Kluwer Arbitration Blog

Arbitration in Colombia: A Recent Ruling Confirms the Country is an Arbitration Friendly Forum

Felipe González Arrieta (Suescún Abogados) · Monday, February 25th, 2019

During the last years, Colombia has been taking steps forward towards the consolidation of the country as an attractive forum for international arbitration.[1)] Within this context, the Supreme Court of Justice (the "***Court***"), Colombia's highest judicial body in civil and commercial matters, has issued a recent ruling on an annulment action dated 19 December 2018[2)], which has reaffirmed all of these efforts.

In 2012, Cerrejón, a multinational mining company with operations in Colombia, and Ferrovial-Sainc ("***CFS***"), an international construction consortium, entered into a contract for the construction of marine works and structures. After some disputes arose within the performance of the contract, CFS initiated an ICC arbitration, with seat in Colombia and Colombian law applicable to the merits. CFS claimed that the contract had terminated and sought damages. Cerrejón filed a counterclaim asking the tribunal to find that the contract had not ended, that CFS had abandoned the works, that a limitation of liability clause was null, and that it was entitled to damages. In 2017, the tribunal issued its award dismissing all the claims brought by CFS and awarding Cerrejón all the damages it sought, approximately in the amount of US$ 40 million.

CFS then moved to have the award annulled based on the following grounds under the Colombian Arbitration Act (Law 1563 of 2012): (i) it was unable to present its case , because the arbitral tribunal had allegedly incurred in nine evidentiary omissions; (ii) the award contained decisions beyond the scope of the arbitration agreement, since the tribunal did not rule in accordance with Colombian law, as provided by the arbitration agreement; (iii) the procedure was not in accordance with the arbitration agreement, since a written witness statement was not excluded, even though such witness did not appear at the hearing, which, in its opinion, was contrary to Procedural Order No. 1; and, (iv) the award was contrary to Colombian international public policy, as the alleged omissions of evidence had led to a *de facto* defect ("*vía de hecho*")[3)], which, in international arbitration, would amount to a violation of Colombian international public policy.

In its ruling, the Court started its analysis by pointing out that Colombia, within the international arbitration framework, has adopted the most recent trends including Law 1563 of 2012, which is by and large based in the UNCITRAL Model Law. As such, the grounds for annulment are to be construed narrowly and, pursuant to article 107 of Law 1563, the Court may not enter into the merits of the dispute or into the evidentiary analysis of the tribunal. In this vein, the Court then defined the general scope of each of the grounds alleged by CFS as follows:

1. A party was unable to present its case (Art. 108(1)(b), Law 1563 of 2012): this ground seeks to protect the right of the parties to be heard, to be treated equally and of due process. The Court clarifies, however, that the breach of due process, under this ground, must be substantial, this is, the alleged breach must be ostensible, flagrant, manifest and unreasonable, in addition to having a direct impact in the decision. As such, according to the Court, simple discrepancies or disagreements that may arise with the decision of the arbitral tribunal must be differentiated, since the latter is not enough to annul the award. Finally, the Court reminded the parties that the annulment judge may not, at any time, qualify the evidentiary analysis or motivation of the arbitral tribunal.
2. The award contains decisions beyond the scope of the arbitration agreement (Art. 108(1)(c), Law 1563 of 2012): it refers to resolved claims which are out of the scope of the arbitration agreement. Therefore, the study of said ground must be based on an objective comparison between the arbitration agreement and the decisions embodied in the final award. However, the Court held that, based on this ground, one cannot seek to disqualify the merits of the reasoning made by the arbitrators or the considerations that served as motivation of the award, since this would correspond to an appeal rather than to an annulment action.
3. The procedure was not in accordance with the arbitration agreement (Art. 108(1)(d), Law 1563 of 2012): this ground may be alleged when the arbitrators disregard, unjustifiably, the procedural guidelines established by the parties, provided that such omission is consistent throughout all the proceeding or that it is so serious that it may undermine due process. According to the Court, such irregularity has to be brought to the attention of the arbitral tribunal who has to reject such claim first, or else it is understood that the parties have waived their right to object.
4. The award was contrary to Colombian international public policy (Art. 108(2)(b), Law 1563 of 2012): this ground seeks to protect the fundamental and guiding principles of the national legal system, such as the social and political order of the State, public liberties, or the right to have a procedure with full guarantees and respect of due process. Likewise, the Court emphasized that, unlike international instruments such as the New York Convention and the UNCITRAL Model Law, in Colombia the concept of public policy is that of "international public policy", which restricts even more such concept and provides a more international vision, in accordance with current worldwide trends.

