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**International Arbitration Case Law // Case Report**

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**Award Name and Date:** Álya Construtora S.A. v. PDVSA Petroleo S.A. and Petroleos de Venezuela S.A. (ICC Case No. 24306/JPA/AJP) – Final Award – 25 July 2023

**Case Report:** Raul A. Ruiz Aguirre \*\*\*, Editor Ignacio Torterola \*\*\*\*.

**Main Issues:**

- Whether the claim is admissible.
- Whether the Respondents terminated the Contracts due to causes attributable to the Claimant.
- The appropriate compensation.

**Arbitral Tribunal:** Professor Diego P. Fernández Arroyo (President), Mr. Cristián Conejero Roos (Arbitrator) and Professor Franco Ferrari (Arbitrator).

**Claimant's Counsel:** Mr. Jose Ignacio Garcia Cueto, Ms. Marie Isabelle Delleur, Mr. Ignacio Diaz, Ms. Florencia Bohl, Mr. Hernan Chiriboga, Mr. Nicolas de La Flor Puccinelli (Clifford Chance US LLP, Washington DC).

**Respondents' Counsel:** Mr. Miguel Barraez, Ms. Annabella Rivas, Mr. Aldo Galindo (PDVSA Petroleos S.A. and Petroleos de Venezuela S.A.), and Mr. Roberto Antonio Leyba (Venatt International Advisors KFT A.C.)

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## **Digest:**

### **1. Relevant Facts**

The dispute in this case concerns a public procurement contract in the oil industry, entered into between the Claimant and PDVSA Petróleos, S.A.

The Claimant, Álya Construtora S.A. (formerly known as Construtora Queiroz Galvão S.A.) is a Brazilian company with a branch in Venezuela, mainly operating in the oil and gas construction sector. The Respondents, Petróleos de Venezuela, S.A. (“PDVSA”) and PDVSA Petróleos, S.A., are two of the main state-owned companies in Venezuela. These companies operate under a public law regime.

Between 2013 and 2014, PDVSA conducted a bidding process and, in June 2014, awarded a public procurement contract to the Claimant for the design, procurement and construction of an extension in the high-pressure gas compressor plant PIGAP II. This plant was used to recover oil deposits located in the Santa Barbara field, Monagas, Venezuela. The resulting contract, referred to as the PIGAP Contract, was signed on 27 November 2014. The PIGAP contract was amended in view of difficulties in financing the project, resulting in Addendum No. 1 – PIGAP.

In 2016, PDVSA conducted another bidding process, awarding a contract for the construction of two high-pressure gas compressors plants in Carito and Piritál, located in the Ezequiel Zamora Municipality, Monagas, Venezuela. This contract, referred to as the Carito-Piritál Contract, was signed on 24 January 2017.

On 6 April 2017, the Parties entered into a financing contract with Banco San Juan International Inc. (“BSJI”) for both projects. A trust agreement for USD 519 million was also executed. Accordingly, the PIGAP and Carito-Piritál contracts were amended to reflect changes in the payment system, resulting in Addendum No. 2 – PIGAP and Addendum No. 1 – Carito-Piritál.

Between 2017 and 2018, disputes arose about financing issues and the obligations in the Contracts. This led to the unilateral termination of the Contracts by Respondents on 9 October 2018.

### **2. Procedural History**

The Claimant sent to the Secretariat of the International Chamber of Commerce (“ICC”) a Request for Arbitration on 2 March 2019. The arbitral tribunal (“tribunal”) was constituted on 9 January 2020. Following the issuance of a Partial Award on Jurisdiction and Admissibility, the arbitration proceeded to the merits phase. The procedural history is marked by other events:

- The Tribunal issued several procedural orders to address document production and calendars.
- The Respondents submitted new objections to admissibility, which were addressed alongside the merits.
- The Hearing on Merits was held in Paris, France on 30 January and 1 February 2023.

- Both Parties submitted their costs certifications.
- The tribunal closed the investigation on 27 March 2023.
- The tribunal fixed the Costs on EUR 670,000.00 on 13 June 2023.

