The Arbitration Review of the Americas 2020

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A Global Arbitration Review Special Report

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This article was first published in July 2019
For further information please contact Natalie.Clarke@lbresearch.com

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Cover iStock.com/blackdovfx

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ISBN: 978-1-83862-207-7

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

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Country chapters

Welcome to *The Arbitration Review of the Americas 2020*, one of *Global Arbitration Review*'s annual, yearbook-style reports.

Global Arbitration Review, for anyone unfamiliar, is the online home for international arbitration specialists everywhere, telling them all they need to know about everything that matters.

Throughout the year, *GAR* delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live banner) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into local developments than our journalistic output is able. *The Arbitration Review of the Americas*, which you are reading, is part of that series. It recaps the recent past and adds insight and thought-leadership from the pen of pre-eminent practitioners from around North and Latin America.

Across 17 chapters, and spanning 107 pages, this edition provides an invaluable retrospective, from 35 leading figures. All contributors are vetted for their standing and knowledge before being invited to take part. Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, supported by footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Argentina, Bolivia, Canada, Colombia, Ecuador, Mexico, Panama and the United States; has an overview on Brazil's national obsession with corruption and how that is playing into arbitration; and an update on how Mexico's federal courts have started to deal with the personal injunctions that had brought its prospects to a grinding halt as a seat.

Among the other nuggets it contains:

- a deep dive on the battle playing out, in the US courts, between owners of intra-EU investment awards and Spain and the European Commission;
- the strides being taken across the Caribbean to embrace international arbitration;
- a technique arbitrators can use to sense check a valuator's assertions, using a company's audited financial statements; and
- a comparison of USMCA (the new NAFTA) with NAFTA, and what the changes mean – along with an analysis of one of the first case to consider the clash between the environmental and the investor pledges in DR-CAFTA.

Plus much, much more. We hope you enjoy the review. If you have any suggestions for future editions, or want to take part in this annual project, my colleague and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
July 2019

Colombia

Alberto Zuleta Londoño and Andrés Nossa Lesmes
Holland & Knight

Challenges against international arbitral awards in Colombia

Law 1563 of 2012 (Law 1563) currently regulates arbitration in Colombia. The section that refers to international arbitration is based on UNCITRAL's Model Law on International Commercial Arbitration (the Model Law). Among other relevant aspects, Law 1563 granted the Civil Chamber of the Colombian Supreme Court (the Supreme Court) and the Third Section of the Contentious-Administrative Chamber of the Colombian Council of State (the Council of State) jurisdiction to decide actions to set aside arbitration awards that are rendered by international arbitration tribunals seated in Colombia (international awards). The Council of State decides over international awards that solve disputes involving Colombian public entities, while the Supreme Court decides over arbitration awards that do not include such entities. Article 107 of Law 1563 provides that the judicial authority that decides over the setting aside of international awards shall not decide over the merits of the dispute, and limits the grounds of annulment to those included in the Model Law.

Also relevant to the challenging of international awards, the Colombian Constitution established more than 25 years ago a mechanism for the protection of fundamental rights (the tutela mechanism) that entitles any person to request that a court issue an injunction for the protection of a fundamental right. The right to due process is a fundamental right according to the Colombian Constitution, and the the tutela mechanism has been used by courts in the past, including the Colombian Constitutional Court (the Constitutional Court), to set aside domestic arbitration awards on the grounds that they violated due process. The Constitutional Court has held that a tutela mechanism may be brought against an international award, but has yet to set one aside.

Framework for annulment of international arbitration awards: Supreme Court decisions

Decision issued on 15 January 2019[1]

A party to an international arbitration seated in Colombia filed before the Supreme Court an annulment action against an international award, raising the following objections as grounds for the annulment:

- the arbitration clause is invalid under article 1502 of the Colombian Civil Code, because one of the parties did not specifically consent to arbitration;
- the arbitration clause is invalid because the parties failed to agree as to the international nature of the arbitration, in breach of law 315 of 1996, in force at the moment the contracts were executed;
- the award is null because the arbitration was conducted according to the rules of international arbitration instead of the rules on domestic arbitration;
- the award violates Colombian international public policy because the arbitrators did not stay the proceedings in light of the pendency of a criminal proceeding for fraud initiated by claimants against respondents;
- the award is null because the tribunal ruled on defences that were raised in their response to the request for arbitration, but not in the statement of defence and on matters that were raised in a withdrawn counterclaim; and
- the award is null because it ruled on issues that were not subject to arbitration.

