Arbitration 2018

Colombia

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Gómez-Pinzón (Bogotá)

LATIN LAWYER
Reference

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Legislation

1 Which legislation governs the enforcement of international commercial arbitration awards and arbitral agreements in international business contracts, and international commercial arbitration proceedings?

The New York Convention and Law 1563 of 2012 (the Arbitration Statute) govern the recognition and enforcement of international commercial arbitration awards and arbitral agreements in international business contracts, as well as international commercial arbitration seated in Colombia.

The Arbitration Statute adopts a dual arbitration system that sets forth different rules for domestic arbitration and international arbitration. The arbitration is qualified as international if:

(a) the parties to the arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different states; or (b) a substantial part of the contractual obligations is to be performed outside the State in which the parties have their domiciles, or the place with which the subject-matter of the dispute is most closely connected is situated outside the State in which the parties have their domiciles; or (c) the controversy has any incidence whatsoever on international commerce. (Arbitration Statute, article 62).

The Arbitration Statute was enacted on 12 July 2012, but entered into force on 1 September 2012 (article 119, Arbitration Statute). So far there are no pending proposals in the legislature to modify the Arbitration Statute. As per article 62 of the Arbitration Statute, it applies either to local or international arbitrations seated in Colombia which commenced after its entry into force. However, articles 70, 71, 88, 89, 90 and 111 to 116 of the Arbitration Statute, regulating the intervention and assistance of local courts in aid of international arbitration apply regardless of the seat of the arbitration.

2 Has the UNCITRAL model arbitration law been adopted in your jurisdiction?

Yes, the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) was adopted in Colombia through its insertion, with certain modifications, in the Third Section, Chapters I to IX (articles 62 to 116) of the Arbitration Statute. Such inclusion is a consequence of the conclusions contained in the legislative motivation document of the Arbitration Statute on the proven efficacy of the Model Law, which reflect the global consensus upon the principles that govern the international arbitration practice. Some of the significant variations from the Model Law include the following:

- The Arbitration Statute does not implement article 1.3 (b) (i) of the Model Law, according to which an arbitration is international if the place of arbitration selected in the arbitration agreement is located outside the state in which the parties have their place of business.
- It adopts the objective criterion set forth in article 1492 of the French Code of Civil Procedure, according to which an arbitration is international if the dispute submitted to arbitration affects the interests of international commerce (Arbitration Statute, article 62 (c)).
- It does not adopt article 1.3 (c) of the Model Law pursuant to which an arbitration is international if: "the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country" (Model Law, 2006 amendments).
- It added a provision expressly indicating that a state or state owned/controlled company, which is a party to an arbitration agreement, may not invoke the provisions of its internal law to challenge its capacity to arbitrate or the arbitrability of the dispute (Arbitration Statute, article 62).
- Colombian courts may refuse to enforce an interim measure or an award if they find that such decision is contrary to Colombia's international public policy, rather than just international public policy (Arbitration Statute, article 89 1.b) ii, and article 108 2. b)).
- When neither party is domiciled or a resident in Colombia, the parties may waive their right to bring an action to set aside the award, or limit it to one or more of the grounds exhaustively listed in the Arbitration Statute (Arbitration Statute, article 107). However, in this case, recognition proceedings are mandatory in order to enforce the award in Colombia (Arbitration Statute, article 111 3).

Conventions

3 Is your jurisdiction a party to both the New York Convention and the Panama Convention? Is it a party to any other

conventions or treaties governing international commercial arbitration agreements, awards or proceedings?

Yes, Colombia is a party to the New York Convention, which was adopted through Law 39 of 1990. Colombia is also a party to the Panama Convention, which was adopted through Law 44 of 1986.

Colombia is also a party to the 1940 Montevideo Treaty on International Procedural Law and the 1979 Montevideo Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.

4 Is your jurisdiction a party to the ICSID Convention? Have steps been taken to renounce the Convention or withdraw from ICSID?

Yes, Colombia is a party to the ICSID Convention. The convention entered into force on 14 August 1997 (it was adopted through Law 267/95). No steps to withdraw from ICSID have been reported.

5 Is your jurisdiction a party to other conventions that directly affect the enforceability of arbitration agreements, rights or awards?

No Colombia is not party to any convention that directly affect the enforceability of arbitration agreements, rights or awards.

Commercial arbitral agreements and arbitrability

6 Some jurisdictions have permitted parties to compel resolution of a dispute by means of arbitration only if the agreement to arbitrate was entered into after a dispute has arisen. Is a pre-dispute arbitration clause to resolve international commercial disputes by arbitration enforceable?

Article 69 of the Arbitration Statute uses the term arbitration agreement, and provides that it could be reached as an arbitration clause or as an independent agreement. Both terms allow the parties to agree on pre-dispute clauses, eg, by its inclusion in a specific business transaction, or on a separate agreement but included by reference in such transaction, and on a post-dispute agreement, commonly known as compromiso. An international arbitration agreement, regardless of whether it appears in the form of a pre-dispute clause, as a separate agreement or as a post-dispute agreement, is enforceable (New York Convention, article II; Arbitration Statute, article 69). The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement in writing, provided the reference is such as to make that clause part of the contract (Arbitration Statute, article 69 d)).

In domestic arbitration, the Arbitration Statute distinguishes between pre-dispute arbitration clauses, separate pre-dispute agreements and separate post-dispute agreements (Arbitration Statute, articles 3-6). All three are enforceable.