### **3. Positions of the Parties**

#### *3.1 Claimant's Position*

The Claimant sought a declaration that the Respondents had terminated the Contracts for reasons attributable to them. The Claimant also sought compensation for the 10% of the value of the uncompleted works and the price of the materials and equipment purchased, in accordance with the Venezuelan Public Contracts Law ("LCP"), the Public Contracts Regulations ("RLCP") and the Contracts. The Claimant requested a declaration of pre-award interest as well.

#### *3.2 Respondents' Position*

The Respondents sought the dismissal of the Claimant's claims, arguing that the claims were inadmissible because the Claimant had not exhausted the previous administrative trial established in the Venezuelan Organic Law of the Attorney General's Office of the Republic ("LOPGR"), and that the Contracts could not have any effect because they had not been approved by the Venezuelan National Assembly. Likewise, the Respondents held that the Claimant was not entitled to compensation because they had regularly exercised their right to unilateral termination. The Respondents contended that, even if the Tribunal found that the Claimant was entitled to his claims, the amount of compensation should be limited to the damages proven. The Respondents also contested the Claimant's request for pre-award interest.

### **4. The Admissibility of the Claim and the Previous Administrative Trial**

#### *4.1 Introduction of a New Claim by Respondents*

##### *a) Respondents' position*

In their Rejoinder, the Respondents requested that the Tribunal declare the Contracts null and void because they had not been approved by the Venezuelan National Assembly. They also requested the Tribunal to declare that the Contracts were terminated pursuant to Clauses 18.1.1 and 18.1.2 of the Contracts (¶ 166).

##### *b) Claimant's position*

The Claimant objects to the introduction of new claims on two grounds - first, because the claims were not included in the jurisdictional objections set out in the Terms of Reference and the Mission Statement, and second, because the Respondents never requested the Tribunal's approval to raise new objections pursuant to Article 23(4) of the ICC Rules (¶ 167).

*c) Tribunal's analysis*

The tribunal considered that the two new claims introduced by Respondents were outside the scope of the Rules. In particular, the Tribunal found that the two claims were not merely defensive allegations, but counterclaims brought outside the scope of the Rules without the Tribunal's approval. Hence, the new claims were dismissed (§ 168).

*4.2 Non-exhaustion of the Previous Administrative Trial by Claimant*

*a) Respondents' position*

The Respondents argue that the claims are inadmissible because the Claimant should have exhausted the previous administrative trial provided for in the LOPGR (§ 172), and that this objection could not have been expressly or impliedly waived because the provisions of the LOPGR are public policy (§ 174).

*b) Claimant's position*

The Claimant submits that the previous administrative trial in the LOPGR applies only to patrimonial claims processed before the contentious-administrative jurisdiction and not in arbitration, as it is not part of the Venezuelan contentious-administrative system (§ 178).

*c) Tribunal's analysis*

Article 68 of the LOPGR establishes the previous administrative trial to be followed by any person who intends to bring a patrimonial claim against Venezuela.

The Tribunal maintains that the preclusive effect of the Partial Award renders meaningless the Respondents' contention that the claim is inadmissible because the Claimant failed to exhaust the previous administrative trial (paras. 180-183). The Respondents never raised such an objection during the pre-trial phase, neither in their memoranda nor at the hearings. Therefore, the tribunal held that the admissibility was a precluded issue and rejected the Respondents' objection (§ 184).

The tribunal also decided that the Respondents' use of Venezuelan Public Policy to avoid preclusion was not relevant for two reasons. On one hand, public administrative procedural provisions are inapplicable since the law applicable to procedural matters when not governed by the procedural rules agreed by the Parties is the law of the seat, which is Paris (§ 187). On the other, the tribunal remarked that the Venezuelan administrative jurisdiction and the international arbitral jurisdiction are two separate and distinct instances, and that accordingly the French law had no rule on admissibility of arbitration claims against public entities (§ 188).

