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New Ruling on Arbitration Agreements in Colombian State Contracts

Santiago Talero-Rueda (Talero Rueda & Asociados) · Tuesday, June 4th, 2013

On April 18, 2013, the Colombian Council of State –*Consejo de Estado*– changed its previous case law, regarding the waiver of arbitration agreements concluded between public state entities and private contractors.

Prior to this decision, the parties could waive arbitration by presenting their case before an administrative court of law, in so far none of them invoked the existence of the arbitration agreement – i.e. Council of State: Decisions of June 16, 1997; March 16, 2005; and June 23, 2010-. This case law had consistently recognized the possibility of waiver under different grounds or scenarios, i.e. the parties' procedural inactivity, before the administrative courts of law, regarding the existence of an arbitration agreement within the state contract.

In its recent decision, the Council of State addressed a case in which the Colombian Province of Casanare and a private contractor entered into a contract for the construction of a lagoon. The state entity terminated the contract based on the apparent illegality of the process whereby the contractor had been selected. The contract, as such, contained an arbitration agreement. The private contractor commenced litigation, against the Province of Casanare, before an administrative court of law, which rendered a final decision as to the merits of the dispute. The judicial decision was challenged by the private contractor. This led the Council of State to address the case. It decided to annul the proceedings carried out before the administrative court of law. According to the *Consejo de Estado*, the administrative court of law lacked jurisdiction since an arbitration clause had been inserted into the state contract. It considered that the parties' inactivity or silence, within judicial proceedings, regarding the presence of the arbitration agreement in the construction contract, would not amount to a waiver. Thus, pursuant to the decision, the parties could only avoid arbitration by drafting a document in which they expressly eliminated said agreement. By doing so, the parties would follow the general principle of Law whereby things must be undone as they have been done. Consequently, since the parties had entered into a written state contract containing an arbitration clause, it would be necessary for them to eliminate the clause by drafting a document containing said intention.

The decision clarifies that its rationale applies to arbitration agreements covered by the previous arbitration regime, and not necessarily to those subject to the new arbitration regime, which came into force on October 12, 2012.

At first sight, the ruling seems to endorse a radical pro-arbitration approach; by verifying the

presence of a written arbitration agreement within the state contract, the administrative court in question is bound to refer the parties to arbitration, no matter their subsequent conduct as to their arbitration agreement, including their procedural behavior. This, in turn, would seem apparently compatible with the *Kompetenz-Kompetenz* principle, pursuant to article II.3 of the New York Convention and other relevant instruments.

Nonetheless, this new ruling reflects a rigid approach to the requirement of arbitration agreements in writing. By ignoring the parties' implied, but unambiguous, intention –reflected during litigation- to set aside their agreement to arbitrate, the decision adopts a view of the arbitration agreement "in writing" as an *ad substantiam actus* requirement, which necessarily demands a document for its existence or its elimination. As a result, it disregards the modern notion of arbitration agreements "in writing" as an *ad probationem* requirement, whereby the existence or non-existence of the arbitration clause is assessed by means of different record or evidence, including the procedural conduct of the parties –i.e. amended UNCITRAL Model Law, art. 7(5); English Arbitration Act, sec. 5-. Under a different perspective, the ruling has gone beyond article II.3 of the New York Convention, because a summary or superficial review of the issue, by the court of law, would have led the latter to retain its jurisdiction to decide the case, without referring the parties to arbitration due to the evident or "manifest non-existence" of the arbitration clause.

Anyway, the ruling's *ratio decidendi* might not affect the cases involving arbitration agreements that are subject to the Colombian arbitration Law 1563 of 2012. It should be noted that this new regime modernizes arbitration rules applicable to domestic and international arbitrations in Colombia. Both the domestic and international chapters of the new Law –with slight variations- state that the agreement to arbitrate is recognized if it is contained in an exchange of statements of claim and defense in which the existence of said agreement is alleged by one party and not denied by the other –arts. 3; 20 and 69, endorsing the Model Law's approach-. Coherently, the domestic chapter has a specific provision, whereby the inactivity, by one of the parties, to timely allege the existence of the arbitration agreement before a judge, amounts to a waiver of said agreement –art. 21-. This rule, at least within the state contracts' scenario, contradicts the Council of State's holding in its decision of April 18, 2013.

It is expected that the Council of State, when asked to rule upon this matter under the new law, will not adopt a "differential" treatment, based on the nature of the parties or of the interests involved. A formalistic approach to arbitration agreements involving state entities, would disregard the general principle of good faith and the spirit of flexibility applicable to the assessment of arbitration agreements under the new arbitration regime. Colombian Law, as many other national laws, is still a dualist system of arbitration. However, its contents reflect the 2006 amendment to the UNCITRAL Model Law, including the flexible approach to the notion of arbitration agreements "in writing".

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