7 What are the requirements for an enforceable arbitral agreement?

To be enforceable, as per the Arbitration Statute, an international arbitral agreement must comply with the following requirements:

- be in writing (Arbitration Statute, article 69), that is, if there is evidence of its content by any means, regardless of whether it was concerted orally or as a consequence of the specific performance of certain acts by the parties (Arbitration Statute, article 69 a), eg, by the exchange of electronic communications (Arbitration Statute, article 69 b) or if it is contained in the statement of claim and defence or its existence is not expressly denied by the parties;
- an express undertaking of the parties to submit to arbitration present or future disputes regarding a specific legal relationship (Arbitration Statute, article 69; New York Convention, article II); and
- concern a matter capable of being resolved by arbitration (Arbitration Statute, article 62; New York Convention, article II).

In domestic arbitration, the arbitration agreement in the form of a compromiso must include the name of the parties and the specific disputes to which is related (Arbitration Statute, article 6). The agreement in the form of an arbitration clause might be included in the contract to which is referred or in a separate document that refers unequivocally to such contract (Arbitration Statute, article 4).

8 Is there subject matter that is not legally subject to arbitration in the context of an international business transaction?

Yes, in principle, under Colombian law, certain matters may not be subject to arbitration. Article 62 of the Arbitration Statute provides that the special regulation on international arbitration contained in the Third Section does not affect any other local law that excludes the arbitrability of certain matters.

- In this sense, in addition to the public order as a limit to the matters subject to arbitration, Colombian law may introduce additional limits. And in this sense, as a general rule, only disputes concerning matters that may be directly settled by the parties or authorised by law can be submitted to arbitration (Arbitration Statute, articles 1 and 62; Constitutional Court, Decision C-098/01), that is, disputes referred to economic rights that neither contravene nor impacts mandatory statutory law (Constitutional Court, Decision SU-174/07), including the possibility to challenge the decisions taken by the board of directors or by the general assembly of shareholders provided that the arbitration clause was agreed after the Arbitration Statute entered into force (Arbitration Statute, article 118 and Supreme Court of Justice, Civil Chamber, Decision STC114132-2016)

Colombian law considers that the following matters are not subject to arbitration:

- claims related to family law, civil status and criminal matters.
- disputes arising out or related to provisions involving public policy and good usages, the rights of incapacitated persons and disputes related to the workers' minimum rights (Constitutional Court, decision C-294/95 and decision C-330/00).
- the legality of administrative acts issued in use of the Administration's "exceptional powers", listed in article 14 of Law 80/93 (ie, unilateral interpretation, unilateral modification, unilateral termination and expiry of state contracts, as well as the subjection of these contracts to domestic

law). (Constitutional Court, Decision C-1336/00 and SU-174/07).

antitrust disputes (Law 1340/09, article 6).

9 Are there any limits to the ability of a state or an instrumentality of the state to enter into an agreement to arbitrate in your jurisdiction? If so, under what circumstances may the state or its instrumentalities enter into such an agreement? Please describe the requirements that must be met for the state to enter into a binding arbitration agreement.

Yes, but such limitation is not absolute and was created for the judicial protection of the interests of the State and for the coordination and control of the activities of the instrumentalities and entities of the Executive Branch of the State as identified in article 56 of Law 489 of 1998.

Such limitation, set forth in the Presidential Directive 03 (23 December 2015), provides that an agreement to arbitrate in contracts governed by Law 80 of 1993 (General Government Procurement Statute), must follow an explicit decision, after an assessment of the convenience of derogating the competence of the administrative jurisdiction. Such assessment must consider, inter alia, the nature of the parties, the subject matter of the contract and the amount of the claims.

Consequently, prior to executing the arbitration agreement, the secretary-general of the state instrumentality or its legal office director must issue an opinion and the directors of the said instrumentality must justify in writing the convenience of agreeing on arbitration, national or international as part of the preparatory contractual works. The same conditions are included in the District Directive 002 of 2016, applicable to the Capital District entities and instrumentalities.

There are no reported cases that review the legality or validity of the aforementioned directives.

Finally, article 62 of the Arbitration Statute provides that a state or instrumentality that are a party to an agreement to arbitrate cannot invoke the provisions of its domestic law to challenge its own capacity to be a party in an arbitration proceeding or the arbitrability of a dispute covered by the arbitration clause.

10 Does the law specify whether an arbitration will be in equity or under law if the parties do not expressly specify the nature of the arbitration in the agreement?

Pursuant to article 101 of the Arbitration Statute, in international arbitration, the arbitral tribunal can decide ex aquo et bono only if the parties so authorise.

In domestic arbitration, an award may be done under Law, in equity or by experts (Arbitration Statute, article 1). If the parties do not specify the nature of the arbitration in the agreement, the arbitration shall be under law (Arbitration Statute, article 3). Additionally, article 1 of the Arbitration Statute also establishes that arbitration proceedings involving state entities where disputes relate to state contracts shall be under law.

11 How does the law limit party autonomy with respect to the terms of an arbitral agreement?

Under the international arbitration section of the Arbitration Statute, parties may tailor arbitration proceedings according to their needs, including the number of arbitrators, the appointment procedure and the arbitral institution of their choice. Additionally, the law does not prohibit that parties agree to a seat in a foreign jurisdiction.

