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Colombia's Constitutional Court Declares That Constitutional Injunctions (Tutela) Can Be Upheld Against Awards In International Arbitration

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On August 6, 2019, the Fifth Revision Chamber of Colombia's Constitutional Court (the "Court") issued judgment T-354/19 resolving a constitutional injunction (*tutela*)[1)] submitted by a state-owned company and its subsidiary against an international arbitral award (the "*Tutela*"). In its decision, the Court recognized the possibility of obtaining constitutional injunctions against awards issued in international arbitrations seated in Colombia. However, it concluded that the *Tutela* was not admissible in the specific case because the annulment proceedings had not been exhausted.

This is a decision of one of the Chambers of the Court, not a decision of the plenary of the Court nor a decision to unify jurisprudence, and therefore it only applies to the specific case and may be revisited.

Background

On December 22, 2010, Gecelca S.A E.S.P ("Gecelca") and its subsidiary Gecelca 3 S.A.S E.S.P ("Gecelca 3"), and the Consortium CUC-DTC, constituted by China United Engineering Corporation and Dongfang Turbine Co. LTD. (the "Consortium"), executed an EPC contract to build a thermoelectric plant (the "Contract").

During the development of the Contract certain disputes arose between the parties regarding, *inter alia*, the term for performance of the Contract, Gecelca 3's alleged delay in the payment of invoices, and the alleged breach of the Contract by the Consortium.

On December 29, 2014, the Consortium submitted a request for arbitration under the arbitration clause of the Contract. The tribunal, seated in Bogota, was constituted on March 11, 2015 from the list of "international arbitrators" of Bogota's Center of Arbitration (the "Tribunal"). The Parties disputed whether the arbitration was to be conducted as a national or an international arbitration.

On May 8, 2015, the Tribunal issued a partial award deciding that the arbitration was international because two of the three criteria set forth in Article 62 of Law 1563 of 2012 (Statute of National and International Arbitration) were applicable in the specific case. Namely, that the parties were domiciled in different States at the time of execution of the arbitral clause and that the dispute

affected international trade interests (the "Partial Award").

On December 4, 2017, the tribunal issued a final award (the "Final Award") declaring, among other things, that Gecelca 3 had breached the Contract, and ordering it to pay over USD $40 million to the Consortium.

On January 11, 2018, Gecelca 3 filed an action to set aside the Final Award before the Third Section of the Council of State (the "Third Section"), because, among other reasons, it was inconsistent with Colombia's international public order.

In parallel, on February 28, 2018, Gecelca and Gecelca 3 (the "Gecelca companies") presented a constitutional injunction (*tutela*) against the Final Award alleging that the Tribunal had violated their fundamental rights to due process and access to justice. The Gecelca companies also requested interim measures to suspend the payment ordered by the Tribunal.

On July 26, 2018, the Fourth Section of the Council of State – the first level competent court –declared that the tutela was inadmissible considering that this mechanism could not be used to re-open a legal debate addressed during the arbitral proceedings. On September 12, 2018, the Fifth Section of the Council of State –the second level competent court– confirmed the first instance judgment and added that, since constitutional injunctions are subsidiary mechanisms, the tutela was not admissible because the decision to set aside the Final Award was still pending.

Following the first and second level decisions, Gecelca 3 filed a request before the Constitutional Court to revise the tutela. On October 29, 2018, the 10th Selection Chamber of the Court selected the tutela for revision and designated the Fifth Revision Chamber for this purpose.

The Constitutional Court's decision

The Fifth Revision Chamber concluded that it is possible to obtain constitutional injunctions (tutelas) against international arbitral awards. However, it decided that, in the specific case, a constitutional injunction was not appropriate because annulment proceedings were still pending.

The court noted previous constitutional jurisprudence according to which arbitral awards issued in national arbitrations are materially equivalent to judicial decisions because arbitrators are temporarily invested with the function of administering justice according to Article 116 of the Constitution, and considering that both are issued in the exercise of jurisdictional functions and have *res judicata* effects. For this reason, the admissibility of constitutional injunctions against arbitral awards must be analyzed under the same requirements applicable to judicial decisions.

Nonetheless, said requisites must be more rigorously applied to arbitral awards than to judicial decisions, considering that arbitral awards derive from the express will of individuals deciding to depart from the jurisdiction of the courts.