## 5. Termination of the Contracts

### 5.1 The Disbursement of Advance Payments

#### a) Claimant's Position

The Claimant argues that the Respondents wrongly terminated the Contracts on the basis of a non-existent ground, such as breach of the term for commencement of works. Accordingly, the Claimant asserts that such a ground does not exist because the commencement of the works was made conditional on the disbursement of advance payments by the Respondents, as provided for in Addendum Nos. 1 and 2 - PIGAP (paras. 190-191).

The Claimant submits that the obligation to disburse advance payments provided for in Addendum No 1 - PIGAP cannot be considered invalid, since the Respondents accepted the same obligation in the Carito-Piritall Contract (¶ 192).

Claimant contends that it submitted the bond and advance payment receipt for the PIGAP Contract on 7 and 12 December 2017 and 9 February 2018, respectively, and the bond and advance payment receipt for the Carito-Piritall Contract on 20 July 2017.

#### b) Respondents' Position

The Respondents argue that the advance payment obligation introduced by Addendum No. 1 - PIGAP violates the Respondents' exorbitant prerogative under Venezuelan administrative law and is consequently invalid (paras. 206-207).

The Respondents maintain that the Claimant should have carried out the works within the initial period of 445 days provided for in the PIGAP Contract, without considering the amendments of the Addendum or the effective date of any other contract (¶ 209). Accordingly, they also maintain that the failure on their part could not result in the non-performance of the Claimant's obligations, i.e. that the *exceptio non adimpleti contractus* is not applicable in this case (¶ 210).

#### c) Tribunal's analysis

The execution of both Contracts was linked to the financing obtained with BSJI on 6 April 2017 (¶ 231). Accordingly, the Tribunal found that the PIGAP Contract was adapted by Addendum No. 1 - PIGAP to include the advance payment obligation, which was finally modified by Addendum No. 2 - PIGAP to 15% of the dollar amount related to the purchase of materials and equipment (para. 233-234). The Carito-Piritall Contract established the advance payment obligation from the outset, consisting of the payment of 10% of the dollar amount related to the acquisition of materials and equipment (¶ 232).

As to the existence of the advance payment obligation provided for in the PIGAP Contract, the tribunal found that such an obligation existed from a logical point of view (¶ 237). The tribunal ruled that the advance payment obligation established in the PIGAP Contract was valid under the LCP, especially since Article 128 expressly allows for the establishment of an advance payment obligation (¶ 238). Thus, the tribunal considered the advance payment obligation to

be valid since it does not violate any exorbitant prerogative of the Venezuelan public administration (¶ 239).

With respect to the conditions for payment of the advance, the Tribunal found that the Claimant's late submission of the receipt and bond for the advance was due to the Respondent's own requests during informal negotiations (para. 245-251). Although the contracts did not allow for informal modifications, the tribunal found that it would be contrary to good faith, honesty and transparency to accept the Respondents' justification for unilateral termination based on non-compliance with certain formalities caused by the Respondents' instructions (para. 252-253). Moreover, the tribunal considered that the Respondents were bound by their own actions and could not terminate the Contracts because of what they had provoked (¶ 254).

## *5.2 Ex Post Facto Reasons invoked to the Termination of the Contracts and Conditions for the Exercise of the Right to Unilateral Termination*

### *a) Claimant's position*

The Claimant argues that the Respondents' justifications for the unilateral termination under clauses 5.8.3 and 5.8.4 of the Contracts cannot be accepted because they were not raised at the time of the termination, but afterwards. According to the Claimant, neither the administrative decisions nor the termination letters mentioned these clauses (¶ 201).

The Claimant also submits that, even if termination could be justified under these clauses, the Respondents did not comply with their obligation to give prior written notice for the right of unilateral termination, since the notices sent referred to grounds other than those mentioned in clauses 5.8.3 and 5.8.4, respectively (¶ 203). Furthermore, the Claimant submits that the right of unilateral termination in Clauses 5.8.3 and 5.8.4 cannot apply here, since the terms were extended by the signing of the Addenda after the Financing Contract (¶ 204). Finally, the Claimant submits that unilateral termination cannot be invoked because the grounds leading to termination are imputable to the party invoking it, i.e. the Respondents (¶ 205).