The section on domestic arbitration of the Arbitration Statute provides that arbitrators shall be appointed by agreement of the parties or by a third party designated by them, eg, the Administrating Institution. If the parties or the designated third party fail to make the appointment, the civil circuit judge will be empowered to appoint the arbitrators (Arbitration Statute, article 8). Additional restrictions on the arbitrators are imposed for domestic arbitration; for example, the arbitrator must be a Colombian national and meet the qualifications to serve as a judge in a court of second instance (Arbitration Statute, article 7). Parties are also free to specify the arbitral institution of their choice.

12 Under what circumstances does the law allow a non-signatory to an arbitral agreement to pursue a claim in an international arbitration against a party that signed the arbitral agreement?

The international section of the Arbitration Statute does not contain an express provision regulating the matter. Additionally, there are no reported cases on this issue.

13 Under what circumstances does the law allow a signatory to an arbitral agreement to pursue a claim in an international arbitration against a party that did not sign the arbitral agreement?

The international section of the Arbitration Statute does not contain an express provision regulating the matter. Additionally, there are no reported cases on this issue.

14 Under what circumstances may a non-signatory to an arbitral agreement compel arbitration of a claim asserted against it in a court of law by a signatory of the arbitral agreement?

The international section of the Arbitration Statute does not contain an express provision regulating the matter. Additionally, there are no reported cases on this issue.

15 Is there any law in your jurisdiction specifically governing the arbitrability of consumer or labour disputes?

Article 43 of Law 1480 of 2011 (Consumer Statute) prohibited the inclusion of arbitration agreements in consumer contracts. However, with the sanction and entry into force of the Arbitration Statute, such prohibition was eliminated (Arbitration Statute, article 118), thus making consumer disputes arbitrable under Colombian Law.

In addition, per article 80 of Decree 1829 of 2013, arbitration agreements in consumer matters (i) must be included in the form of an option contract in favour of the consumer in the contract, (ii) must be clear, precise and be informed at the celebration of the contract and; (iii) the acceptance of the consumer must be explicit at the celebration of the contract, or else it ceases to have effects. In relation to the arbitrable matters under consumer disputes, article 81 of Decree 1829 of 2013 provides that any dispute arising from a consumer relation, in any of its phases, or originated in the legal transaction entered

upon consumers and producers to acquire goods and services are arbitrable.

In relation to labour law, arbitrable disputes can be classified in two mayor groups: (i) collective labour disputes; and (ii) individual labour disputes. First, in relation to collective labour law matters, disputes subject to arbitration can be further divided in to two categories: (i) those subject to obligatory arbitration; and (ii) those subject to voluntary arbitration.

As established by article 454 of the Labour Code, the following disputes are subject to obligatory arbitration: (i) collective labour disputes in essential public services which were unable to be solved through direct settlement; (ii) collective labour disputes in which the workers decide, after the direct settlement stage, to submit the conflict to arbitration; (iii) collective labour disputes from a minority union, if the absolute majority of the workers have not gone on strike. It is important to take into account that, given the economic nature of these collective labour disputes, obligatory arbitration is ex aequo et bono. On the other hand, any other collective labour dispute may be subject to voluntary arbitration if the collective agreement has an arbitration agreement or if the parties to the conflict celebrate a post-dispute agreements. Voluntary arbitration can be both in law or ex aequo et bono.

In second place, in relation to individual labour law disputes, as per article 130 of the Code of Labour Procedure, employers and employees may subject their individual disputes to arbitration if the conflict is of legal matter, it is not related to inalienable rights and the arbitration agreement is celebrated after the dispute has arisen.

16 Does your jurisdiction provide for class-action arbitration or group arbitration? If so, are there any limitations to the arbitrability of such claims or requirements that must be met before such claims may be arbitrated?

The Arbitration Statute does not expressly provide for class action or group arbitration. It must be noted that the Supreme Court of Justice, in a decision of 11 May 2001, held that arbitral tribunals are competent to decide class actions, when all the parties of the class action are parties to the arbitration agreement (Supreme Court of Justice, Civil Chamber, Ref: Exp 11001220300020001-0183-01, MP, Carlos Ignacio Jaramillo, 11 May 2001).

Class actions, as established in article 88 of the Colombian Constitution, are envisioned as a means of redress for the harm that was caused to several people by the same circumstance (Constitutional Court, Decision C-242-2012, MP, Luis Ernesto Vargas Silva, 22 March 2012). It is an action over subjective rights that can be assessed economically (Constitutional Court, Decision C-242-2012, MP, Luis Ernesto Vargas Silva, 22 March 2012), and thus it is, in principle, arbitrable.

There is one reported case of 30 January 2004, whereby a tribunal in a domestic arbitration rendered an award deciding on a group action filed by Luis Alberto Durán against Bancolombia and others. In this case, the tribunal assumed jurisdiction since all the parties of the class action were parties to the by-laws of the companies and therefore had accepted the arbitration agreement.

17 Are contractual waivers precluding arbitration of claims on a class-wide basis enforceable? Under what circumstances have such waivers been upheld or set aside by the courts?

The Arbitration Statute does not expressly regulate contractual waivers precluding arbitration of claims on a class-wide basis. However, as mentioned in question 17, the Supreme Court of Justice has stated that class and group actions cannot be subject of being settled by arbitration in Colombia, unless all of the parties have consented to the arbitration agreement.

18 If the parties' contract is silent on the issue of class-action arbitration, is class-action arbitration allowed under the law of your jurisdiction?

The Arbitration Statute does not expressly regulate contractual silence of the parties for class-action arbitration.

