific subject or matter.

## National Civil and Commercial Procedural Code

It is suitable to review such legal body within the Articles 517 to 519 bis, at Chapter II named "Sentences of Foreign Tribunals", which state the following:

### *Conversion of an Executory Title*

**Art. 517.** - The sentences of the foreign Tribunals will be enforceable on the terms of the International Treaties celebrated with the countries from which they come.

If there were no treaties, they will be executable with the following requirements:

- 1) If the sentence as authorized and previously judged in the State where it was pronounced, forthcoming from a competent Tribunals, according to the Argentine norms of International jurisdiction, will be the consequence of the exercising of a personal action or an action on an property moved to the Republic during or after the completion of the proceedings abroad.
- 2) If the defendant against whom we expect to execute the sentence had been personally notified and had guaranteed his defense.
- 3) That the sentence must have fulfilled the necessary requirements to be considered valid, in the place where it was ruled and with the needed conditions required by the National local Laws.

- 4) The sentence should not affect the principles of the Argentine Public order.
- 5) The sentence should not be incompatible with one that has been previously or simultaneously pronounced by an Argentine Court

## *Jurisdiction. Requirements*

**Art. 518.** - The execution of the sentence ruled by a foreign Court, will be requested or presented to the corresponding Judge of first Instance together with his legalized and translated testimony; and of evidence proving that the actions have been executed, and that the remaining requirements have been complied if they are not proven by the same sentence.

The norms for the incidents procedure will be applied for the exequatur proceedings.

If the execution is accepted, the established procedure will be applied for the Sentences according to Argentine Tribunals

## *Effectiveness of Foreign Sentences*

**Art. 519** - When in trial, the authority of a foreign sentence is invoked; this may only be effective if it fulfills the requirements of Article 517

## *Foreign Arbitrational Awards*

**Art. 519 BIS.** - The awards pronounced by foreign arbitrator, may be executed if complying with the established procedure in the previous articles, if:

- 1) The requirements pertaining to the Article 517 are complied with and in this case, that the extension of the jurisdiction is admissible or recognized on the terms of Article 1.
- 2) The matters that have been subject of the commitment are not excluded from the arbitration in accordance with Article 737.

The code organizes and regulates the conditions of the indirect international jurisdiction which distinguishes when they come from foreign State Court with whom Argentina has signed Treaties and the cases in which that has not occurred.

It is relevant to observe that the legislation puts in a similar status the judicial sentences as well as the arbitration awards.

These Arbitration Awards must fulfill the following conditions, to be executable:

- Comply with requirements in Article 517 and 518
- If the dispute can be subject to settlement between the parties, then there is an internal remission to our Civil Code articles 842 to 849.
- When it is about International matters, and it is not exclusive jurisdiction of the National Courts, and the extension of Jurisdiction is not forbidden by law.

The transcription of the Civil Code articles will result of great use:

## **Title XIX**

### ***Regarding to Settlements***

**Art. 832.** - The settlement is a bilateral judicial act where the parties make reciprocal concessions, extinguishing doubtful or controversial obligations

**Art 833.** - All the provisions of the contracts regarding the capability to perform act of commerce, the object of the contract, the modality, formalities, evidence and annulment of the contracts, with the exceptions and modifications contained in the title are applicable to the settlements.

**Art. 834.** - The different clauses of a settlement are indivisible, and if any of these were null, the settlement will remain without effect.

**Art. 835.** - The settlement terms must be strictly interpreted. It does not rule within the differences in between parties that had the real intention of settle, been the intention from the terms that are stated, recognizing them to be a necessary consequence of the agreed terms.

**Art. 836.** - Through settlement one does not transmit, one declares or recognizes rights that come from the matter on which they intervene. The declaration or recognition of these rights, does not oblige them to guarantee them nor does it impose any liabilities in case of eviction, nor is it a legal right to invoke a time bared period.

**Art. 837.** - The validity of the transactions is not subject to the observance of the external formalities, but their proofs are subject to terms of the contracts.

**Art. 838.** - If the settlement terms are about legal controversial rights, it may only become valid by presenting the matter to the judge, signed by the interested parties. Before the parties submit their settlement agreement to the judge, or before they present the statement, the settlement will not be concluded and the interested parties may present their withdrawal.

## Chapter I

### *Those who may settle*

**Art. 839.** - You may not withdrawal on someone else's behalf, except with a special power of attorney where the rights and obligations are specified concerning to the faculty to settlement stated in the power of attorney to all holders names, including the power to settle.