### *b) Respondents' position*

The Respondents reject the Claimant's argument that *ex post facto* grounds cannot be accepted, stating that the rule relied on by the Claimant applies only to administrative acts (¶ 215). In addition, the Respondents note that Clauses 5.8.3 and 5.8.4 provide a right of unilateral termination for both parties in the event of failure to obtain funding or disburse the advance payment within 12 months of the effective date (¶ 217). Respondents understand these conditions to be alternative and not cumulative (¶ 218).

The Respondents contend that the notices of termination did not have to state the actual reasons for terminating the Contracts (¶ 221). Respondents also submit that, in an email dated 6 September 2018, they gave prior notice in accordance with the Contracts. Accordingly, the Respondents maintain that they regularly exercised the right of unilateral termination as provided in the Contracts. (¶ 222).

### *c) Tribunal's analysis*

The tribunal remarked that the Venezuelan State and its companies are obliged to issue motivated acts in order to guarantee the right of defence, including administrative decisions terminating public contracts (§ 257). This finding was supported by the Respondents' expert, who confirmed that the obligation to motivate administrative decisions is enshrined in Venezuelan laws and case law, and is therefore applicable to administrative contracts (§ 258).

The tribunal found that the Respondents never mentioned in any of the administrative decisions or notices that the Contracts were being terminated under clauses 5.8.3 and 5.8.4, respectively. Far from considering the validity of the administrative acts, the tribunal concluded that the exercise of unilateral termination on grounds other than those invoked at the time of termination is unacceptable (§ 261). Therefore, the Respondents' argument that the Contracts were terminated in accordance with Clauses 5.8.3 and 5.8.4 of the PIGAP and Carito-Pirital Contracts is unacceptable and contrary to the guiding principles of Venezuelan public procurement law (§ 262).

### *5.3 Breach of Terms for the Execution of the Contracts*

#### *a) Claimant's position*

The Claimant contends that the first clause of Addendum No. 1 - PIGAP modified the term for the execution of the PIGAP contract. For this reason, the Claimant understands that Addendum No. 1 - PIGAP modified the conditions for the commencement of the works so as to make it conditional upon the Respondents' disbursement of the advance payment and the signing of the Minutes of Commencement of Works. Therefore, the Claimant contends that the Respondents are responsible for the breach of the term for the execution of the works, since they never fulfilled their obligation to disburse the advance payments, nor informed the time in which the Minutes were to be signed (paras. 190-191).

With regard to the Carito-Pirital contract, the Claimant alleges that the Respondents failed to observe the 760-day term set out in the contract, which was due in February 2019 and not October 2018, as the Respondents wrongly stated in the administrative decision terminating the Carito-Pirital contract (§ 197). The Claimant therefore submits that the Respondents terminated the contract prematurely. In addition, the Claimant argues that the Respondents' assertion that the Claimant was required to perform the Contracts with its own funds is contrary to the Contracts and that, therefore, the commencement of the works was conditioned by the advance payments (§ 193).

#### *b) Respondents' position*

The Respondents argue that the modifications introduced by Addendum No. 1 - PIGAP for the execution of the PIGAP Contract are invalid (§ 207). Accordingly, the Respondents understand that the applicable period is the 445 days (§ 209) to be counted from the signature of Addendum No. 1 – PIGAP (§ 218). With regard to the Carito-Pirital Contract, the Respondents contend that the effective date was 24 January 2017, and accordingly, the term to carry out the works would have expired on 24 January 2018 (§ 219).

The Respondents also claim that the Claimant began to execute the contracts despite the lack of advance payments, thereby waiving the condition precedent to the commencement of the works (¶ 208).