Prior cases indicate that the only circumstance under which an arbitral Tribunal will decide a class-action arbitration is whenever all of the parties have consented to the arbitration agreement. See question 17.

19 Are foreign arbitral institutions without a physical presence in your jurisdiction authorised to administer arbitrations in your jurisdiction? Does the law require that a foreign institution be licensed under local law in order to administer an arbitration seated there?

Foreign institutions are authorised to administer international arbitrations seated in Colombia, without any licence under local law.

In domestic arbitration, arbitral institutions must be authorised to act by the Ministry of Justice. Such approval requires the fulfilment of the requirements set forth by article 51 of the Arbitration Statute.

Arbitral institutions and arbitrators

20 Is an arbitral award issued in an arbitration seated in your jurisdiction under the auspices of a foreign institution (such as the ICC, ICDR, LCIA or similar institutions) vulnerable to challenge because it was issued under the auspices of a foreign institution?

No, the fact that an award was issued by a tribunal constituted under the auspices of a foreign institution does not make the award vulnerable to challenge for that specific reason.

21 Does the law require that arbitrators in international arbitrations be citizens or residents of your jurisdiction?

No. Article 73 1 of the Arbitration Statute provides that the nationality of a person is not an obstacle to act as an arbitrator in international arbitration.

22 Does your law require that arbitrators in international cases be lawyers?

No, article 73 2 of the Arbitration Statute provides that it is for the parties to agree on the qualification of the arbitrators, therefore, there is no requirement that arbitrators must be lawyers.

23 Does your jurisdiction provide immunity to arbitrators serving in an arbitration with its legal seat in your jurisdiction? Under what circumstances does such immunity apply or not apply?

The Arbitration Statute does not provide for immunity to arbitrators serving in an arbitration with its seat in Colombia.

24 Are the fees of foreign arbitrators serving in an arbitration seated in your jurisdiction subject to taxation?

Yes, pursuant to article 408 of Colombian Tax Code, any payment or accrual made to a foreign individual domiciled abroad that results from the services rendered in Colombia will be subject, as a general rule, to income tax withholdings at the rate of 33 per cent.

25 Must arbitrators in international arbitrations be independent and impartial? What is the legal standard governing conflicts of interest and disclosure by arbitrators in international arbitrations?

Yes, pursuant to article 75 of the Arbitration Statute, which closely follows article 12 of the UNCITRAL Model Law, arbitrators in international arbitrations must be independent and impartial. Under the mentioned provision, arbitrators are obliged to make a disclosure of all possible circumstances which could raise justified doubts on their independence and impartiality. Arbitrators must reveal such circumstances during the entire arbitral procedure.

Since the Arbitration Statute entered into force on 12 October 2012, there have been no reported cases on conflicts of interests.

26 Will courts entertain requests to disqualify an arbitrator before the conclusion of an award?

In international arbitration, parties may decide on the procedure to be followed for challenges or agree to the application of the rules of an arbitration centre. If the parties are silent on the matter, the following rules apply:

- in a case of sole arbitrator, the challenge should be decided by the selected centre of arbitration, or in absence of such, by a civil circuit judge; and
- in cases of three member tribunals, the two arbitrators who were not challenged shall decide upon the matter and, in case of disagreement, the president of the tribunal has the final decision.

If there is a disagreement on the matter and the president of the arbitral tribunal is the challenged arbitrator, the challenge should be decided by the centre of arbitration or, in the absence of such, by the civil circuit judge (Arbitration Statute, article 76).

In domestic arbitration, the two arbitrators who were not challenged shall decide on challenges to arbitrators. If the entire tribunal is challenged, or if various members are challenged, or if the case is to be decided by a sole arbitrator, the civil circuit judge of the seat of the arbitration shall decide on the matter (Arbitration Statute, article 17).

Arbitral proceedings

27 Does the law require that arbitral proceedings seated in your jurisdiction be held in a specific language?

No. In international arbitration the parties are free to determine the language of the proceedings (Arbitration Statute, article 95).

In domestic arbitration, proceedings shall be held in Spanish (Colombian General Code of Procedure, article 104).

28 Can foreign lawyers serve as advocates in arbitral proceedings in your jurisdiction? If so, can they do so alone or must a local lawyer serve as co-counsel?

In international arbitration, foreign attorneys can serve as advocates in arbitral proceedings. A local lawyer does not need to serve as co-counsel in such cases.

In domestic arbitration, if the dispute is to be decided under law, the parties must be represented by a lawyer admitted to practice in Colombia. Furthermore, in cases where, because of the nature or amount of the claim, a lawyer is not required in order for a party to appear before courts, parties will be able to intervene directly in the arbitration (Arbitration Statute, article 2).

29 Are the fees of foreign lawyers earned for services rendered in connection with an arbitration seated in your jurisdiction subject to local taxation?

The legal services rendered in connection with an arbitration seated in Colombia can be understood to be "consulting services" (ie, the rendering of expert advice on a particular domain or area of expertise such as law, human resources, sales, public relations, communications or other).

Pursuant to article 408 of Colombian Tax Code, consulting services rendered by foreign individuals domiciled abroad originate a Colombian source income and consequently are subject to income withholding tax at a 10 per cent rate.

30 In what circumstances, if any, does your law allow the consolidation of multiple arbitral proceedings into a single proceeding?

In international arbitration, the parties are free to agree to the consolidation of multiple arbitral proceedings.

