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Salient Features of the Colombian Constitutional Court's Review of Awards in International Arbitrations

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In its recent decision T-354/2019, the Colombian Constitutional Court, through one of its chambers, declared that arbitration awards, issued in international arbitrations seated in Colombia, may be subject to constitutional challenges by means of the so-called *acción de tutela.*[1)]

As described in another post [2)], the Court decided that the *tutela* was inadmissible in the case, because the claimant had not exhausted the appropriate legal remedies against the final arbitration award. [3)] Namely, when the Constitutional Court rendered its decision, the annulment proceedings, against the award, were still pending before the Third Section of the Colombian Council of State –*Consejo de Estado, Sección Tercera*. However, the Court upheld the claimant's right to re-submit the case, for its further review, once the *Consejo de Estado* rendered its decision regarding the annulment of the award.

The case was about an arbitration award referring to a dispute between a public utilities company –mainly owned by the Colombian State- and a Chinese consortium, regarding a contract for the construction of an electric generation facility in Colombia. The arbitration tribunal, which was constituted under the rules of the Center of Arbitration of the Chamber of Commerce of Bogotá, found partially in favor of the Chinese consortium. It declared that the Colombian public utilities company had breached the contract. As a result, the Colombian party began annulment proceedings before the *Consejo de Estado, Sección Tercera* and, soon after, also filed the constitutional challenge or *tutela*, against the award, before the Fourth Section of the *Consejo de Estado*. While the annulment proceedings were pending, said section of the *Consejo de Estado* denied the *tutela*. Upon the claimant´s appeal to the Fourth Section's decision, the Fifth Section of the *Consejo de Estado* ratified the lower court's decision. Consequently, the claimant requested the Constitutional Court to review the lower courts' decision, notwithstanding the fact that the *Consejo de Estado, Sección Tercera*, was –and is- still reviewing the annulment request.

Technically speaking, the *ratio decidendi*, of the Constitutional Court's ruling, dealt with the residual character of the *tutela* against arbitration awards. However, the legal grounds set forth in its decision, raise several concerns regarding the judicial review, for constitutional reasons, of awards arising from international arbitrations having their seat in Colombia.

Case law prior to decision T-354/2019

The Constitutional Court has rendered several decisions about *tutelas* against arbitration awards in Colombia, especially in the field of domestic arbitrations. Decision T-354/2019 is perhaps the first time in which the Court addressed, in a rather detailed manner, the *tutela* within the field of international arbitration.

These are some of the main features of the case law prior to said decision:

- Pursuant to the Colombian Constitution –article 116-, arbitrators are considered State judges in each particular case. Thus, since judicial decisions may be subject to constitutional review under the *acción de tutela*, the arbitration awards follow the same fate (See Decisions SU-500/2015 and SU-033/2018);
- The *tutela* protects a party against a current or potential breach of its fundamental rights. As to arbitration matters, the *tutela* against awards is frequently invoked for alleged breaches of both due process and the parties' fundamental right to seek justice;
- Despite the fact that arbitrators and judges perform the *public function* of justice adjudication, the former derive their powers from the parties' arbitration agreement –*principio constitucional de habilitación*-, while the latter's' powers stem from the law (*See* Decision C-378/2008). Therefore, awards and judicial decisions are not completely identical for the purposes of the *tutela*. As to arbitration awards, the requirements for the *tutela* are stricter than those applicable to judicial decisions, since arbitration is a "*(…) scenario in which the parties express their will to pull away from ordinary justice and to abide by the decision rendered by the arbitration tribunal.*" (See Decision SU-500/2015);
- Accordingly, arbitration awards in Colombia are not subject to a review on the merits. Neither the annulment proceedings nor the tutela are scenarios for said review. By doing so, the courts would end up deciding a case, both against the parties' private autonomy and article 116 of the Constitution (*See* Decisions SU-174/2007 and SU-500/2015); and
- *Tutela* against awards is subject to two sets of requirements: (i) general admissibility requirements –*i.e.* exhausting annulment proceedings-; *and* (ii) the existence, in the case, of specific grounds of protection, known as *vías de hecho*, which amount to manifest or gross mistakes made by the arbitrators (*See* Decisions C-590/2005 and SU-817/2010). These *vías de hecho* may be factual, substantive, organic or procedural. They cover, *inter alia*, a manifestly undue assessment of evidence; the application of a non-existent rule of law; the manifest lack of jurisdiction of the arbitrators; and a severe breach of the procedural framework applicable to the case. Importantly, said defects must directly breach fundamental rights *and the claimant must prove that the defects have a direct impact on the arbitration award*-–arguably except for the organic *vía de hecho*, which consists in the arbitrators' manifest lack of jurisdiction to solve the dispute.

Salient features of the Constitutional Court's decision: a new methodology for the review of awards in international arbitrations

Decision T-354/2019, which characterizes the tutela as "*highly exceptional*" in international arbitration, contains salient features regarding the constitutional review of awards in international arbitrations having their seat in Colombia.