In deciding the action to annul the award, the Supreme Court relied on the principle of minimum judicial intervention in arbitration, establishing four rules to be followed in reviewing international awards:

The first two rules are no review of the merits and exhaustive number of grounds for annulment, the latter being established in article 107 of Law 1563. The Supreme Court reiterated the country's long-standing doctrine that the annulment action can only be used in reliance of the specific grounds established in the law and that none of those grounds allow the courts to interfere with the merits of the case.

The Supreme Court established international harmonisation as a third rule. It held that courts must follow international practice when interpreting the grounds to set aside an international award. The Supreme Court based this assertion on the fact that Law 1563 followed the UNCITRAL Model Law, which, in turn, followed the New York Convention. It then went on to cite its own ruling of 2017,[2] in which it specifically stated that local standards of interpretation were inapplicable to the annulment of international awards and that the Supreme Court should observe international uniformity when deciding actions to set aside an award.

The Supreme Court established as a fourth rule that there can be no waiver of the action to set aside an international award. The court explained that the annulment action against the award is designed to protect the parties' procedural rights, as well as guarantee that the award does not infringe upon the basic principles that are the foundation of Colombian institutions, and a waiver of such recourse is therefore not valid. Nonetheless, article 107 of Law 1563 establishes as an exception that parties that do not reside in Colombia may agree, in writing, the waiver of the annulment action, in which event the award would have to undergo recognition proceedings to be enforced in Colombia.

In relation to each of the grounds for annulment presented by the plaintiffs, the Supreme Court indicated the following.

- The claim for invalidity of the agreement to arbitrate as established in article 108(1)(a) of Law 1563 must be understood as a substantial ground that must be reviewed under the validity requirements for the arbitration clause contained in the applicable law. According to the Supreme Court, the arbitral tribunal is allowed to decide first on its own jurisdiction, which

does not exclude the court's ulterior review of the arbitration clause's validity. Regarding the specific objection to the arbitral clause, the Supreme Court found that the claimant had executed the arbitral clause complying with all validity requirements of the applicable law, that being the rules established in the Colombian Civil Code, which prevented him from raising an objection to the arbitral clause after he had willingly executed the contract.

- Under article II of the New York Convention, the Colombian Civil Code and Decree 2279 of 1989, parties need not to specifically agree that that the arbitration be international for the arbitration clause to be valid. Also, the Supreme Court indicated that Law 315 of 1996, which was replaced by Law 1563, established such requirement, but it cannot be understood as a substantial rule that can affect the validity of the arbitration clause.
- The objection that the arbitration was conducted according to the rules of international arbitration, instead of the rules on domestic arbitration, to be meritless. The court took into account that, as mentioned, it understood that the arbitration clause did not require a specific agreement indicating the arbitration to be international. The Supreme Court also indicated that under this ground, an arbitral award can only be annulled if there is a substantial non-compliance of the procedural arbitration rules. The parties agreed to be bound by the International Chamber of Commerce Rules and the arbitral tribunal complied with those rules.
- The existence of a pending criminal case was not part of the essential public policy or of due process that could breach Colombian international public policy
- The arbitral tribunal had not exceeded its authority as it had followed the terms of reference to which it was bound.
- Regarding the Tribunal's alleged excess authority, the Supreme Court stated that in arbitration proceedings, the arbitral tribunal determines the matters over which it must decide, by taking into account the arguments presented by the parties in all their submissions. In this case, the claimant presented their defences in several documents, which is why the tribunal had to take them all into consideration.

Based on the mentioned considerations, the Supreme Court dismissed the annulment of the arbitration award.

Decision issued on 19 December 2018[3]

In another case, a party to an international arbitration seated in Colombia filed before the Supreme Court an annulment action against an international award. The following are the objections that the claimant raised:

- incapacity to exercise their rights resulting from the arbitral tribunal's omission of assessing evidence that would have changed its decision;
- the tribunal exceeded its authority by deciding over matters not contained in the arbitration agreement;
- the arbitration proceeding did not conform to the agreement of the parties as a result of not being able to cross-examine a key witness who had sent a written testimony; and
- the award breached Colombian international public policy as a result of evidentiary omissions that constituted due process violations.

In its analysis, the Supreme Court began by restating that judicial intervention over arbitral awards should be limited to the specific grounds provided for in Law 1563. The Supreme Court indicated that the annulment of arbitration awards is a mechanism established to ensure the protection of the right to a fair trial, which doesn't mean that it can be used to review the merits of the dispute, as provided in article 107 of Law 1563. It then went on to emphasise that even if annulment proceedings must follow the laws and rules of the arbitration seat, the Supreme Court must also follow the unifying tendency of international arbitration law. Finally, the court made a description of the scope of the specific grounds for annulment that were invoked by claimant, regulated in article 108 of Law 1563, thereby setting the framework of interpretation for each in the future.

