Colombia's Council of State Defines the Contours of Arbitral Tribunals' Procedural Discretion in a Recent Annulment Decision

Kluwer Arbitration Blog
July 27, 2020

Alberto Madero-Rincón, Manuela Sossa (Refinería de Cartagena S.A.S.)

Please refer to this post as: Alberto Madero-Rincón, Manuela Sossa, 'Colombia's Council of State Defines the Contours of Arbitral Tribunals' Procedural Discretion in a Recent Annulment Decision', Kluwer Arbitration Blog, July 27 2020, http://arbitrationblog.kluwerarbitration.com/2020/07/27/colombias-council-of-state-defines-the-contours-of-arbitral-tribunals-procedural-discretion-in-a-recent-annulment-decision/

On February 27, 2020, the Third Division of the Colombian Council of State ("**Court**") issued a judgment resolving an annulment petition submitted by a state-owned company's subsidiary against an international arbitral award. In its judgment, the Court decided to annul the award due to the Tribunal's failure to comply with the agreed arbitral procedure. In its reasoning, the Court departed from standards set forth by Colombia's Supreme Court of Justice ("**SCJ**") and adopted a more expansive criterion to annul international awards based on procedural defects.[fn]The Court's decision comes after the Fifth Revision Chamber of the Council of State, in an August 2018 judgment, decided to dismiss a constitutional injunction against the same award, given the existence of a pending annulment proceeding against the award.[/fn]

The Court's decision raises a series of questions on its interplay with Article V(1)(d) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**NYC**") and the restrictions it imposes on arbitral tribunals' procedural discretion.

Background

On December 22, 2010, GECELCA S.A. E.S.P., acting on behalf of GECELCA 3 S.A.S. E.S.P., (indistinctively, "**GECELCA**") and the Consortium CUC-DTC, integrated by China United Engineering Corporation and Dongan Turbine Co. Ltda. ("**Contractor**"), executed an EPC Agreement for the construction of a power plant in Colombia.

During the development of the project, a series of disputes arose between the parties related to, among others, GECELCA's imposition of over US$ 10 million in penalties; delayed payments of Contractor's invoices; and Contractor's failure to tender the plant pursuant to the agreed terms.

On December 29, 2019, the Contractor initiated an international arbitration against GECELCA before the Chamber of Commerce of Bogotá for breach of the EPC Agreement. The arbitral tribunal was constituted on March 11, 2015 and its seat was Bogotá, Colombia ("**Tribunal**").

In the course of the arbitration, GECELCA requested the Tribunal's authorization to file a rebuttal expert opinion in response to an expert opinion submitted by the Contractor with its Rejoinder submission. In November 2019, the Tribunal denied GECELCA's petition on the basis that paragraph 62 of Procedural Order No. 1 ("**PO1**") only allowed a party to submit an expert report to reply to new arguments submitted in the opposing party's expert opinion, and this condition was not met.

On December 4, 2017, the Tribunal issued its award ruling, *inter alia*, that GECELCA breached the EPC Agreement and ordered it to pay over US$ 20 million in damages to the Contractor ("**Award**").

On January 11, 2018, GECELCA sought the annulment of the Award before the Court based, among other grounds, on the fact that it had been prevented from presenting its case and that the arbitral procedure did not follow the agreement of the parties.

The Court's Judgment

The Court decided to annul the Award based on the Tribunal's failure to comply with the agreed procedure, by denying GECELCA the right to present an expert opinion, while allowing the Contractor to present one after the conclusion of the written submissions stage. The Court held that, a showing that the Tribunal contravened or deviated from the agreed procedure is the only requirement to annul an international award based on Article 108(1)(d) of Law 1563 of 2013 ("**Arbitration Act**"), and that the reviewing court may not inquire into the materiality or consequences of the procedural irregularity.

At the outset of its analysis, the Court acknowledged that the SCJ has established a more stringent standard to annul an award pursuant to Article 108(1)(d) of the Arbitration Act.[fn]Pursuant to the Colombian Arbitration Act, the Council of State has jurisdiction over annulment petitions against international awards issued in arbitral proceedings where a party is a Colombian public entity, whereas the SCJ has competence over all other awards rendered in arbitral proceedings seated in Colombia.[/fn] In a 2018 judgment, the SCJ determined that annulling an award on this ground requires demonstration that the tribunal's deviation from the agreed procedure has either an impact over the entire proceeding or undermines the parties' rights to present their case and defense.[fn]Supreme Court of Justice, Civil Cassation Division, Judgement of July 11, 2018, File No. 2017-0348, Issuing Justice: Margarita Cabello Blanco.[/fn] The Court explained that the SCJ's standard was inconsistent with the Arbitration Act for, among others, the following reasons.

First, the language of Article 108(1)(d) of the Arbitration Act does not require the reviewing court to inquire into the materiality and effects of a procedural violation. However, the SCJ's legal standard requires such review, and thus illegitimately constrains the right of the party that seeks annulment under this ground.

Second, a clear and considerable difference exists between the grounds for annulling a domestic award and an international award based on procedural deficiencies. While the Arbitration Act sets forth specific procedural defects that must be proved to annul a domestic award, it does not limit the annulment of an international award in the same way.

Third, Article 107 of the Arbitration Act precludes the Court from reviewing the legal and factual basis of the Award as well as the evidentiary assessment of the Tribunal, to determine the effects of the procedural irregularities on the Award.