In domestic arbitration, the consolidation of multiple arbitral proceedings is governed by the same rules applicable to court proceedings, namely, those listed in article 148 of the Colombian General Code of Procedure.

31 Please describe common practice and usage in international arbitrations seated in your jurisdiction with respect to a party's right to require an opposing party to produce documents pertinent to the dispute.

In international arbitration, arbitrators will generally respect an agreement of the parties on the possibility of requiring the opposing party to produce documents related to the dispute. It is important to bear in mind that in Colombia there is no discovery as understood under common law.

32 Does the law impose a duty of confidentiality in arbitration? If so, on whom?

Arbitrations are in principle confidential. However, there are no specific statutory rules on confidentiality for international arbitral proceedings seated in Colombia.

Pursuant to article 16 of the Arbitration Statute, domestic arbitrators are subject to the same ethical duties established under statutory law for judges, which oblige adjudicators "to abstain from revealing confidential information" (Colombian General Code of Procedure, article 42).

33 Does the law authorise third-party funding for international arbitration? Are there any ethical limitations imposed upon counsel to the parties that restricts the use of such funding?

The Arbitration Statute does not expressly prohibit third-party funding for international arbitration. There are no reported cases on this matter.

34 Are there any mandatory national rules of professional ethics that apply to counsel in an international arbitration in your jurisdiction? If so, are those rules applicable to counsel from another jurisdiction participating in an arbitration in your jurisdiction?

No, there are no specific professional ethics rules applicable to international arbitration. The Arbitration Statute does not expressly regulate this matter.

Nevertheless, please note that professional ethics of counsels are regulated by the Lawyer Disciplinary Code (Law 1123 of 2007). Pursuant to articles 18-19 the code will apply only to lawyers appointed in Colombia whether the proceedings are held in its territory or abroad. There are no reported cases regarding the scope of application of the Lawyer Disciplinary Code to international arbitrations.

However, the following should be kept in mind:

- Counsel is not required to be admitted to practise law in order to act in international arbitrations (Arbitrations Statute article 73-3).
- The Arbitration Statute is to be interpreted giving due regard to its international origin (Arbitration Statute article 64).
- Therefore, since international arbitration is generally not subject to any forum-state disciplinary system (Gary Born, International Commercial Arbitration 2318-2319 (3d ed. 2009), it is unlikely that the Lawyers Disciplinary Code is applicable to to international arbitrations.

35 Are there any mandatory rules on oath or affirmation for witnesses testifying in an arbitration in your jurisdiction that have to be administered prior to their testimony? If so, what are they?

Yes, pursuant to article 220 of the Colombian General Code of Procedure, witnesses are required to take an oath prior to the practice of the testimony. This provision is applicable to domestic arbitrations.

However, it is important to note that the procedural rules set forth in the Colombian General Code of Procedure are not of mandatory application for international arbitrations (Arbitration Statute article 92).

36 Are there restrictions in your jurisdiction on the interviewing of witnesses in anticipation of hearings or giving of testimony?

There are no restrictions on the interviewing of witnesses in anticipation of giving testimony, insofar as attorneys do not advise or instruct witnesses to modify or alter their version or make untruthful declarations. Aside from the criminal implications of perjury for the witness, attorneys who act in such matter may have disciplinary consequences.

Court support for arbitration

37 Can arbitrators decide on their own jurisdiction? Is the principle of 'Kompentenz-Kompetenz' followed in the courts?

Yes, the Kompetenz-Kompetenz principle is acknowledged by law and courts for both domestic and international arbitration (Arbitration Statute, articles 30 and 79; for decisions rendered by the Constitutional Court on this point see, for example, decisions SU-174/07 and T-1224/08).

38 Do the courts follow the principle of the independence and separability of the arbitration clause?

Yes, courts follow the principle of independence and separability of the arbitration agreement, which is expressly recognised by articles 5 and 79 of the Arbitration Statute.

39 Are arbitral tribunals empowered to grant interim relief? If so, how is that relief enforced in the courts?

Yes, in international arbitration, unless otherwise agreed by the parties, the arbitral tribunal is empowered to grant interim relief at the request of either party (Arbitration Statute, article 80). According to article 88 of the Arbitration Statute:

An interim measure issued by an arbitral tribunal shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued.

Under the domestic arbitration section of the Arbitration Statute, arbitrators are also empowered to adopt interim measures in arbitral proceedings at the request of either party (Arbitration Statute, article 32). The granting, enforcement and elimination of such measures shall be governed by the Colombian General Code of Procedure. The tribunal can request assistance from local judges in the enforcement of interim measures.

40 Can arbitrators issue orders, subpoenas or use other legal processes to compel the production of evidence by a third party or compel a third-party witness to appear before them? If so, will a court lend its aid in enforcing such an order against a recalcitrant third party? Also, if arbitrators can issue orders, subpoenas or use other legal processes to compel the production of evidence by a third party or compel a third-party witness to appear before them, are there any limitations to their doing so?

In principle, in international arbitration, arbitrators cannot issue orders to compel the production of evidence by a third party or compel a third-party witness to appear before the tribunal. Pursuant to article 100 of the Arbitration Statute, local

courts shall lend their aid in the collection of evidence for the arbitration.

In domestic arbitration, arbitrators cannot compel the production of evidence by a third party or compel a third-party witness to appear before them. Courts should lend their aid in the collection of evidence for the arbitration.

41 Can a party to an arbitration seek relief from the court to obtain evidence in aid of an international arbitration? What is the scope of such relief?