**Art. 840.** - No settlement can be made by who cannot dispose of the objects partially or in full.

**Art. 841.** - No settlement can be made by:

- 1) Neither the agents of the Public Ministry, National or Provincial nor the Municipal Procurators.
- 2) The tax or fiscal employees of any rank or denomination
- 3) The representatives or agents of a legal person as to the rights and obligations of those persons, if, for the settlement, they were not legally authorized;

- 4) The executors, with regards to the rights and obligations of the wills declarations, without the authorization of the corresponding judge, with a previous hearing with the interested parties;
- 5) The guardians with the pupils who are emancipated regarding to the accounts of tutorage, even though they were authorized by the judge;
- 6) The guardian regarding the rights of the disabled and minors, unless they were authorized by the judge, with a hearing with the Ministry of Minors;
- 7) The emancipated minors.

## Chapter I I

### *The object of Settlements*

**Art. 842.** - The civil action regarding the indemnity of the damage caused by a crime can be the subject of settlement, but not the action of accusing and requesting the punishment of the crimes, whether on the part of the offended party or the Public Ministry

**Art. 843.** - You cannot settle on issues of marriage annulment or validity, unless the settlement is in favor of the marriage.

**Art. 844.** - What is not connected with commercial activities and the rights that are not susceptible to be a matter of an agreement, may not be subject of the settlement.

**Art. 845.** - You cannot settle on matters related to the Patria Potestas or about the authority of the husband, nor about the family condition, nor about the right to claim the corresponding state of the persons, whether by natural or by legal affiliation.

**Art. 846.** - To settle is allowed regarding to pecuniary interests subject to the state of the person, even though he contested, as long as at the same time the settlement is not about it's personal state or condition.

**Art. 847.** - If the settlement is simultaneous with the pecuniary interests, and about the state of the person, it will be of no value, whether only one price was given, or one thing, or a price were given and something different for the resignation of the state, and giving up the pecuniary rights.



**Art 848.** – Nor settlement can be possible over the eventual legal rights of a will declaration, nor even over a living person.

**Art. 849.** - In all other cases you can settle about all kinds of rights, of whatever nature even though they were subject to a condition.

## **International Conventions and Treaties**

Argentina has celebrated several International Convention amongst which:

### ***- Internationals***

- Convention on Recognition and Execution of Civil matters Sentences with Italy - Ratified by Law 23.720

### ***- Latin-American***

- International Procedural Law - 1889 - Montevideo

In their Articles, the requirements are established for the Awards and Sentences on Civil and Commercial matters that will be effective as long as they are correctly legalized.

Also with the following requirements:

- Intervention of a competent Court
- Character of Res Judicata
- Parties legally notified
- As long as it is not against the Public Order, in the country where held.

Also the following indispensable conditions are included:

- Complete copy of the Sentence or Arbitration Award

- Copies that prove that the parties have been duly notified,
- Copy of the judicial resolution that declares that the Sentence or Award is able to be legally executed at the corresponding legal authority.

The executive character will be determined by the State Law of Procedure, where the execution is requested. Regarding the validity of the acts of voluntary jurisdiction, such as inventories, appraisals, will testimonies; they will have the same value as in their own territory.

In matters of common interests and within the South American Nations, the inspiring principles were not controversial, and the premise was the principle of no restrictions and guarantees in favor of those interested parties.

## **Treaty of International Procedural Law - 1940 - Montevideo**

The treaty maintains the principles regarding the civil sentences, their requirements and formalities, adding a previous step which is the request for a previous hearing with the Public Ministry, so as to ensure the adjustment to the Law.

The judge that intervenes has the faculty to request all the measures considered necessary to ensure the effectiveness of the Award or the Sentence, complying with the local State Law, where preventive measures were required.

The most important innovation is the distinction between the execution and the recognition of sentences or awards.

## **Interamerican Convention on Jurisdiction for effectiveness for the extraterritorial of Sentences and Foreign Arbitration Awards - 1979 - Montevideo - Ratified by Law 22.921**

Through this Convention, it incorporates the Labor Forum as a relevant innovation, maintaining the previous requirements and formalities to obtain the needed effectiveness.

## **Interamerican Convention on Jurisdiction in the International coverage for extraterritorial effectiveness of Sentences and Foreign Awards - 1984 - La Paz**

It clearly distinguished between personal actions and pecuniary actions, real states actions or other properties actions on commercial contracts.

The physical domicile or address of the person, or of their main establishment, is used to determine the Judges Jurisdiction. The recognition seeks the unifying criteria so as to eliminate the differences that could exist between the Federal and Provincial States.

## **Regional Level - Mercosur**

### **Jurisdictional Protocol of Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters - 1992 - Las Leñas, Argentina - Ratified by Law 24.578**

The main purpose was to ensure the correct judicial assistance between the signatory State parties, involving the cooperation in simple procedural matters, execution of Sentences and Arbitration Awards.

The area of Commercial, Civil, Labor, Administrative, Criminal, repair of damages and restitution of Property issues, to which it applies, was extensive.

It is required that the documents have to be translated into the language of the State where the legal assistance is required, although the requirements for legalization are not an impediment when considering that the central authorities and agencies had intervened for this reason.

As a substantial result, it is clear that one should not contradict the principles of public order of the State, when recognition or execution of the Sentences or Awards is required.

