The Arbitration Review of the Americas

2019

Colombia

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Summary

CORE ARBITRATION PRINCIPLES IN THE JURISPRUDENCE OF COLOMBIA'S HIGH COURTS

After the enactment of Law 1563 of 2012, which incorporates the Colombian Arbitration Statute (CAS), several courts, including the highest courts in Colombia (the Supreme Court, the Constitutional Court and the Council of State) have had a chance to apply its principles in different scenarios. These include the recognition of foreign awards, the decision of actions to set aside an award rendered by an international tribunal seated in Colombia, judicial review of regulations, constitutional injunctions and others. This article analyses the way in which the Colombian highest courts have referred to the core principles of arbitration in those decisions, explains certain problematic implications of the decisions and points out possible outlooks for the future.

KOMPETENZ-KOMPETENZ AND THE OBLIGATION OF STATE COURTS TO REFER THE PARTIES TO ARBITRATION

The CAS contains two different rules regarding the arbitral tribunal's jurisdiction to rule on its own jurisdiction, further the principle of kompetenz-kompetenz: articles 29 and 79 – for domestic arbitration and international arbitration respectively. Notwithstanding the disparity of the wording of the two rules, they clearly embrace the same principle: the arbitral tribunal's jurisdiction to rule on its own jurisdiction takes precedence over that of any other authority, and the judge of the action to set aside the award may, if asked to, subsequently exercise control over this decision.

This principle, as such, has generally been upheld by Colombian jurisprudence. The Colombian Constitutional Court ruled in 2007[1] that Colombian law recognises the principle of kompetenz-kompetenz which grants the arbitration tribunal a wide discretion to rule on its own jurisdiction. This ruling unified the Constitutional Court's jurisprudence on the matter. In a decision of 24 June 2016, the Supreme Court recognised a foreign award in a proceeding where the defendant raised the lack of jurisdiction of the arbitral tribunal as an argument against the recognition of the award in Colombia. The defendant based the argument on the alleged exclusive jurisdiction of Colombian Courts to hear cases regarding to commercial agency agreements performed in Colombian territory. In rejecting the argument, the Supreme Court reiterated that the principle of kompetenz kompetenz means that arbitral tribunals have jurisdiction, under the lex arbitri, to decide on their own jurisdiction without interference from or a duty to defer to a previous decision of national courts. The unequivocal approach that the Supreme Court has applied to kompetenz-kompetenz in the context of judging the actions of arbitral tribunals, however, has not been clearly replicated when adjudicating over the conduct of state courts that find themselves before arbitration agreements.

An essential corollary of the arbitral tribunal's jurisdiction to rule on its own jurisdiction is the obligation of state courts, following Article II(3) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), to refer the parties to arbitration when faced with an action with respect to which they have executed an agreement to arbitrate. In this regard, the international section of the CAS followed the text of article 8 of UNCITRAL's Model Law on International Commercial arbitration, which unequivocally orders the court to refer the parties to arbitration. The CAS went further and deleted the final part of article 8(1) of the Model Law, which allowed the court to make an exception and exercise jurisdiction over the matter when it found that the agreement was null and void, inoperative

or incapable of being performed,2 thus withdrawing from state courts any decision as to the scope, validity or enforceability of the agreement, which under Colombian law now rests exclusively with the arbitration tribunal – at least in the event of international arbitrations.

