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Arbitral Tribunal	Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago (CAM Santiago) (Santiago Arbitration and Mediation Centre)
Date of the decision	29 May 2023
Case no./docket no.	3568-18
Case name	*Inter Rao UES et al. v. CELEC EP*

Abstract

by Juan Manuel Ramírez Cirera[*]

The case concerns a contractual dispute between a Russian public company and its Ecuadorian vehicle corporation, acting as Claimants, and an Ecuadorian public company, Respondent (the **«Parties»**). The dispute arises in connection with a project for the construction of a 254.40 MW hydroelectric power plant at the intersection of the Ecuadorian provinces of Pichincha, Santo Domingo de los Tsáchilas and Cotopaxi (the **«Project»**).

The Parties signed, in October 2010, a contract under which the Claimants committed to the Respondent, in return for the payment of USD 145 million, to supply, install and commission the turbogenerator units and other electro- and hydro-mechanical equipment relating to the Project (the **«Contract»**). The Arbitral Tribunal qualifies this agreement as a «semi-turnkey» one, insofar as the general coordination of the Project, the necessary civil works and its design were awarded to three separated entities.

The contractor and its client expressly decided that the «law of the Republic of Ecuador» was to be applied to the Contract. The Claimants argued in the arbitration for the application of the CISG (the **«Convention»**), given that, in their view, the Ecuadorian regime for public contracts entered into with foreign public enterprises would result in domestic procurement rules being displaced in favour of the relevant international treaties – in this case, the CISG. In this sense, such a special regime, when read in conjunction with Arts. 1(1)(a) and 3(1) CISG (as the Claimants categorise the Contract as a mixed sales and services contract covered by the Convention, circumventing the exclusion of Art. 3(2)), would determine that the Convention governs the agreement.

However, the Respondent argued that the relevant public procurement regime, the will of the parties (*ex* Art. 6 CISG) and the material scope of application of the Convention (Art. 3(2) CISG) determined the application to the Contract of the public procurement law of the Republic of

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Ecuador (i.e. the Ley Orgánica del Sistema Nacional de Contratación Pública and its Regulations) and, supplementarily, of its Civil Code.

The Arbitral Tribunal analyses the opinions of the Parties' legal experts and examines some of the existing doctrine on the application of the CISG to mixed contracts (and, in particular, to «turnkey» contracts), citing CISG Advisory Council (CISG-AC) Opinion No. 4[1]. However, it reaches the conclusion that the law applicable to the Contract is that proposed by the Respondent, given the relevant provisions of Ecuadorian public procurement law, and also arguing that, in any event, the Contract would fall within the scope of the exclusion of Art. 3(2) CISG. The arbitrators, however, do not conduct the economic preponderance analysis recommended in CISG-AC Opinion No. 4. Subsidiarily, the Arbitral Tribunal argues that the Parties had excluded, *ex* Art. 6 CISG, the application of the Convention; in particular, because in the Addendum No. 5 they had defined «Ecuadorian law» by reference to the Ley Orgánica del Sistema Nacional de Contratación Pública and the Civil Code.

After deciding the law applicable to the Contract, the arbitrators analyse the details of the dispute, which originated in March 2017, when the Respondent issued an administrative resolution declaring the unilateral and early termination of the Contract, alleging various breaches by the Claimants of their contractual obligations; notably, of those relating to compliance with the agreed deadline for the delivery of the construction; but also others, such as those concerning the quality of some of the equipment supplied, the provision of certain work schedules and the appointment of an appropriate representative.

Indeed, initially, the Parties agreed that the provisional acceptance of the works was to take place in May 2015; however, in March 2017, due to various causes (including geological failures at the site of one of the powerhouses), when the contract was terminated, i.e. almost two years later, approximately 15% of the works were still to be completed.

The Claimants argued in the arbitration proceedings that the various contractual breaches on which the Respondent based the termination of the Contract, including the delays, were in fact attributable to the Respondent; in particular, they argued that those were due to deficiencies in the development of the civil works by the Respondent's contractor, on whose progress the electromechanical works depended, and to delays in the payments of the various milestones (due to restrictions in the credit line that the Respondent had subscribed). In this regard, they requested that the Respondent be ordered to pay the termination value of the Contract, compensation for the damages suffered, as well as to repay to the Claimants the amount corresponding to the contractual guarantees executed after the termination (i.e. advance payment and performance guarantees). In addition, the corresponding amounts should be increased by the applicable interest rates and the Respondent should also be ordered to pay the costs of the proceedings and of the Claimants' legal defence.

[1] CISG-AC, Opinion No. 4, «Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)», 24 October 2004. *Rapporteur*: Professor Pilar Perales Viscasillas, Universidad Carlos III de Madrid.

The Arbitral Tribunal essentially upholds the Claimants, stating that they did not commit any fundamental breach that would entitle the Respondent to terminate the contract. In particular, the Arbitral Tribunal argues that the delays in delivery were due to causes attributable to the Respondent, and that, on the basis of these, the Claimants were entitled to obtain an extension of the contractual term until March 2018, i.e., one year later than the date on which the Respondent unilaterally decided to terminate the contract.

In this sense, accepting the claims (with the exception of that corresponding to the refund of the executed amount of the advance payment guarantee), the arbitrators ordered the Respondent to pay the Claimants a total amount of approximately USD 44 million.