First, the decision reaffirmed the principles of supremacy and territoriality of the Colombian Constitution, which had been applied by the Constitutional Court in previous cases related to arbitration (See Decision C-347/1997). Under a constitutional standpoint, this means that the *tutela* may operate in relation to domestic and international arbitrations seated in Colombia, irrespective of the status of the arbitrators as judges, public authorities or private parties exercising a public function. In other words, the Court has endorsed a "territorialist" approach vis-à-vis arbitration rather than a delocalized or detached approach, regarding the constitutional review of awards.

Second, the Court, in a rather curious analysis, decided that the different requirements (exhausting annulment proceedings, and existence of *vías de hecho*), regarding the *tutelas*, apply when the case is solved totally or partially under Colombian substantive law. Conversely, when the case is solved under a foreign substantive law the specific grounds of protection or *vías de hecho* are not applicable. The Court did not explain why or how it reached these methodological conclusions.

Third, in those cases solved under foreign substantive law, the constitutional review must be done only by examining the award vis-à-vis international public policy. Since international public policy is a ground of annulment of arbitration awards in Colombia, then the constitutional review must necessarily take place after the competent court –*i.e. Consejo de Estado*– renders its annulment decision.

Fourth, unlike the Colombian Supreme Court of Justice which applies international public policy restrictively, the Constitutional Court adopted a "cumulative approach" regarding Colombian case law on this matter. Thus, the Constitutional Court declared that international public policy, applicable to the constitutional review of awards, would cover, *inter alia*, the good faith principle; the abusive exercise of rights –*abuso del derecho*-; due process; impartiality of the arbitrators; and the protection of fundamental rights. Moreover, the Court upheld the procedural as well as substantive character of international public policy in Colombia.

Fifth, the Court declared that an expert report, incorporating irregular evidence, may be covered by a *tutela* in any case, in so far as the evidence had an impact on the arbitrators' decision.

Concluding remarks: Is the Constitutional Court overlooking the Colombian Constitution?

Despite the Court's attempt to describe the *tutela* as a "highly exceptional" remedy against awards in international arbitrations, the fact is that Decision T-354 leaves some questions open regarding international arbitrations seated in Colombia. It is unclear why the Court selects a different methodology for the constitutional review of awards depending on the application of Colombian or foreign substantive law to the merits of the dispute. For example, if an arbitration tribunal applies Colombian law to the merits, there would be no reason why international public policy could not be applicable to the constitutional assessment of the case.

In any case, the "cumulative approach" taken by the Constitutional Court regarding international public policy, may enlarge the latter's scope, thereby prejudicing the restrictive position taken by the Supreme Court within proceedings for the recognition of foreign arbitration awards. In practice, when addressing a *tutela* against an award in an international arbitration seated in Colombia, the Constitutional Court may end up reviewing a wide range of procedural or substantive issues, falling within the scope of "international public policy", thereby increasing both the legal uncertainty of the arbitration award and the likelihood of setting aside the arbitrators'

decision.

In the author's opinion, the Constitutional Court should revisit its case law based on constitutional grounds, instead of creating new methodologies for the constitutional review of awards. In this respect, the Court's case law has consistently and repeatedly stated that party autonomy is a constitutional principle applicable to arbitration. Thus, pursuant to said principle, State justice cannot decide on the merits of a case. Paradoxically, the same case law has declared that the *tutela* is only successful if the claimant proves that the alleged irregularity has affected the outcome of a case. This necessarily entails a judicial review on the merits. Said contradictory findings have taken place because the Court has equated –with some exceptions- the arbitration awards and the judicial decisions for the purposes of the *tutela*. In other words, the Constitutional Court has not realized that the constitutional principle of party autonomy or *principio de habilitación* should exempt the claimant from proving that the alleged irregularity has affected the outcome of a case.

Accordingly, if *tutela* is purported to be "highly exceptional", then the Court should limit it as much as possible. The constitutional assessment could be restricted only to the organic *vía de hecho*. The other *vías de hecho* or methodological options could be disregarded. This would enhance finality and predictability within the fields of domestic and international arbitrations seated in Colombia.

References

?1 The *acción de tutela* is similar to the so-called *recurso de amparo*, a constitutional injunction widely known in different Latin American countries and Spain.

?2 Said post addressed some relevant issues contained in Decision T-354/2019, such as the interplay between the New York Convention of 1958 and the Court's decision; and the unsupported equivalence, drawn by the Court, between domestic and international arbitration awards. This new post addresses other aspects arising from Decision T-354/2019, such as its constitutional inconsistencies and a potential enlargement of the scope of international public policy regarding *tutelas* in Colombia against awards in international arbitrations.

?3 Pursuant to article 107 of the Law 1563 of 2012 – Colombian Arbitration Statute-, annulment proceedings, against arbitration awards, are the *only* judicial mechanisms in order to challenge said decisions in relation to international arbitrations seated in Colombia. In general terms, Colombia adopted the UNCITRAL Model Law on International Commercial Arbitration with the amendments contained in its 2006 review. Pursuant to the Colombian Constitution, the *tutela*, in turn, has a residual character, in the sense that it only becomes available when the claimant has exhausted the appropriate legal remedies before the judicial courts.

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