

Arbitration & ADR - Ecuador

Court rejects petition to review ruling annulling award

Contributed by **Coronel & Pérez**

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The National Court of Justice has denied a petition to review a lower tribunal ruling which annulled an arbitral award. The decision was based on a strict reading of the cassation law. While the ruling follows some of the court's previous decisions on this matter, the sentence contains important – mostly favourable – views on arbitration. It remains to be seen whether the lower courts will follow these views.

Facts

A contract dispute arose between a private company (Nedetel) and a telecommunications stock corporation owned by the government (Pacifictel). The parties had agreed to settle their dispute through arbitration. The arbitral tribunal ruled in favour of Nedetel. It found that the defendant had breached the contract and awarded damages for \$11 million, including lost profits.

Pacifictel filed a nullity action under Article 31 of the Arbitration Law. It argued, among other things, that the arbitral tribunal had exceeded its powers since the plaintiff had declared that the quantum of its complaint was about \$3 million. It also argued that proceedings should have been stayed because a criminal investigation into the contract was underway.

The president of the Guayaquil Provincial Court dismissed the nullity action. He found that none of the grounds invoked by the losing party of the arbitration to annul the award were fulfilled. Pacifictel then filed an appeal with one of the chambers of the provincial court. In a terse ruling issued on November 17 2011 the chamber accepted the appeal and reversed the ruling of the president of the provincial court. The appeal was highly contested since there is no provision in the Arbitration Law to regulate an appeal for cases such as this.

Nedetel then filed a cassation recourse against the adverse ruling of the chamber of the provincial court. The recourse was filed with the National Court of Justice. By this time, Pacifictel had been transformed into a state company.

Decision

On April 7 2014 the National Court of Justice refused to hear the cassation petition. According to the court, rulings dealing with the nullity of arbitral awards fall outside the scope of cassation appeal.⁽¹⁾ Such recourse is limited to cases where a lower tribunal has ruled on the merits of a dispute. A ruling on the nullity of an arbitral award does not reach the merit of the underlying disputes, since that falls within the exclusive jurisdiction of the arbitrators. The court cited some of its previous decisions that follow the same reasoning.

Although the court may have ended its ruling by simply not admitting the cassation recourse filed by Nedetel, the magistrates went to some lengths to analyse several arbitration issues under Ecuadorean law. In general, the views expressed by the court were favourable to arbitration. They include the following:

- In hearing a nullity action against an arbitral award, provincial courts must refrain from examining the merits of the arbitrators' decision. The provincial court has the power to examine neither "the foundations of the award nor its accuracy".
- The judiciary must "avoid an excessive state interference in the settlement of disputes of private parties, who in their exercise of the autonomy of their will...decide to put aside the common jurisdiction and avail themselves to the arbitral jurisdiction".
- The petition to annul an arbitral award does not technically involve a judicial process, because there are no parties in the traditional sense. It is simply an expeditious procedure whereby judges must verify and decide within 30 days whether one or more of the grounds established by the law to annul the award have been satisfied.

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- The procedure to annul an arbitral award "excludes the possibility that such procedure be transform into a second instance to judge the award for its mistakes *in iudicando*, and in this way to modify its findings for the sole reason of not agreeing with them".
- The judge that hears a nullity petition is not a judge of a higher level with respect to the arbitral tribunal.
- The agreement to settle disputes through arbitration is a right constitutionally protected.

Comment

The ruling is the latest in a series of National Court of Justice decisions denying petitions to review sentences that deal with the nullity of arbitral awards. While the stance adopted by the court should help to reduce the uncertainty associated with the nullity of arbitration awards, it excludes the possibility of having a single body of jurisprudence for such an important area as the annulment of arbitration awards.

Thus, the interpretation of Article 31 of the Arbitration Law remains in the hands of more than a dozen provincial courts. However, the ruling under comment contains important statements in favour of the autonomy of arbitral proceedings. It remains to be seen whether the provincial courts will follow these views. Unfortunately, this was not so in the opinion of the chamber of the provincial court in this case. Its ruling is an example of the excessive interference of the judiciary in the arbitration process.

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Endnotes

(1) Trial 626-2013.

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