Reviewing each of the grounds for annulment presented by claimant, the Supreme Court indicated the following.

- Grounds for annulment relate to due process breaches, which are in turn material. This means that annulment on these grounds depends on how material the alleged breach is. Regarding the omission of assessing evidence, it must be proved that the tribunal breached the procedural rules that govern the gathering of evidence (eg, irregular incorporation of evidence to the proceeding or unjustified rejection of evidence). In this particular case, the Supreme Court understood the tribunal allowed both parties to present their case and defend their interests, which is enough to dismiss the objection, besides the fact that the claimant presented the objection with the purpose of leading the court to review the merits of the award, which is something it is not entitled to do.
- The tribunal's competence is determined by the arbitration agreement and therefore, when reviewing an annulment challenge, the Supreme Court's review must consist of an objective comparison between the arbitration award and the arbitration agreement. It also found that the tribunal that issued the award did limit its decision to the arbitration clause agreed into by the parties.
- Regarding the argument that the arbitration proceeding did not conform to the agreement of the parties as a result of the absence of cross examination of a key witness, the Supreme Court considered the objection to be meritless because the parties agreed to be bound by the International Chamber of Commerce (ICC) Rules, which in turn allowed parties to be bound by the International Bar Association Rules on evidence. In turn, the Supreme Court found that the fact that a witness had not appeared before the tribunal did not invalidate his witness statement.
- On the objection that the award breached Colombian international public policy, the Supreme Court differentiated Colombian international public policy from Colombian public policy, as it has done since a ruling dated 27 July 2011.[4] The court indicated that the reviewed arbitration award did not violate Colombian international public policy.

The Supreme Court dismissed the annulment presented by claimants.

The tutela mechanism against international awards: Constitutional Court decisions

As a general rule, a tutela mechanism cannot be filed to challenge judicial decisions, but the jurisprudence of the Constitutional Court has established certain requirements that, if met, entitle a person to use that mechanism to challenge such decisions. It has held that a party that files a tutela mechanism against a judicial decision – or an arbitral award – must fulfil six general

admissibility requirements and prove that at least one special admissibility requirement occurred.

General admissibility requirements are:

- the matter must have constitutional relevance;
- all ordinary and extraordinary recourses must have been exhausted;
- the constitutional injunction must be filed within a reasonable time frame from the moment the violation of the fundamental right occurred;
- when a procedural irregularity is argued, it must have been decisive for the decision that is being challenged;
- the claimant must present the facts that generated the violation of the fundamental right and demonstrate its connection with the alleged violation, and, in addition, the claimant must have raised the occurrence of the violation within the proceeding that resulted in the challenged decision; and
- the challenged decision cannot be a decision over another constitutional injunction.

Regarding the special admissibility requirements, they have been classified as follows:

- organic defect (lack of jurisdiction of the issuing judicial authority);
- procedural defect (not following the applicable procedure);
- factual defect (the judicial authority does not have evidence to link its decision to the applied legal rules);
- material or substantive defect (decision is based in unconstitutional or non-existent laws, or there is a material inconsistency between the decision and its considerations);
- the judge was induced to err in his decision;
- the decision was not supported;
- disregard of the judicial precedent; and
- direct violation of the Constitution.

When a party proves one of these requirements, the judge that decides over the tutela mechanism may declare the violation of a fundamental right and order the judicial authority to amend its decision for it to comply with the Colombian Constitution.

SU 500/201[5]

The claimant filed a tutela mechanism against both an ICC arbitration award issued on 2 July 2010, by an international tribunal seated in Bogotá, and a ruling issued by the Council of State that decided over the annulment of that arbitration award. The arbitral award had decided that claimant was liable for certain damages caused to defendant under a construction contract.

The claimant argued that:

- the matter had Constitutional relevance because the arbitration award failed to consider material evidence, and the arbitration proceeding did not conform to the established proceeding;
- all recourses provided by the law had been exhausted; and
- the tutela mechanism was filed within a reasonable time frame since it was filed five months after the annulment ruling was enforceable.

The claimant also argued that the arbitration award contained:

- an organic defect since the parties that executed the arbitration agreement were not the ones that appeared before the arbitral tribunal;
- a substantive defect that consisted of the arbitral tribunal's omission to address the consent over the arbitration agreement;
- a procedural defect because the tribunal did not comply with its own decisions; and
- a factual defect since the arbitral tribunal did not assess material evidence that would have led to a different decision.

The first instance decision, issued by the Fourth Section of the Contentious Administrative Chamber of the Colombian Council of State dismissed the constitutional injunction.