Pursuant to article 100 of the Arbitration Statute, the parties, when authorised by the tribunal, can seek relief from local courts to obtain evidence in aid of an international arbitration. The arbitral tribunal can also seek such relief from the court.

Tribunals can, by themselves, order a witness to appear before it, in as much as they have the power to request evidence ex officio and all persons have the duty to declare as a witness if so requested, as established in article 208 of the General Code of Procedure. Having all the powers set forth in local law governing the specific mean of evidence (article 100, Arbitration Statute) courts are able to order a witness to produce a document that is in its power.

42 Can a party in an international commercial arbitration seek interim or provisional relief from a court without first seeking relief from the arbitral tribunal?

Yes, article 90 of the Arbitration Statute authorises parties in an international arbitration to seek interim relief from local courts without first seeking relief from the arbitral tribunal. Parties can also address local courts for this purpose prior to commencing arbitration proceedings.

43 Have the courts issued injunctions enjoining arbitral proceedings from going forward?

There are no reported cases on the matter.

44 Does the law provide that post-award interest accrues on an unpaid arbitral award?

Yes, the law provides that post-award interest accrues automatically on an unpaid arbitral award (Law 45 of 1990, article 65). Unless otherwise agreed by the parties or determined by the arbitral tribunal, the interest rate shall be the current bank interest rate certified by the Colombian Superintendency of Finance.

It must be noted that Colombian law establishes a limit on interest rates, which has been set by statutory law at 1.5 times the current bank interest rate as certified by the Colombian Superintendency of Finance.

In practice, the party seeking to collect any sum granted by the arbitral tribunal may have to commence enforcement proceedings in Colombia in order to effectively collect the post award interest. At the beginning and the final stage of such proceedings, the applicant may request an update of the total amount owed.

45 Is an arbitral tribunal empowered to award attorneys' fees to the prevailing party or is that power reserved to the courts?

Yes, an international arbitral tribunal seated in Colombia is empowered to award attorney's fees to the prevailing party, unless otherwise agreed by the parties.

Domestic arbitral tribunals are also empowered to make such decision (Colombian General Code of Procedure, article 280).

46 Is an arbitral tribunal empowered to award punitive or exemplary damages? Is the arbitral tribunal empowered to award interest?

As a matter of Colombian substantive law, the majority of commentators are of the opinion that punitive or exemplary damages are prohibited. A systematic interpretation of the civil liability regime (articles 1602–1617 of the Colombian Civil Code) leads to the conclusion that only compensatory damages, as opposed to punitive damages, can be awarded.

Nevertheless, the Arbitration Statute provides that the arbitral tribunal shall decide in accordance with such rules of law as are chosen by the parties (article101). Therefore, if a tribunal is deciding upon the basis of rules of law not prohibiting punitive damages no limitation for the award of these damages would exist. There are no reported cases in which a Colombian court has set aside or refused to enforce an award grounded on the existence of punitive damages.

Awards - content

47 What are the grounds for challenging or vacating an international award issued in an arbitration seated in your jurisdiction?

The grounds for annulment are set forth in article 108 of the Arbitration Statute, which states as follows:

The judicial authority may set aside an award by request of one of the parties or by its own initiative.

1 At the request of a party, if the party making the application furnishes proof that:
   - A party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Colombian law; or
   - The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
   - The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
   - The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this section from which the parties cannot derogate, or, failing such agreement, was not in accordance with this section.

2 By its own initiative, when the court finds that:

- The subject-matter of the dispute is not capable of settlement by arbitration under Colombian law; or
- The award is in conflict with the international public policy of Colombia.

Colombian courts have recently shown a high degree of deference to international awards. In Isagen S.A. E.S.P. v Construtora Norberto Odebrecht SA (Decision 29 November 2012) the Council of State gave respectfull regard to the decisions rendered by the tribunal both in substantive and procedural issues, denying the application to set aside. Although this is a case rendered prior to the entry into force of the Arbitration Statute, it is expected for Colombian courts to follow this line of reasoning and degree of deference towards international awards.

In a recent decision (6 August 2015), the Constitutional Court ruled that an international award rendered under Colombian's previous arbitration regime was subject to vacation via an action for the immediate protection of constitutional rights (acción de tutela), if due process had not been observed in the arbitration. To date, we have no reported decisions on the possibility of filing an acción de tutela against awards rendered by international arbitration tribunals under the Arbitration Statute.

48 Is "lack of reasonableness", manifest disregard or a mistake in the application of the substantive law to the dispute of an international award grounds to vacate it?

No, lack of reasonableness, manifest disregard or mistake in the application of the substantive law to the dispute are not grounds to vacate an international award under the Arbitration Statute. In Colombia, the grounds for annulment are only those listed in article 108 of the Arbitration Statute as set forth in question 43.

49 Have international awards rendered in your jurisdiction been vacated on the grounds of "public policy"? If so, how has the "public policy" ground for vacating an award been interpreted in your jurisdiction?

Article 108 of the Arbitration Statue contains an express ground for annulment regarding public policy. However, under the former Colombian arbitration rules, public policy was not a specific ground for annulment. To date, we have no reported decisions that vacate an international award on the grounds of public policy.

50 What is the period of time a party has to challenge such an award after its issuance?

An action for the annulment of an award must be submitted within the month following the service of process of the award or any decision correcting, clarifying or complementing it (Arbitration Statute, article 109).

51 Please describe any recent significant experiences or cases that illustrate the attitude of your courts towards the annulment of international awards rendered in your jurisdiction.