### **Protocol of International Jurisdiction on Contractual Matters - 1994 - Buenos Aires, Argentina - Ratified by Law 24.669**

This Convention holds importance because it gives a legal frame, offering predictability and legal certainty, guaranteeing the uniformity which favors the economic impulse and development in all Member countries. At the same time it orders the remission according to what was established by the Buenos Aires Protocol, where the criteria is established in which the judgment has been ruled:

- Ruled by a Judge or an Arbitrator chosen by the parties
- Judge of the domicile of the defendant
- Judge of the place where the contract has to be complied
- Judge of the domicile or headquarters of the judicial person

## **Global or Universal Solutions**

### **Convention on the Recognition and Enforcement of Foreign Arbitration Awards – 1958 - New York - Ratified by Law 23.619 / 1988**

Due to the very important increase in International Judicial relations, Arbitration has unquestionably become the method by excellence most used to resolve conflicts. Hoping to obtain a neutral Forum, without interference or conflicts from State Courts, but always leaving the possibility open to refer to them for very specific matters or issues.

This legal treaty seems to be most important instrument in order to obtain uniformity in Private Law, aiming towards solving two aspects of the matter:

- Avoiding unnecessary delays in the procedure
- Avoiding the refusal of recognition and enforcement by any of the signatory parties.

The Convention, therefore recognizes the validity and compels the Courts to recognize, and forces the compliance of the Arbitration Awards.

Recognition and Execution may only be denied when:

- There is a disability of one of the parties
- The lack of proper notification to any of the parties
- Unforeseen circumstances in the arbitral agreement
- The constitution of the Arbitral Tribunal does not adjust to Law

The following may also occur:

- That the matter is not feasible for Arbitration
- That the recognition or ruling may be contrary to the Public Order of the State

Which are the merits for the universal recognition of this Convention:

- Notion of Foreign Judgment and it's recognition
- Presumption of validity and enforceability of the foreign judgments
- Minimum requirement of the translation of the Arbitral Award
- Changes the burden of proof, oblige whoever refuses the ruling to prove that requirements are not gathered.
- It enables the authority's rejection, when there is opposition to the International Public Order.
- Allowing the partial enforcement of the Award, called partial exequatur

## **International Interpretation of the Tribunals of the New York Convention**

*Italy* gives prevalence over the Civil Procedure Code, treating it as a Special Law, giving International Jurisdictional protection for the enforcement of the Arbitration Awards.

*Singapore* supports the principle of international courtesy, giving validity between Nations, unless there is an exceptional cause that produces an impediment. The State is seeking for an international recognition as World Centre for International Arbitrations.

*United States*, regardless of being the originating country of the Convention, and due to it's State differences, it has achieved uniformity in all it's States for the appliance.

The International Jurisprudential criterion is of carefulness when relating to the defense of the International Public Order that has almost systematically rejected with quite a significant frequency.

## **Interpretation by Argentine Courts**

The Supreme Court of Justice sustained that the (Naval Mortgage case):

- It conditions the effectiveness, by complying with the requirements that state parties have agreed
- Compatibility of Public Order Principles
- Principle of a proper legal right of a Lawsuit procedure
- Ensure the proper defense of the parties
- Enable the Extraordinary appeal at the Supreme Court of Justice
- Preserve the formalities so as not to frustrate it's main subject

The Higher Court of Appeal of the Civil Chamber, regarding to the recognition, establishes that (Divorce case):

- Establishes points of connection, as the marital domicile or the last address where the couple lived together - according to the Civil Code
- Releases the defendant to prove the last marital domicile
- Impossibility to avoid from the effects of the national legislation.

The Higher Court of Commercial Appeals:

- The Exequatur Lawsuit is a control procedure providing certainty to the execution
- It recognizes the effectiveness of a foreign ruling
- It also recognizes the defendant the right to post oppositions.
- It establishes the right to perceive fees.

The National Higher Court of Commercial Appeals (case: "Voest Alpine c/Cargem") sustains that:

- Judge rejected the matter as immediately due to lack of formal legalization requested
- The Higher Court revoked the ruling due to intervention from the Public Notary from the remitting country. And accepted the request, previous to the compliance of the formalities according to the Convention of The Hague - 1961

## **Conclusions**

Argentina has reached an important internal development in the recognition and execution of Sentences and Arbitral Awards, with all intention of affirming a solid International and Private National Law.

There are important proposals coming from our local Doctrine Jury consultants, in order to achieve the Codification of the discipline, without leaving a side the difficult path towards the uniformity and harmonization of this area of the Law as an important instrument in favor of the development of the International relations and the already imminent and tangible globalization.

With this legal tendency or prospects, it is not expect to affected or alter any Constitutional Principal regarding to any National and/or Provincial Power or Authority, it has the main goal to facilitate all aspects towards improving a more harmonious relation in between States and their future interactive development.

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