Once the Court reminded the parties what should be the general understanding of the previous grounds, it stated that the recourse filed by CFS was in fact an appeal in disguise which sought to reopen the merits of the dispute. As such, this alone would be enough to reject it. However, the Court entered into the analysis of each of the allegations made by the moving party finding, *inter alia*, that: (i) the tribunal ruled based on a comprehensive assessment of all the available evidence; (ii) the award did not contain decisions beyond the terms of the arbitration agreement and the tribunal ruled in accordance with Colombian law; (iii) the arbitration procedure was in accordance with the agreement of the parties; and, (iv) the award was not contrary to Colombia's international public policy.

It is especially noteworthy the analysis made by the Court when it examined the allegation in the sense that the procedure was not in accordance with the arbitration agreement since the tribunal had allegedly taken into account a witness statement of a witness who had not appeared at the hearing. In this vein, the Court noted that the parties agreed to ICC Arbitration and, based on such rules, agreed, in Procedural Order No. 1, that all evidentiary matters would be governed by the IBA Rules on the Taking of Evidence in International Arbitration (the "***IBA Rules***").

The Court pointed that, according to the IBA Rules, documents are an independent source of

evidence, with an autonomous regulation, different from witness statements. In this respect, the Court noted that the allegations made by CFS were not regarding the probatory value given by the tribunal to the witness statement itself, but rather to the contemporaneous documents and letters that such witness had signed during the performance of the contract. Therefore, the fact that the witness did not appear at the hearing did not annul or exclude from the record those contemporaneous documents or letters that said witness had signed, as they constituted a different source of evidence that had nothing to do with its witness statement. The importance of this analysis is that the Court, in a prior ruling regarding the recognition in Colombia of a foreign award, had already used another soft law instrument, the IBA Guidelines on Conflicts of Interest in International Arbitration, in order to assess whether an international arbitrator had the duty to disclose the appointment of one of the party's counsel, in another unrelated arbitration in which said arbitrator was, in turn, counsel for one of the parties.

From this specific ruling and prior case law, both within the context of annulment and recognition proceedings[4)], one may identify the following trends regarding the Court's position towards international arbitration – all of which reflect that Colombia is giving steps in the proper way as an arbitration friendly seat:

1. The only grounds to annul or decline the recognition of an international award are those provided for in Law 1563 of 2012, which mirror the UNCITRAL Model Law and the New York Convention, and are to be construed narrowly.
2. The Court must take into account the most recent international trends in its analysis using, for example, soft law instruments such as the IBA Rules or the IBA Guidelines.
3. National judges are prohibited from entering into the merits of the dispute or the analysis made by arbitral tribunals.
4. The Court is pro-recognition and pro-arbitration and such principles must guide its study.
5. The concept of public policy is that of international public policy and, as such, is restricted to those fundamental and guiding principles of Colombia's legal system.
6. For an award to be annulled or its recognition denied, the procedural irregularity has to be so serious as to effectively undermine due process. Specifically, as to an irregularity related to the procedure, such objection has to be raised before the arbitral tribunal or else the right to object is waived.