The rule for referring the parties to domestic arbitration, however, is not as clearly drafted and, although it establishes the prevalence of the arbitration tribunal's decision regarding jurisdiction with respect to that of other authorities, it fails to specifically order the courts to refer the parties to arbitration, thus leaving some room for procedural rules to permeate a matter that should be governed by principles of arbitration. In a recent decision handed down on 17 June 2017, the Supreme Court addressed a case in which the trial court had referred the parties to arbitration, only to be reversed by the appellate court, who ruled that the controversy was outside the scope of the agreement to arbitrate and that, consequently, it was the trial court and not the arbitration tribunal who had jurisdiction over the matter. In deciding a cassation recourse over the appellate court's final decision of the controversy, the Supreme Court addressed the issue of the arbitration agreement and, even though it mentioned that Colombian law grants arbitral tribunals jurisdiction to rule over their own jurisdiction, it failed to find that it follows from that principle that state courts should refer the parties to arbitration when faced with the possibility of the controversy being covered by an arbitration agreement. Instead, it decided that only if a parallel arbitration procedure existed, the judge was obligated to refer the controversy to such tribunal. In absence of a parallel action before an arbitration tribunal, state courts may make a decision as to the scope, validity or enforceability of the arbitration agreement and its applicability to the controversy, a decision which the Supreme Court is then allowed to review under the rules of cassation, once the trial court and appellate courts have entered the final rulings over the controversy. This decision is a blow to the principle of kompetenz-kompetenz and although the Supreme Court did not specifically state that the situation would be different for the case of a controversy that is covered by the rules of international arbitration, kompetenz-kompetenz can only be upheld as a principle if it is coupled with a clear-cut rule regarding the obligation of courts to refer parties to arbitration. This is an area where high court jurisprudence still needs to evolve towards a stricter rule regarding state courts and their obligation to refer the parties to arbitration.

OBJECTIVE ARBITRABILITY

The arbitration legislation in Colombia that was in force until the CAS was enacted in 2012, stipulated that any controversy that was capable of being settled could be brought to arbitration. The CAS expanded this rule to include matters specifically authorised by the law. This is a major leap in arbitrability rationae materia in Colombia, where the law may now determine that certain specific matters may be brought to arbitration, notwithstanding the fact that they may not necessarily concern waivable rights.

Colombian courts had yet to have a chance to refer to this seemingly unnoticed innovation of the CAS with regard to the previous legislation. In HTM LLC v Fomento de Catalizadores Foca SAS, the Supreme Court held that it is clear that the CAS expanded the notion of objective arbitrability to include matters beyond those which concern waivable rights, and now encompasses those which have been specifically authorised by the law.

In this case the Supreme Court also addressed the issue of whether a local regulation indicating that a specific matter must be governed by Colombian law, poses an issue of arbitrability. The Supreme Court determined that article 1328 of the Code of Commerce, which calls for the application of Colombian law to commercial agency agreements that are

performed in Colombian territory, could not be deemed to challenge the objective arbitrability of the matter. This ruling puts to rest a decades-long controversy as to whether a rule that calls for the application of Colombian law to a particular matter, and allows no agreement to the contrary (in this case commercial agency agreements performed in Colombia), implies the notion that only Colombian state courts or domestic arbitration tribunals (which Colombian law considers to be Colombian judges) can rule over controversies including that subject matter. The Supreme Court clearly defined the scope of rules concerning conflict of laws, conflict of jurisdictions and arbitrability, by stating that conflict of law or conflict of jurisdiction rules cannot be understood as limitations to the arbitrability of a particular controversy.

The notion that arbitrability may extend beyond rights of which the parties can freely dispose to other matters specifically included in the law was reaffirmed by the Colombian Supreme court in 2018, in Innovation Worldwide DMCC v Carboexco CI Ltda. The court, however, has failed so far to explain the legal or constitutional constraints that apply to the legislator, when it expands arbitral matters beyond those rights.

INTERNATIONAL PUBLIC POLICY

In cases such as HTM and Petrotesting, the Supreme Court has held that Colombian international public policy refers to foundational aspects of Colombian institutions, reflected in principles such as of prohibition of abuse of rights, impartiality of courts and tribunals and due process which cannot be overlooked in determining the enforcement of a foreign arbitral award. It has also established a clear distinction between this notion and that of domestic public policy which is a broader concept that includes all mandatory rules of domestic law.