On 10 March 2010, the Appellate Tribunal of Bogotá decided on an annulment action brought by SAP Andina and Caribe CA Colombia against an ICDR award rendered in Bogotá. The Colombian court held that no recourse was available against the award due to the fact that the arbitral agreement, the ICDR Rules and the award itself established that the latter was final. Moreover, the court held that annulment recourse had to be raised before the arbitrators rather than directly before courts of law (previous regulation on arbitration, that is, Decree 1818/98, article 161).

Afterwards, a recurso de súplica (whereby a court is required to review a decision made by one of its members on its behalf) was filed. On 21 May 2010, the Appellate Tribunal confirmed the judgment based on article 161 of Decree 1818/98. However, it corrected the previous decision by clarifying that:

> *the mere fact that annulment recourse has been raised does not deprive [the award] from being a final decision and, although the parties are free to tailor the proceedings, they cannot act against due process in order to determine whether the proceeding agreed by the parties was fulfilled; thus, the [annulment] recourse was [in principle] available…*

52 Do the courts consider themselves empowered to vacate an arbitral award rendered in another jurisdiction?

Colombian courts have not set aside awards rendered abroad to date and are unlikely to do so. Indeed, on 22 April 2002, in the case Empresa Colombiana de Vías Férreas v Drummond, the Council of State explained that, under article V.1.e of the New York Convention, a decision suspending or annulling an award may be issued only by the competent authority of:

- the country in which that award was made; or
- the country under the law of which that award was made.

Since in that case the arbitral seat was Paris, it was held that the annulment recourse fell beyond the Council of State's jurisdiction.

Awards enforcement

53 May parties waive all court review of an arbitral award rendered in your jurisdiction (or restrict or expand the scope of that court review)?

Yes, pursuant to article 107 of the Arbitration Statute, parties may waive the right to bring an action to set aside an award rendered in an international arbitration seated in Colombia, provided that neither party is domiciled or a resident in Colombia. In this case, the parties can also limit the grounds for annulment, restricting the scope of the court's review. It is important to bear in mind that when the parties waive the right to the annulment recourse, recognition proceedings are mandatory in order to enforce the award in Colombia (Arbitration Statute, article 111.3).

54 Please describe the process for enforcing an arbitral award rendered in another jurisdiction.

Recognition claims of arbitral awards rendered in another jurisdiction must be submitted before the Civil Chamber of the Supreme Court of Justice, which is the sole instance for such claims.

Article 111 of the Arbitration Statute only requires that the party seeking recognition of the foreign arbitral award provide the original award or a copy thereof, along with a translation of the award into Spanish.

However, in a recent decision the Supreme Court of Justice

requested that the party seeking recognition also submit the original arbitration agreement or a duly certified copy thereof pursuant to article IV of the New York Convention.

If the party requesting the recognition has filed the necessary documents as provided in article 111 of the Arbitration Statute, the judicial authority shall accept the request and communicate it to the other party or parties for them to make their submissions within 10 days. Upon the expiry of the aforementioned term, the judicial authority must decide on the request for recognition within 20 days. However, the mentioned provision has not yet been interpreted by the courts.

If recognition is granted, enforcement proceedings may be commenced under the provisions of the Colombian General Code of Procedure.

55 Assuming that the award is covered by a convention applicable in your jurisdiction, how long does it take to obtain an order of enforcement in the first instance? How long does it take for the enforcement process to run its full course through to the last instance?

The enforcement of a foreign award can take from three to four years (including the recognition procedure before the Supreme Court of Justice as well as the execution proceedings before local courts required for enforcement).

56 Please compare how long it takes to enforce an arbitral award rendered abroad with how long it takes to domesticate a foreign judgment.

The recognition and enforcement of foreign arbitral awards or judgments can take from three to four years. Recognition proceedings for awards and judgments used to be governed under the same provisions prior to the enactment of the Arbitration Statute, thus it has generally taken the same time to enforce a foreign court ruling and a foreign award.

It is important to consider that, pursuant to article 115 of the Arbitration Statute, a request for recognition of a foreign arbitral award shall be decided within 20 days from the expiry of the period in which the parties make their submissions. However, the mentioned provision has not yet been interpreted by the courts.

In at least two cases, requests for recognition of international arbitral awards were filed before the Supreme Court of Justice in the third and fourth trimester of 2014 and as of the date of this report, the Supreme Court has not issued a decision on the corresponding requests.

57 Please describe some significant recent experiences with the enforcement of foreign arbitral awards.

On 27 July 2011, the Supreme Court decided an exequatur request raised by Petrotesting Colombia SA & Southeast Investment Corp for obtaining recognition of an award issued by an ICDR Tribunal. In this case, the court interpreted article V.2.b of the New York Convention for the first time. In so doing, the court stated that the notion of public policy under the Convention is limited to the basic or fundamental principles of legal institutions, such as the prohibition to exercise rights abusively, good faith, the arbitral tribunal's impartiality and due process. Thus, the contravention of a mandatory rule does not necessarily fall within the scope of article V.2.b.

Drummond Ltd v Ferrovías en Liquidación and FENOCO

On 19 December 2011, the Supreme Court of Justice decided on a request filed by Drummond Ltd for obtaining an exequatur of two ICC awards, including a partial award. The court made reference to the Petrotesting case and held that the New York Convention establishes the only grounds on which recognition of a foreign award may be denied. It also ratified its understanding of article V.2.b. of the Convention. In addition, the court implicitly abandoned the doctrine set in Merck v Tecnoquímicas with regard to partial awards as it recognised that such decisions may put an end to party claims and are therefore actual awards.