The Court concluded that the same criteria applicable to analyze the admissibility of arbitral awards issued in national arbitrations, must be applied to awards issued in international arbitrations. Accordingly, the admissibility of constitutional injunctions against international arbitral awards must be analyzed on the basis of the following criteria: (i) the arbitral award must have violated fundamental rights directly; (ii) the applicable remedies must have been previously

exhausted (according to Article 40 of Law 1563 of 2012, the only applicable remedy to arbitral awards is annulment); and (iii) compliance with "specific admissibility requirements" (as set out in Judgment T-466 of 2011), which refer to the existence of substantive, organic, procedural, or factual defects of the award or the tribunal's constitution, also known as the doctrine of "*vías de hecho*".

Additionally, the Court noted that when the substantive law applicable to the arbitration is foreign, constitutional judges shall only apply Colombia's international public order as parameter of constitutional control. In consequence, "specific admissibility requirements" are only applicable when the award is "partially governed by Colombian law" and not when the substantive law applicable to the arbitration is foreign.

Finally, the Court noted that the possibility of obtaining constitutional injunctions against international awards is even more exceptional ("*excepcionalísima*") than in the case of national awards. Yet, it is a discretional matter for the competent judge to decide.

Based on the above, the Court concluded that the *Tutela* filed against the Final Award was not admissible considering that the Gecelca companies had not previously exhausted the proceedings to set aside the award, which are still pending before the Third Section of the Council of State.

Comments

The Court's decision leaves several questions unresolved.

First, despite the fact that Colombia is a contracting party to the New York Convention of 1958 (the "Convention"), the Court did not address the interplay between Colombia's international obligations under the Convention and the domestic legal regime. According to Article V(1)(e) of the Convention, the recognition and enforcement of the award may be only refused if, *inter alia*, the "award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made." In the light of this provision, one may ask how the decision of the Court that tutelas may be filed against awards issued in international arbitrations seated in Colombia interplays with an international convention to which Colombia is a signatory and which provides for the action to set aside as the sole remedy against an award. Regrettably, the Court did not address this point in its decision.

Second, the Court's analysis regarding the relation between "the law governing the award" and the admissibility of constitutional injunctions is unclear. The Court states that when the "the law governing the award" is foreign, there is no room to analyze the admissibility of a *tutela* in light of criteria different than Colombia's international public order. While it is far from clear what the Court means by with "the law governing the award", it seems to be referring to the substantive applicable law. Accordingly, the Court seems to conclude that in those cases where "the law governing the award" is partially Colombian, the constitutional judge may apply other criteria such as the doctrine of *"vías de hecho"*, a catalogue of: substantive (*e.g.* the arbitrator interpreted or applied a rule ignoring constitutional judgments with *erga omnes* effects defining the scope of the rule); organic (*e.g.* the arbitrators have absolutely no competence to resolve the matter submitted to their consideration, either because they have manifestly acted outside the scope defined by the parties or because they have ruled on non-arbitrable matters); procedural (*e.g.* the arbitrators have

issued the award in a manner completely contrary to the procedure established contractually or in the law); and factual defects (*e.g.* the arbitrators made their assessment of the evidence directly violating fundamental rights) in which the award or the tribunal may incur. If this is so, then a constitutional judge deciding a *tutela* against an international arbitral award, may review the merits of the case to determine if the arbitral tribunal incurred in *vías de hecho.*

Third, while the court states that national awards are "materially equivalent" to judicial decisions and seems to conclude that the same equivalency applies to an award issued in an international arbitration, it does not explain how it arrived to such conclusion and does not analyze the implications of such equivalency. Does it mean that the decision considers arbitrators in an international arbitration as judges? If so, can a non-Colombian be deemed to be a judge exercising jurisdiction in Colombia, although Colombian nationality is required to be a judge in Colombia? Can arbitrators seated in an international arbitration in Colombia trigger the international responsibility of Colombia?

Conclusion

In its review of the case, the Court invited scholars and institutions to provide comments on several questions related to the *Tutela*, the key one being whether constitutional injunctions should be admitted against awards issued in international arbitrations seated in Colombia. The majority of the opinions were in the negative based on the same point of departure: arbitrators in international arbitrations seated in Colombia are not judges, public officials, or private parties exercising public functions. The Court, however, seems to have departed from this premise and based its analysis on the thesis that international arbitrators comply with public functions.

References

?1 The *tutela* is a constitutional injunction that aims to protect fundamental constitutional rights when they are violated or threatened by the action or omission of any public authority. This mechanism is incorporated in Article 86 of the Constitution. *Tutelas* proceed when: (i) fundamental constitutional rights are violated or threatened; (ii) when there are no other means to protect the right; and (iii) against action or omissions of a private individual in the event that said individual provides a public service, or exercises public functions; and (iv) when the actor is in a situation of defenselessness or subordination with respect to the individual against whom the *tutela* is brought.

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