In HTM specifically, the Supreme Court determined that broadening the notion of international public policy would allow Colombian residents to acquire commitments abroad, knowing that they would be unenforceable in Colombia. It also pointed out that the current tendency in many countries is to reduce the scope of international public policy, while broadening that of arbitrability.

Accordingly, in HTM, when the Supreme Court was asked to determine if a tribunal's non-compliance with the provisions of article 1328 of the Colombian Code of Commerce would be deemed to be a violation of Colombian international public policy, it determined that the defendant's argument in relation to the application of article 1328 of the Code of Commerce reflected a principle of internal public order and not a matter of Colombian international public order which could prevent enforcement of the award. The Supreme Court then held that if an award breaches mandatory norms or laws of the enforcement forum, such breach does not in itself amount to a violation of international public policy. In the Supreme Court's reasoning, public policy can be classified either as 'directive public policy norms' or as 'protective public policy norms'. While the former encompass the most fundamental principles of a judicial structure and are therefore relevant to the international public policy, the latter are aimed at protecting a specific sector and do not represent the most fundamental principles of a state.3 Only 'directive public policy norms' are, according to the Supreme Court, of interest to private international law and the recognition of foreign awards in Colombia. In that regard, a rule aimed at protecting a specific sector of the economy, such as article 1328 of the Colombian Code of Commerce, that is aimed at protecting commercial agents, is not part of international public policy, as it belongs to 'protective public policy'.

In 2018, in Innovation Worldwide DMCC v Carboexco CI Ltda, the Supreme Court reiterated its posture regarding international public policy as a barrier to enforcement of foreign awards and went as far as indicating, in dicta, that in the case of recognition of foreign awards it should be interpreted in a manner that is even narrower than that which is applied to the recognition of foreign judicial decisions. If this becomes the prevailing standard, it will mean an important development for the recognition of foreign awards in Colombia, making the recognition process even more 'pro-arbitration'.

SEPARABILITY OF THE AGREEMENT TO ARBITRATE

The principle of separability (or autonomy) generally implies that an arbitration clause or agreement is independent from the contract to which it refers and thus, should the latter be declared null or void, the arbitration clause will remain valid. It is intended to protect arbitration tribunals from abolishing themselves when they declare the nullity or unenforceability of contracts that contain agreements to arbitrate. Articles 5 and 79 of the CAS establish the principle of separability (called autonomy in the CAS) of the arbitration clause, specifically referring to the specific effect of surviving the nullity of the agreement that incorporates them. Higher Colombian courts such as the Council of State and the Constitutional Court have consistently upheld the principle of separability as a means to preserve the intent of the parties to subject the controversy to arbitration, even if the underlying contract were to be deemed null or void.

On 5 December 2012, the Superior Tribunal of Bogotá decided a case involving an arbitral clause included in the by-laws of a company, and held that it could not be amended following the ordinary voting rules of the corporation, but had to be agreed unanimously. The Supreme Court cited the autonomy of the arbitration clause as the underlying rationale for this decision, unequivocally stating that the principle of autonomy meant that the agreement to arbitrate was separate from the by-laws and therefore had to be consented to by all parties involved.

Following this ruling, the Superintendence of Corporations held in case 2015-800-14 that an agreement to arbitrate that was contained in the company by-laws was only binding to those shareholders who had expressly consented to it and, therefore, a shareholder who had inherited its shares and had therefore not had a chance to specifically consent to the arbitration agreement, was not bound by it. This decision was later revoked by the Supreme Court of Justice in a decision rendered on 15 February 2016, which determined that the binding effects of the arbitration agreement included the assignees or the heirs of the shareholder who had consented to be bound by arbitration. The Supreme Court fell short of stating that the principle of separability did not mean, as the Superintendence of Corporations and the Superior Tribunal of Bogotá had held, that the agreement to arbitrate was separate from the by-laws in all respects and for all purposes, and therefore bound only shareholders who had consented to it or their assignees and heirs. This scope of the principle of separability poses some serious challenges in the law of corporations and raises important questions in general. For instance, when a company that includes an agreement to arbitrate in its by-laws issues new shares, are the new shareholders bound by such agreement? The answer, under this doctrine, would be 'no'. Acquiring a newly issued share binds a shareholder to the by-laws of the company, but not to a completely separate agreement which binds the parties to arbitration, which would leave some shareholders as parties to the arbitration agreement and others excluded from it. With regard to contracts in general, is it possible for a party to assign a contract but not its arbitration clause? Even