*c) Tribunal's analysis*

The tribunal found that the PIGAP Contract was validly amended by the clauses of Addendum No. 1 – PIGAP, thus rejecting the Respondents' argument that the regime of the original PIGAP Contract was applicable due to the invalidity of the first clause in the Addendum. Accordingly, the tribunal found that the Addendum provided for a commencement date, which was the time indicated by the Respondents after having received the advance payments receipts and bond; such a date was to be evidenced in the signing of the Minute of Commencement (¶ 274). The tribunal determined that the Respondents did not specify the commencement date and that, consequently, there was no breach of the time limit for performance of the PIGAP contract (¶ 275).

With respect to the Carito-Pirital Contract, the tribunal concluded that it was also subjected to the signature of a Minute of Commencement, which was never signed (¶ 277). Furthermore, after noting that the administrative decision to terminate the Carito-Pirital Contract used the same language as the administrative decision used for the termination of the PIGAP Contract, the tribunal found that the Respondents had failed to observe the full term established in the Contract by terminating it before the end of its term (¶ 278).

The Tribunal rejected the Respondents' argument that the Claimant's performance of the works despite not having signed the Minute of Commencement constituted a waiver by the Claimant of that condition. Nor did it consider that such a fact could be interpreted to mean that the Claimant should have completed the works with its own funds (paras. 279-280). Therefore, the Tribunal did not find a breach or waiver by the Claimant of the conditions for commencement of work in the Carito-Pirital Contract (¶281).

*5.4 Submission of Bonds*

*a) Claimant's position*

The Claimant submits that it provided all the bonds required by the two Contracts (paras. 194-195). The Claimant also notes that the Contracts provided for withholding of payments in the event of failure to submit the Performance Bond and the Labour Liability Bond, and that accordingly the Respondents could not have terminated the Contract for failure to produce these documents in view of another contractual remedy (¶ 196).

*b) Respondents' position*

The Respondents contend that the Claimant failed to maintain the bonds required by the Contracts. Although the Respondents acknowledge that the Claimant filed the bonds in connection with both Contracts, they note that the bonds were received late (¶ 211). In the case of the PIGAP contract, the Respondents contend that the Claimant failed to maintain the bonds in force (¶ 214). In addition, in the case of the Carito-Pirital Contract, the Respondents argue that the Bonds are ineffective because the Commencement Documents for the Works were

never signed and that, moreover, the effectiveness of the Bonds depends on the signature of the Commencement Documents. As a result, the Respondents understand the Claimant failed to comply with its obligation to maintain the Bonds (§ 213).

*c) Tribunal's analysis*

Both contracts provided for the obligation to maintain performance and labour bonds from the signing of the contracts until the issue of the certificate of provisional acceptance and 6 months after the issue of the certificate of provisional acceptance (§ 283).

The bonds related to the PIGAP Contract contained a statement indicating that they were issued in accordance with the General Conditions of the Surety Agreement with Government Agencies. Clause 2 of the General Conditions stipulated that the bonds issued in relation to public contracts must remain in force until the bond is released, the object of the contract is fulfilled and other conditions, which did not include a term of one year (§291). Although the bonds also contained another statement referring to a term of one year, the tribunal found that it would be inconsistent with the General Conditions to consider that the bonds were valid for only one year (§292).

In addition, the tribunal observed that the Respondents only raised issues relating to the bonds at the time of termination of the PIGAP Contract and not earlier (§293). Thus, the tribunal found that the Respondents had failed to prove their allegation that the bonds were not in force and consequently, that the Claimant had fulfilled its obligation to keep the bonds in force (§294).

Lastly, the tribunal concluded that the Respondents had created certain legitimate expectations in the Claimant with regard to the continuity of the Carito-Piritral contract despite the absence of a signature of the Commencement Documents for the Works (§ 296). Consequently, the tribunal rejected Respondents' argument about the efficacy of the bonds in the Carito-Piritral contract, and held them accountable for their own actions (paras. 297-299).