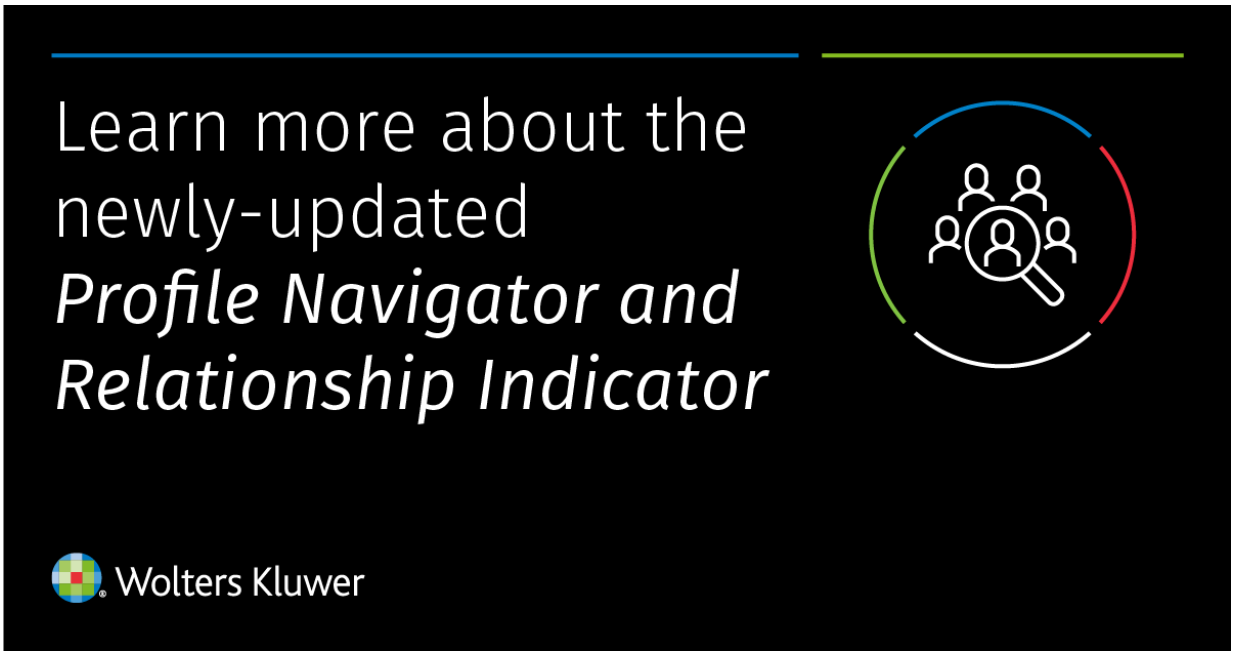
Despite the fact that the general prospect is positive, a couple of things still that have to be resolved before being able to fully list Colombia as an arbitration-friendly forum. For instance, the possibility for a party to file a writ for the protection of fundamental rights ("*acción de tutela*") against an arbitral award. This, however, should be the subject of another post.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

Profile Navigator and Relationship Indicator
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to

uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.



References

?1 For a more detailed analysis, see: F. González Arrieta; "Arbitration in Colombia: Two Steps Forward and one Backwards" TDM 5 (2016), www.transnational-dispute-management.com; available at: www.transnational-dispute-management.com/article.asp?key=2382

?2 *See Consorcio Ferrovial – Sainc v. Carbones del Cerrejón Ltd.*, Corte Suprema de Justicia [Supreme Court of Justice], Sala de Casación Civil [Civil Chamber], 19 December 2018, Ruling No. SC5677-2018, M.P. Margarita Cabello Blanco.

?3 In Colombia, in order for an award or a judgement to be subject to a writ for the protection of fundamental rights ("*tutela*"), a de facto defect ("*vía de hecho*") is needed.

?4 To date, there are ten different decisions within recognition of foreign awards proceedings and three within international awards annulment proceedings.

This entry was posted on Monday, February 25th, 2019 at 5:05 am and is filed under Arbitral seat, Colombia, Commercial Arbitration, ICC Arbitration, Latin America
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.