though the law states that the assignment of a contract includes the arbitration clause, the scope that the discussed rulings have given to the principle of separability would suggest the freedom of a party to accept the assignment of a contract but not its arbitration clause. These are issues that should be resolved by taking the principle of separability for what it should be: a means to allow an arbitration tribunal to void a contract without thereby abolishing its own jurisdiction. The proposition that the principle generally allows for the agreement to arbitrate to be held as separate from the main contract for all purposes can have a wide array of unintended consequences.

INTERNATIONALITY OF THE ARBITRATION

The CAS provides for a dual system of arbitration, establishing consequential differences for domestic and international arbitrations seated in Colombia. This situation calls for a clear-cut distinction between the former and the latter. The general rule that draws the line between the two types of arbitration follows article 1(3) of the Model Law which provides that an arbitration is international when the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states, although it uses the concept of domicile instead of that of places of business. It goes on to add that if a party has more than one domicile, the domicile is that which has the closest relationship to the arbitration agreement.

This rule has generated significant controversy as to the nature of the arbitration when one of the parties, albeit being a foreign company, has a branch on Colombian territory and the dispute involves events that took place in Colombia, as that could make Colombia the domicile that has the closest relationship to the arbitration agreement, thus making the arbitration domestic. The Supreme Court recently reviewed an annulment recourse filed against an award that was rendered in a case where two members of one of the parties-4 were Mexican companies, and each of them had a branch incorporated in Colombia. Neither the arbitration tribunal nor the Supreme Court questioned the internationality of the arbitration and simply drew focus on the fact that both parties agreed that the arbitration was international. The internationality of the arbitration, however, was essential to the Supreme Court's jurisdiction to decide the annulment recourse. Had the Supreme Court found that the arbitration was domestic, it would have had to decline jurisdiction and refer the matter to the Superior Tribunal of the District corresponding to the city where the arbitration was seated, as mandated by the CAS. The fact that the Supreme Court decided the annulment recourse under these circumstances is a step in the direction of the internationality of any arbitration seated in Colombia in which any of the parties is a foreign company, even if such company has a branch established in Colombian territory and there are no further elements of internationality of the dispute.

RECIPROCITY

Before the entry into force of the CAS, the issue of reciprocity was a key element which determined the enforceability of a foreign award in Colombia. The Supreme Court, notwithstanding Colombia's reservation-free adherence to the New York Convention, understood that article 693 of the Code of Civil Procedure limited the enforcement of foreign arbitral awards in Colombia to those that were issued in countries that would recognise Colombian awards.

Since the issuance of the CAS which expressly abrogated the provisions of article 693 of the Code of Civil Procedure, the Supreme Court has interpreted the requirement of reciprocity to

no longer be applicable, a posture it reiterated in Innovation Worldwide DMCC v Carboexco CI Ltda. Even though this is clearly a step in the right direction, it is still odd that the Supreme Court has failed to even address the fact that Colombia did not make a reciprocity reservation when it adhered to the New York Convention and still refers to domestic law to arrive at that conclusion.

Notes

1 Decision SU-174/07
2 UNCITRAL Model Law on International Commercial Arbitration, article 8(1) and New York Convention Article II, numeral 3.
3 Supreme Court of Justice, Decision issued by the civil chamber-SC8453-2016, Chief Justice: Ariel Salazar Ramirez.
4 Consorcio CISE was a consortium made up by two Mexican companies: Construcciones y Trituraciones SA de CV e Ingenieros Civiles Asociados SA de CV and a Colombian company,

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