## **6. The Right to Compensation under the LCP and the RLCP**

### *6.1 The Right to Compensation*

*a) Claimant's position*

The Claimant argues that, under the LCP and the RLCP, it is entitled to compensation for (i) the price of the work actually carried out, (ii) the price of the materials and equipment, and (iii) a compensation of 10% of the value of the work not carried out (§ 302). The Claimant submits that it is irrelevant which authority is obliged to pay the compensation, i.e. both Respondents are jointly and severally liable for the payment of the compensation (§ 303).

*b) Respondents' position*

The Respondents deny that the Claimant is entitled to any compensation since they terminated the Contracts pursuant to the termination clauses of the Contracts (§ 304). As a subsidiary

contention, the Respondents argue that the Claimant is not entitled to any compensation because the Contracts were terminated due to the Claimant's breaches of the Contracts (§ 305).

The Respondents contend that, even if the previous arguments are rejected, the Claimant cannot recover costs and expenses under both the RLCP and the scenario set out in the Contracts at the same time. The Respondents argue that the Claimant has already requested the compensation under the scenario in the Contracts, and therefore, if compensation were to be awarded under the RLCP as well, this would only constitute unjust enrichment (§ 307). The Respondents assert that the Contracts could not produce effects because they were not approved by the Venezuelan National Assembly (§ 308).

Finally, the Respondents reject that both are jointly and severally liable, and maintain that each Respondent should be held liable to the extent of their participation in the conclusion, performance and termination of the Contracts (§ 318).

### *c) Tribunal's Analysis*

Article 153 of the LCP and Article 191 of the RLCP establish the right to compensation when the public entity terminates the contract for reasons not attributable to the contractor, i.e. the Claimant in this case. Compensation under these provisions, as it could be applied to this case, can be divided into three parts. First, a right to compensation for the price of the work actually carried out. Second, a right to compensation for the costs and expenses of acquiring the materials to be incorporated into the work. Third, a right to compensation equal to 10% of the value of the work not carried out.

The tribunal found that the termination clauses in both contracts were not applicable in this case because they dealt with the scenario of termination for causes attributable to the contractor (§313). In addition, the tribunal supported the analysis in its previous finding that the Contracts were terminated for reasons not attributable to the Claimant (§314). Therefore, the Tribunal found that the Claimant was entitled to compensation under the LCP and the RLCP (§317).

Finally, the tribunal held that both Respondents were jointly and severally liable for the compensation due for the termination of the two contracts. The tribunal stated that although PDVSA Petroleos, S.A. was always involved as a signatory, the liability of PDVSA could be determined from its constant control of the operations, the signing of the financing contract and the issuance of the administrative decisions terminating the contracts (§321).

## *6.2 The Quantum of the Compensation*

### *a) Claimant's position*

The Claimant argues that the suspension of the Contracts due to the non-fulfillment of the suspensive conditions in no way affects the payment of the compensation under the LCP and RLCP (§ 323). The Claimant also argues that it must apply a certain exchange rate in order to preserve the intention of the parties in drafting the Contracts (para. 328-329). The Claimant understands the percentages set in Article 191 of the RLCP as fixed and predetermined amounts, and not as ceilings (§ 330).

With respect to the compensation of costs and expenses, the Claimant submits that the change in the language of the invoices to be compensated does not alter the reasonableness of the compensation (§ 324). In addition, the Claimant asserts that the costs submitted relate to the site work, engineering, construction and movement of personnel necessary for the performance of the contractual obligations, and are therefore compensable under Article 191 of the RLCP and Clauses 18.4 and 18.7 of the Contracts (§ 327). The claimant also sought pre-award interest (§ 332).

Finally, the Claimant estimates the amount of its claim for the PIGAP Contract to be USD 20,999,984 and Bs. 88.198.725 for the 10% of the works not carried out, and USD 15,811,121 for the costs and expenses. For the Carito-Piritall Contract, Claimant estimates its claim at USD 30,869,234 and Bs. 2.604.428.129 for the 10% of the value of the works not executed, and USD 14,116,186 for costs and expenses (§ 343).