In its decision, the Constitutional Court determined the scope of the special admissibility requirements raised by claimant, when applied to arbitral proceedings.

- The organic defect on arbitral proceedings occurs when the arbitral tribunal exceeds its authority or decides over matters not contemplated in the arbitration agreement. Still, the Constitutional Court understood that, by virtue of the competence-competence principle, the arbitral tribunal is empowered to decide over its own jurisdiction within the arbitration proceeding. Accordingly, the organic defect is subordinated to the parties' agreement and to the arbitral tribunal decision over its own competence. In the claimant's case, the Constitutional Court considered that both the arbitral tribunal and the Council of State followed the constitutional principles that govern arbitration in Colombia in the challenged decisions.
- Regarding the material or substantial defect, the Constitutional Court indicated that, in arbitral proceedings, the arbitral tribunal has greater autonomy than do the courts in judicial proceedings. Therefore, a substantial defect occurs only when there is a gross error that entails the disregard of the parties' will to arbitrate. The Constitutional Court considered that the violations alleged by claimant did not constitute a substantial defect. It stated that during the annulment proceeding, the Council of State had duly examined the arbitral tribunal's decision and therefore the Constitutional Court could not supersede the Council of State's role of guaranteeing the right to a fair trial.
- The Constitutional Court stated that to determine the occurrence of a factual defect, the arbitral tribunal's actions regarding the assessment of evidence must be reviewed taking into account the arbitral award and the significance of those actions in the tribunal's decision. Regarding the claimant's allegations, the Constitutional Court, once again, considered that the Council of State in the annulment proceeding had correctly reviewed the evidence considered by the arbitral tribunal and its relevance within the arbitration award. The Constitutional Court explained that, even if in certain aspects the arbitral tribunal failed to consider part of the presented evidence or with disregard of certain procedural rules, there is no connection between those actions and the reason of their decision, therefore no factual defect was formed.
- The scope procedural defect was established by referring to the Constitutional Court's T-466/11 decision. In that decision, the Constitutional Court had stated that a procedural defect occurs when the arbitral tribunal has issued the award with no regard of the procedure agreed upon in the contract or established in the law, leading to a violation of the right to present a defence. The Constitutional Court did not make an extensive analysis for this defect, since it had previously determined that claimant failed to prove that the alleged procedural error had a decisive effect on the decision contained in the arbitration award.

The Constitutional Court dismissed the claimant's objections and confirmed the first instance decision.

Conclusions

Under Colombian law, international awards can be challenged by filing an annulment action or a tutela mechanism against them. The Supreme Court, as one of the Colombian high courts with jurisdiction to decide over actions to set aside international awards, and the Constitutional Court, who has jurisdiction to review and decide over any tutela mechanism, have established the rules that must be followed when reviewing the mentioned challenge mechanisms.

The Supreme Court has established there are four rules that must be followed when deciding over an action to set aside an international award:

- no review of the merits;
- exhaustive number of grounds for annulment;
- international harmonisation; and
- there can be no waiver of the action to set aside an international award.

In addition, the Supreme Court has been especially respectful of not reviewing the merits of international award, as established in article 107 of Law 1563, bearing in mind that the annulment action is a mechanism that must be used to protect a person's right to a fair trial.

On the other hand, the Constitutional Court has indicated that a tutela mechanism can be filed against judicial decisions if certain admissibility requirements are met, and has extended the possibility of filing such actions against domestic arbitration awards and international awards. In 2015, the Constitutional Court determined the scope of the 'special admissibility requirements' when applied to international awards. The scope of such requirements was set to respect both the autonomy of international arbitral tribunals during the arbitration proceeding, on the one hand, and the analysis made by the judge that decided over the respective annulment action, on the other. The objections raised in a tutela mechanism against an international tribunal, as can be seen by the scope the Constitutional Court gave them, should only be granted if there is a gross procedural error that entails a violation of a person's right to a fair trial.

Notes

1 Supreme Court of Justice, Civil Chamber, 15 January 2019, Issuing Justice Aroldo Wilson Quiroz Monsalvo (Decision No. SC001-2019).

2 Supreme Court of Justice, Civil Chamber, 12 July 2017 (File No. 2014-01927-00).

3 Supreme Court of Justice, Civil Chamber, 19 December 2018, Decision No. SC5677-2018, Issuing Justice: Margarita Cabello Blanco

4 File No. 2007-01956-00.

5 Issuing Justice Luis Guillermo Guerrero.

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THE ARBITRATION REVIEW OF THE AMERICAS 2020 ISBN: 978-1-83862-207-7