Kluwer Arbitration Blog

Is An Arbitral Tribunal's Draft Award Susceptible to Judicial Review?

Julio-César Betancourt · Thursday, June 18th, 2020

Background

In a recent blog post, Luis Capiel and Alicia Larrazabal of Herbert Smith Freehills commented on the Venezuelan Supreme Court of Justice's decision to stay institutional arbitration proceedings initiated by *Modexel Consultores e Servicios S.A.* (MODEXEL) against *Alimentos Polar Comercial C.A.* (POLAR) under the Business Center for Conciliation and Arbitration (CEDCA) arbitration rules.

In essence, that decision arises out of POLAR's application for judicial review of an arbitral tribunal's draft final award. If successful, it would enable Venezuela's most senior court to determine the merits of the parties' underlying dispute.

This blog post deals with the basics of the review of draft awards and provides guidance on the question of whether national courts are empowered to review these types of awards, particularly, in the context of such a decision.

Out-of-Court Review of Draft Awards: The Basics

An arbitral tribunal's draft award may be described, in simple terms, as a work-in-progress version of the tribunal's ruling on a given matter. At any rate, a draft award is not, technically speaking, an interim or a provisional award.

In a three-member arbitral tribunal, for instance, draft awards will usually form the basis for the tribunal's discussions (or deliberations) as to the content of an award that upon publication — and always subject to the exercise of any other right that the parties may have in connection with it, whether under the *lex arbitri* or the applicable arbitration rules — will eventually acquire *res iudicata* effect as between the parties to the arbitral proceedings.

Consequently, it is safe to say that the review of draft awards is, more often than not, carried out by the members of the arbitral tribunal themselves. It is plain that, prior to their publication, such drafts are of no legal effect whatsoever. This is so regardless of how perfectly drafted (or how similar to the final version) they might be.

Draft awards may also be reviewed (or scrutinised) by an arbitral institution (see, for example, Article 34 of the ICC Arbitration Rules 2017 and Rule 32.3 of SIAC Rules 2016) and also, but less frequently, by the parties to the arbitral proceedings, who may be perfectly invited to identify any errors of fact or law that the draft may have, whether real or perceived.

Statutory Challenge of Arbitral Awards under Venezuelan Arbitration Law

As far as Venezuelan arbitration law is concerned, a party to arbitral proceedings may apply to the national courts challenging an award on very limited grounds (see, in particular, Article 44 *Ley de Arbitraje Comercial de 1988* (LAC 1988)). They almost mirror the language of Article 34 of the UNCITRAL Model Law 1985, as amended.

In principle, an application to challenge an arbitral tribunal's award under Article 44 of the LAC 1998 does not operate as a stay of enforcement proceedings of the relevant award.

Nonetheless, the court may order a stay of enforcement proceedings subject to an undertaking by the applicant to provide security should the application to challenge the award ultimately fail (as per Article 43 LAC 1988).

Suffice it to say that Articles 43 and 44 of the 1988 legislation are not intended to apply to arbitral tribunals' draft awards.

Inadmissibility of POLAR's Application for Judicial Review

Article 106 of the *Ley Orgánica del Tribunal Supremo de Justicia de 2010* (LOTSJ 2010) empowers the Supreme Court (in any of its divisions), whether upon a party's motion or *sua sponte*, to exert jurisdiction over any matter handled by national courts, i.e., to engage in *avocamiento* proceedings.

Avocamiento proceedings are only permissible in exceptional cases. They aim to protect: (1) the image of the Venezuelan judiciary, (2) public peace, and (3) the institution of democracy, (as per Article 107 LOTSJ 2010).

When exercising such power, the Supreme Court has two options to choose from: (1) it may itself hear the matter and make a judgment on the merits of the case in question or, instead, (2) it may remit the matter to a court other than that in which court proceedings were originally commenced.

Whilst Article 106 LOTSJ 2010 makes use of the expressions 'any tribunal' (*cualquier tribunal*) when regulating *avocamiento* proceedings, a closer examination of the language employed by the Venezuelan legislator demonstrates conclusively that 'arbitral tribunals' do not fall within the scope of application of the 2010 legislation.

Article 25(16) in conjunction with Article 108 LOTSJ 2010 clearly stipulate that *avocamiento* proceedings would only be allowed in relation to a matter litigated in the Venezuelan Republic's national courts (*tribunales de la República*).

Although it can be argued that arbitral tribunals and national courts perform a somewhat analogous

function, it is evident that arbitral tribunals seated in Caracas (or any other Venezuelan city) do not, by implication, become a distinctive part of the Venezuelan judiciary.

Thus, an application for *avocamiento* can only be lawfully made in respect of court — and not arbitral — proceedings that are (or are likely to be) surrounded by procedural irregularities or where a scandalous violation of the juridical system is at stake.

In other words, judicial review by means of *avocamiento* proceedings has been specifically designed to prevent an act of injustice associated with an impending 'judgment', and not in respect of an arbitral tribunal's draft or future 'award'.

Hence, for purely procedural reasons, POLAR's application should have been declared inadmissible *in limine litis*.

The Supreme Court's Judgment

The Venezuelan Supreme Court's decision in POLAR v MODEXEL (albeit interlocutory) has, quite rightly, caused great concern among the arbitration community.

Its decision is tantamount to an anti-arbitration injunction that results from one of the parties' dissatisfaction with a 'draft award'.

It is far from certain what the principle behind such a decision actually is. What is clear, however, is that the Supreme Court appears to have interpreted the concept of 'tribunal' far beyond the legislator's intention.

No doubt such an interpretation would lead to a perilous precedent for the development of Venezuelan arbitration law.

But not all hope is lost. The Supreme Court may very well re-examine the admissibility of the application (*inadmisibilidad sobrevenida*) and decide that POLAR's application is not admissible for the reasons set out above.

The Supreme Court may also take this opportunity to clarify: (1) that a draft award cannot be challenged before the national courts and, at the same time, (2) that there is only one way to challenge an arbitral tribunal's award within the meaning of Article 43 of the LAC 1988.

Conclusions

I am not aware of any legal system that allows national courts to review arbitral tribunals' draft awards. As a matter of Venezuelan arbitration law, it is clear that POLAR has applied for a remedy that, *de lege lata*, does not exist.

Although, in practice, draft awards may be — and indeed sometimes are — relied upon in the national courts, especially, in the context of a statutory challenge, it is also clear that a draft award in itself provides no right to bring a claim for judicial review.

But otherwise it is submitted that draft awards are not susceptible to review by any national court, not least because they are not binding on the parties concerned, as a result of which the dissatisfied party has no legal standing to seek its review.

This entry was posted on Thursday, June 18th, 2020 at 9:00 am and is filed under Anti-arbitration Injunction, Court Proceedings, Draft Award, judicial review, Review on the merits
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.