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Colombian Supreme Court Draws on the Different Standards of Review when Challenging the Independence and Impartiality of an Arbitrator in Domestic and International Arbitration

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On July 12, 2017, the Colombian Supreme Court issued a decision on the enforcement of the arbitral award rendered in the ICC case (No. 16088/JFR/CA) *Tampico Beverages Inc. v. Productos Naturales de la Sabana S.A. Alquería*, seated in Santiago de Chile. The decision provides for an interesting differentiation of the standard of review to be applied when analyzing the independence and impartiality of an arbitrator, depending on whether the arbitration is domestic or international.

Background of the case

The case concerned a trademark license agreement concluded in 2001 that went sour and was terminated by Tampico in 2009. Tampico initiated the ICC arbitration to declare the termination of the license contract and seek damages for the illegal commercialization of its trademark. The arbitral tribunal found in favor of Tampico in relation to the termination of the contract but declined to grant any damages. However, the tribunal ordered Alquería to pay for the arbitrators' fees and for Tampico's legal defense costs. After a failed attempt by Alquería to set aside the award in Chile, Tampico filed an *exequatur* with the Colombian Supreme Court to recognize and enforce the ICC award in Colombia.

The Supreme Court's standard of review

One of Alquería's arguments to deny the recognition and enforcement of the arbitral award was grounded on the fact that Tampico's party-appointed arbitrator and its counsel were also related in an ICSID arbitration but with different roles: Tampico's counsel was an arbitrator and its party-appointed arbitrator was counsel; a circumstance that was not disclosed and that according to Alquería, amounted to a public policy violation.

From the outset, the Supreme Court indicated that the situation described by Alquería could be reprehensible from an ethical standpoint and even violate mandatory domestic legal provisions. However, such situation did not amount to a ground to stop the recognition of a foreign arbitral

award because it did not violate Colombia's international public policy. The Supreme Court indicated that the Colombian General Code of Procedure establishes fourteen grounds for the challenge of a judge, grounds that are incorporated by reference in article 16 of the Colombian Arbitration Act (Law No. 1563) ("CAA") related to domestic arbitration. Article 75 of the CAA, which relates to international arbitration, prescribes a different provision for the challenge of an arbitrator, without listing specific grounds: "[a]*n arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess the qualifications agreed by the parties.*"

Therefore, the Supreme Court concluded that this differentiation evidences that "*the standard for impartiality that integrates the international public policy cannot be inferred from the current list established in the local procedural statutes; it must be adopted on the basis of reasonable criteria.*" Under this premise, the Supreme Court went on to rely on international authorities rather than domestic ones. As such, it stated that in this context of international interpretation, the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration reflects the practice in the arbitral community, indicating that these guidelines are frequently used by arbitral institutions and that in 2015, the ICC conducted a survey which showed that 106 of 187 cases in which the independence and impartiality of an arbitrator were at stake, the IBA Guidelines were used to decide such issues.

Relying on the IBA Guidelines as a non-binding but authoritative source of soft law, the Supreme Court concluded that none of the situations listed in the Guidelines that could affect an arbitrator's independence and impartiality were met in the present case. Moreover, it added that international arbitrators form a reduced guild, where it is usual for them to coincide in different processes. Thus, there could only be a threat to their objectivity when the relationship transcends the professional field and passes to the personal one. This last reference to an "arbitrators' guild" strongly resembles the situation described by Prof. Emmanuel Gaillard in his article "Sociology of International Arbitration," where he describes how the world of international arbitration became a "*recognized area of institutional life*" that is still a "*solidaristic model*," meaning that a small number of occasional players act in different capacities, which explains how arbitrators and counsels often alternate in those roles in different arbitration proceedings.

In conclusion, the Supreme Court found that nothing in the applicable law and in the IBA Guidelines compelled Tampico's party-appointed arbitrator to communicate to the parties the existence of the ICSID arbitration in which he was counsel and therefore, there was no violation of Colombia's international public policy. Moreover, the Supreme Court recalled that the disclosure requirements established in the domestic arbitration chapter of the CAA were not replicated in the international arbitration chapter and thus, one cannot infer the application of the same standards, for that was not the intention of the lawmakers, drawing a clear line between the standard of review for domestic and international arbitration.

The pro-enforcement stance

In addition to the reasoning indicated above, the Supreme Court also relied in the pro-enforcement principle established by the New York Convention ("NYC"), explaining that the notion of public order must be analyzed in light of this principle to avoid extensive interpretations and limit the application of the public order objection to the minimum. It recognized that this restrictive

interpretation was the internationally accepted one since *Parsons Whittemore Overseas Co Inc v. Société Générale de l'Industrie du Papier* (the RAKTA case), in which the Court of Appeals for the Second Circuit reasoned that "[e]*nforcement of foreign arbitral awards may be denied on* [the basis of public policy] *only where enforcement would violate the forum state's most basic notions of morality and justice*."

In light of this principle, the Supreme Court reasoned that when in doubt, one must decide in favor of the recognition and enforcement of a foreign arbitral award. The violation of the public order must be manifest in order to deny the recognition and enforcement, a circumstance that was missing in the present case, since the lack of disclosure of the ICSID case did not violate essential values of the Colombian state.

Final words

The decision of the Colombian Supreme Court is certainly welcomed to aid and guide the review of an arbitrator's independence and impartiality in international arbitration proceedings seated in Colombia, as well as the recognition of the evermore-important IBA Guidelines on Conflicts of Interest in International Arbitration.

In addition, the clear differentiation of the dual system of international and domestic arbitration enshrined in the CAA warrants that pure local laws and regulations will not intervene in the enforcement of foreign arbitral awards in Colombia.

Finally, the decision reiterates the well-established rule that challenges grounded on the violation of public policy must be analyzed restrictively, an interpretation that furthers the safeguarding of the NYC's pro-enforcement nature and purpose.

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