# Kluwer Arbitration Blog

## A One-Two Punch to the Kompetenz-Kompetenz Principle in Venezuela

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This post focuses on two decisions issued by the Venezuelan Supreme Court of Justice in the *Corporación LSR* case. The decisions constitute an unexpected change in the approach of the Supreme Court towards arbitration, deviating from its latest and vastly commented case law regarding commercial arbitration matters.

**Background**

The dispute in *Corporación LSR* arose out of an option contract that contained a pathological arbitration clause, in that the clause referred all future disputes to arbitration under the rules of a non-existing arbitration institution: the *Conciliation and Arbitration Centre of the Chamber of Commerce, Industry and Agriculture of the Bolivarian Republic of Venezuela*.

Claimants in the case filed suit before the First Instance Courts arguing that it was the correct forum due to the evident impossibility to comply with the arbitration agreement. The Second Tribunal of First Instance declined jurisdiction, in correct application of the *Kompetenz-Kompetenz* principle (Article 7 of the Venezuelan Arbitration Act) following the Supreme Court's leading case law regarding arbitration, in particular the 2009 ruling in *Astivenca Astilleros de Venezuela, C.A. v. Oceanlink Offshore III AS*.

The decision was subject to a jurisdictional review by the Political Administrative Chamber of the Venezuelan Supreme Court. The Political Administrative Chamber reaffirmed the lack of jurisdiction of the courts on the basis that the option contract contained an arbitration clause and, therefore, the courts could not exercise jurisdiction over the dispute.

However, claimants insisted on their arguments and filed a constitutional request for review before the Constitutional Chamber of the Venezuelan Supreme Court, which is considered in more detail below.

**The first punch**

The Constitutional Chamber of the Supreme Court ruled in favor of claimants. In its reasoning it held that the Political Administrative Chamber failed to consider

claimants' argument regarding the unavailability of the arbitral institution, which amounted to a serious violation of claimants' access to justice, due process and effective judicial protection. It concluded that it was necessary to produce an express and positive conclusion on claimants' argument, i.e. to interpret the existence, validity and enforceability of the arbitration agreement. Hence, the Constitutional Chamber remanded the case for retrial before the Political Administrative Chamber in order to decide the appeal in accordance with the criteria established in its decision.

**The second punch**

The Political Administrative Chamber of the Supreme Court decided the remanded case following the ruling of the Constitutional Chamber. In its decision, the Political Administrative Chamber concluded that the lack of availability of the arbitration center seriously infringed claimants' due process rights given the uncertainty as to the proper forum to file suit.

**Analysis**

These decisions are an unpleasant surprise for the Venezuelan arbitration law community, especially since the Venezuelan Constitution provides in its Article 253 that arbitration forms part of the judicial system. As a result, a decision that holds that compelling a dispute to arbitration *"hinders the parties' right to resolve the dispute before a competent tribunal"* is an unexpected outcome.

In addition, there is no doubt about the *Kompetenz-Kompetenz* principle being in force under Venezuelan law. The principle is expressly provided for in Article 5 of the Venezuelan Arbitration Act and affirmed by the Constitutional Chamber of the Supreme Court in *Astivenca Astilleros de Venezuela, C.A. v. Oceanlink Offshore III AS*:

> "The question does not lie in determining the existence of the competence-competence principle in the Venezuelan legal system, which is clearly supporting it, but its application in those cases in which one of the parties that agreed to submit to arbitration all differences or certain differences that have arisen or may arise between them with respect to a certain legal, contractual or non-contractual relationship concerning a matter that can be resolved by arbitration, decides to initiate proceedings before the organs of the Judicial Power…."

Moreover, the *Corporación LSR* decisions are contrary to the holdings of the Constitutional Chamber regarding the scope of the negative effect of the *Kompetenz-Kompetenz* principle. The scope of the negative effect of the principle and how the courts should act vis-à-vis a dispute that is subject to an arbitration clause was also an aspect considered in the *Astivenca Astilleros de Venezuela, C.A. v. Oceanlink Offshore III AS*, in which the Constitutional Chamber held with binding effect that:

> "… **the summary review** [that courts should perform in application of Article 7 of the Venezuelan Arbitration Act] **should (i) be limited to the**

> **verification of the written nature of the arbitration agreement and (ii) refrain from analyzing possible defects of party consent arising from the written clause.**"

As we can see, there is no doubt about the scope of Article 7 of the Venezuelan Arbitration Act limiting the courts to a *prima facie* review as to the existence of the arbitration agreement. However, the *Corporación LSR* Constitutional Chamber decision diverted from that holding and went as far as to declare that the first instance decision was null because the judge failed to decide on the issue of the nullity and inapplicability of the arbitration clause.

Hence, the *Corporación LSR* decisions not only contravene with the Venezuelan Arbitration Act but also go against the binding case law of the very same Constitutional Chamber of the Supreme Court – a clear threat to the uniformity of jurisprudence and integrity of the legislation.

Another aspect to consider is the effect these decisions may have on future lower court rulings. The Corporación LSR decisions have created a no-win situation for first instance judges who are forced to take decisions in breach of the law either way: If they apply correctly the *Kompetenz-Kompetenz* principle and compel to arbitration, they will contravene with the *Corporación LSR* decisions. However, if they follow them, any rendered decision will be subject to judicial review due to a lack or unduly application of Article 7 of the Venezuelan Arbitration Act and the binding jurisprudence of the Constitutional Chamber of the Supreme Court of Justice (*Astivenca Astilleros de Venezuela, C.A. v. Oceanlink Offshore III AS*).

Finally, these decisions go against the international trend on the issue at hand. For instance, the UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration indicates that arbitration clauses referring to non-existing arbitral institutions should, whenever possible, be interpreted in an arbitration-friendly way to provide for arbitration under an existing arbitration institution. This has even more significance in a jurisdiction like Venezuela with only two widely recognized arbitration centers: *The Centro de Arbitraje de la Cámara de Caracas and the Centro Empresarial de Conciliación y Arbitraje from the Venezuelan American Chamber of Commerce*.

Fortunately, the *Corporación LSR* rulings do not constitute binding precedents under the Venezuelan legal system, and we can hopefully expect that the Supreme Court will undertake future cases in line with arbitration´s fundamental principles.

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