Fourth, the Court stressed that international scholars and case law have not set an unequivocal criterion to interpret that this annulment ground requires inquiring into the materiality or effects of the procedural defect. In fact, the unqualified language used in Articles V(1)(d) of NYC and 34(2)(iv) of the UNCITRAL Model Law further demonstrates that no consensus exists on this matter.

Against this backdrop, the Court determined that the Tribunal erred in its interpretation of PO1, by ruling that paragraph 62 of the PO1 conditioned GECELCA's right to submit an expert opinion in the presence of new technical arguments or facts in the Contractor's expert opinion. The Court concluded that GECELCA's right to submit an expert opinion was not exceptional or conditioned in any way, and thus GECELCA should have been allowed to present its expert opinion. Moreover, the Court found that the Tribunal disregarded paragraph 45 of PO1, by admitting an expert opinion of the Contractor after the expiration of the preclusive term set therein. In its assessment, the Court reasoned that the procedural rules that were infringed guaranteed GECELCA's rights to due process and right to defend – despite concluding that it was not necessary to evaluate the materiality and effects of the procedural defects.

For these reasons, the Court decided to annul the Award. The judgment was accompanied by one concurring and one dissenting opinion. The latter upheld the view that Article 108(1)(v) of the Arbitration Act requires an inquiry into the materiality and effects of the procedural violations on the Award.

Is the Court's judgment a more expansive view of Article V(1)(d) of the NYC?

In its judgment, the Court acknowledged that the annulment ground in Article 108(1)(d) of the Arbitration Act was inspired in Articles V(1)(d) of the NYC and 34(2)(iv) of UNCITRAL Model Law. However, the Court's analysis on the standard required under the NYC and the UNCITRAL Model Law is unclear. The Court cited many examples of national arbitration legislations that require reviewing courts to assess the materiality, effects and seriousness of the procedural defect. Likewise, it identified decisions of foreign courts and international arbitration scholars that endorsed this view. Nonetheless, it failed to rely on a single foreign arbitration act or jurisprudence that supported the Court's approach.

The Court also failed to assess the interplay between the Arbitration Act and the NYC. In fact, Article 62 of the Arbitration Act establishes that its international arbitration rules will apply subject to international multilateral conventions ratified by Colombia. Therefore, the Court should have assessed more carefully if its legal standard resulted in an expansive or contradictory interpretation of Article V(1)(d) of the NYC.

An analysis of case-law, national arbitration legislations and scholarly opinions, including those cited by the Court, suggest that annulment on this ground is "ordinarily permitted (and not required) only in cases involving serious breaches of significant elements of the parties' procedural agreement, which cause material prejudice to the debtor."[fn]Gary B. Born, International Commercial Arbitration (Second Edition), Kluwer Law International, 2014, pp.3561-3565. *See* also Marike R. P. Paulsson, The 1958 New York Convention in Action, Kluwer Law International, 2016, pp. 191-195.[/fn] In turn, minor or incidental violations of the parties' agreement have not been considered a basis for denying the annulment of the award. One may ask if this position is more in line with the pro-enforcement rationale that inspired the NYC, than the Court's objective approach to annulling international awards for procedural omissions.

Does the Court's judgment impose a procedural straitjacket on arbitral tribunals?

The Court's legal standard rests on the assumption that deviation from the agreed procedure is the only condition required to annul an international award, regardless of the materiality of the procedural defect. This standard imposes a procedural straitjacket on arbitral tribunals. Indeed, it would allow reviewing courts to police and second-guess all procedural rulings made by tribunals, and to set aside an award for any violation of the agreed rules of procedure.

Domestic courts' judicial review of compliance with the parties' agreed procedure should not be conducted in a vacuum, but must be assessed in the context of the tribunal's procedural authority to conduct the arbitration. The Court did not address how its ruling reconciles with arbitral tribunals' discretion to fill in the gaps and interpret the framework provided by the parties' agreement. In fact, in the case at hand, the Court recognized that the International Arbitration Rules of

Bogota's Chamber of Commerce ("**CBB Rules of Arbitration**") were an integral part of the parties' procedural agreement. Article 31.21 of the CCB Rules of Arbitration confirms the arbitrators' discretion to conduct the proceeding as it deems appropriate, including the Tribunal's authority to admit, reject and weight the probative value of all evidence submitted.

Nonetheless, the Court did not analyze if the Tribunal's interpretation of paragraph 62 of the PO1, for better or for worse, was within the contours of said discretion. Instead, the Court re-opened the debate and reinterpreted the parties' agreement. In this case, deferring to the Tribunal's interpretation of the procedural agreement would have been more consistent with the parties' agreed procedure.

Conclusion

At these times of unrest, many measures adopted by arbitral tribunals to mitigate the adverse effects of the COVID-19 pandemic, including measures recommended by international arbitral institutions, are underpinned on the tribunals' procedural discretion. The current times make it more critical than ever for tribunals to have the authority to interpret the parties' agreement and expeditiously adopt procedural measures to mitigate delays and by-pass other constraints. However, the Court's judgment may lead to a *due process paranoia* that discourages arbitrators from adopting the armory of remedies needed to mitigate the adverse effects of the pandemic, such as delays and the impossibility to hold in-person hearings.