*b) Respondents' position*

The Respondents contend that the non-fulfillment of the suspensive conditions caused the suspension of the Contracts, which can only mean that the Claimant assumed all the costs and expenses on its own and therefore, is not entitled to any compensation (§334).

The Respondents understand the percentages in Article 191 of the RLCP as a ceiling that varies according to the Claimant's proof of the damage caused. The Respondents contend that the exchange rate used by the Claimant is incorrect (§ 339). They also request that the compensation for costs and expenses be calculated in Bolivares (§ 340).

They deny that the expenses presented by the Claimant are compensable, as they consider that such expenses do not relate to the performance of the Contracts, and reiterate that the expenses submitted lack evidentiary support and an actual link between the expenses and the execution of the Contracts (§ 337). Furthermore, the Respondents argue that pre-award interest is not due because the amounts to be compensated are neither liquid nor enforceable (§ 338).

*c) Tribunal's analysis*

The tribunal maintained its previous finding that the termination was due to causes not attributable to the Claimant, and therefore considered the compensation under Article 191 of the RLCP to be admissible (§347). The Tribunal further held that the percentages described in that Article were not ceilings subject to the tribunal's free appraisal, rejecting the Respondents' argument that the Claimant could only receive compensation for proven damages (§357).

The tribunal accepted the Claimant's proposed amount for compensation of the 10% of the value of the works not executed, although it determined that the amounts due in Bolivares would have to be converted because of the two national conversions in 2018 and 2021 (para. 363-364).

The tribunal turned to the question of the quantum of compensation for the Claimant's costs and expenses. The tribunal asserted that the Claimant had no legal basis under the contracts to recover such costs and expenses, but examined this possibility under Article 191 of the RLCP. While the Claimant submitted up to 4351 accounting items, the tribunal found evidential

support for only 819 items (¶ 369), which were reduced to 632 items. Of the 632 items, the tribunal found that only 60 related to the Contracts (¶ 382). Finally, the tribunal concluded that although the 60 items were related to the Contracts, they were not compensable under Article 191 because they were never incorporated into the works (¶385).

The tribunal rejected the claim for pre-award interest on the basis that the obligation to pay any amount could only have arisen from the date on which the facts were established (¶386). However, the tribunal awarded post-award interest at an annual interest rate of 6% from the date of notification of the award to the date of actual payment (¶392).

## **7. Costs**

Each Party requested that the other Party bear the full fees and expenses of the arbitrators, the ICC's administrative expenses, and the costs of presenting its case. The costs of the arbitration were determined to be USD 771,774.00. The Claimant's legal costs were USD 1,024,210.90. The Respondents' costs were USD 1,772,061.83. The costs therefore amounted to USD 3,528,046.73.

The tribunal decided that 63% of the costs should be borne by the Respondents and 37% by the Claimants (¶397).

## **8. Decision**

The tribunal decided as follows:

- Rejected as inadmissible Respondents' contention that the Contracts were invalid and that the Contracts could not produce effect for the lack of authorization of the Venezuelan National Assembly.
- Dismissed the Respondents' claims that the Claimant had waived its right to compensation, that the claim was inadmissible because the previous administrative trial had not been exhausted, and that the Respondents had validly exercised their right to terminate the contracts unilaterally.
- Declared that the Contracts were terminated for causes not attributable to the Claimant, and accordingly ordered the Respondents jointly and severally to pay the compensation stipulated under the LCP and RLCP for the unilateral termination for causes not attributable to the Claimant.
- Established the Compensation for the PIGAP Contract at USD 20,999,984 and VED 00.0008. Established the Compensation for the Carito-Piritall Contract at USD 30,869,234 and VED 00.0260.
- Rejected Claimant's request for pre-award interest and determined that the amounts due as compensation are subject to an annual interest rate of 6%, from the date of notification until the date of actual payment.
- Declared that the costs and expenses submitted by the Claimant are not compensable.
- Ordered the Respondents to pay USD 2,222,669.43 and the Claimant to pay USD 1,305,377.29 for the costs of the arbitration.