HTM LLC v Fomento de Catalizadores FOCA SAS

On 24 June 2016, the Supreme Court of Justice decided a request filed by HTM LLCC for obtaining the recognition of an ICC award, which decided the Tribunal's jurisdiction to rule on the dispute arising from the termination of a contract. In the proceedings, Fomento de Catalizadoras FOCA SAS argued that the contract was an agency agreement, carried out in Colombia, therefore to be governed exclusively by Colombian law (article 1328 of the Code of Commerce) and thus the choice of law and forum choice clauses of the agency agreement contradicts Colombian public policy. In the end, the argument of Fomento de Catalizadores FOCA SAS asked the Court to consider that the award violates Colombian public policy, under article V.2.(b) of the New York Convention, the Court must deny the recognition request.

In its decision, the Court disregarded Fomento de Catalizadores FOCA SAS arguments, and granted the recognition request raised by the plaintiff. The Court established, that article 1328 of the Code of Commerce does not account to a rule of international public policy under article V.2.(b) of the New York Convention, and thus the public policy exception does not apply in this case.

Empresa de Generación Eléctrica del Sur SA v Consorcio Pisco

On 7 September 2016, the Supreme Court of Justice decided a request for recognition of an award issued under the auspices of the Arbitration Tribunal of the Administrative Arbitration Directorate of the Supervisory Body of the State Contracts of Perú, which decided the controversies between Empresa de Generación against Consorcio Pisco.

In its decision, the Supreme Court considered that the rules applicable to the recognition and enforcement of arbitral awards is the one in force at the moment of the application for recognition and not as of the date of commencement of the arbitration.

Consorcio CISE v Consorcio Geo Bauer

On 8 February 2017, the Supreme Court of Justice decided a request for annulment of an award issued under the auspices of the Arbitration Centre of the Chamber of Commerce of Medellín, pursuant its international arbitration rules.

In its decision, the Supreme Court reaffirmed that the annulment grounds are expressly provided in the Arbitration Statute and are referred to the formal aspects or procedural matters of the award, and not the merits or arguments of the decision.

Additionally, the Court analysed whether an incongruent decision is subject to annulment under the international public policy clause pursuant article 108 2.b) of the Arbitration Statute, to conclude that the principle of congruency of the judicial decision is not part of the international public order, as neither is it included within the due process clause nor is referred to

the violation of any imperative internal law or specific rule. Finally, the Court held that a decision ex aequo et bono does not exceed an arbitration clause ordering the Tribunal to decide according to the substantive law chosen by the parties as long as the Tribunal used one or more rules of evidence, conducted an effective assessment and if it has chosen a mandatory guideline to address certain matters.

Tampico Beverages Inc v Productos Naturales de la Sabana SA Alquería

On 12 July 2017, the Supreme Court of Justice decided a request filed by Tampico for obtaining the recognition of an ICC award, which decided on the termination of a contract of licence.

In said decision, the Supreme Court considered that although the exequatur is mainly a local proceeding, it is not possible for local courts to impose higher burdens, or additional requirements for the applicant to obtain the recognition of an awards.

58 To what degree has "public policy" been a ground to refuse enforcement of an international award rendered abroad?

The violation of public order provisions is a ground for refusing the enforcement of a foreign arbitral award (New York Convention, article V.2.b, Arbitration Statute, article [108 2. b)]. The Supreme Court has held that disregarding a mandatory provision does not in itself amount to a violation of public policy; rather:

the concept of "public policy" that may prevent a court of law from granting recognition and enforcement to a "foreign award", made under the aforementioned New York Convention, is limited to the basic or fundamental principles of legal institutions, such as: the prohibition to exercise rights abusively, good faith, the arbitral tribunal's impartiality and due process. Therefore, the contravention of a mandatory provision of the exequatur judge's forum does not entail itself a violation of [international public policy] ... (Supreme Court of Justice, Decision of 27 July 2011).

Scholars have debated whether article 1328 of the Colombian Commercial Code is a public policy provision and whether it prevents the parties from submitting to international arbitration disputes arising out of commercial agency agreements performed in Colombia. Some argue that international arbitration awards that settle to such disputes should not be recognised in Colombia on public policy grounds.

In an ongoing proceeding for the recognition of an international award on the tribunal's jurisdiction to settle the disputes arising from a contract labelled "agency agreement" performed in Colombia, the Attorney General's Office submitted an opinion to the Supreme Court of Justice favouring such award's recognition.

The outlook

59 Can a foreign arbitral award be enforced if the award has been set aside by the courts at the seat of the arbitration?

There are no reported cases on the matter.

Pursuant to article V of the New York Convention:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

60 Has your jurisdiction refused to honour an international arbitral award issued against the state or an instrumentality of the state in your jurisdiction? If so, please provide a brief explanation.

There are no reported cases in which Colombia has refused to honour awards rendered against it or an instrumentality grounded exclusively on the public nature of an entity.

61 What is your view of the future of international arbitration and is the trend positive in your jurisdiction? What advice do you have with respect to dispute resolution for a foreign lawyer advising a foreign client contemplating entering into a business deal with a company from your jurisdiction?

After the enactment of the Arbitration Statute, Colombia has experienced a steady growth of arbitration tribunals seated in Colombia. This has motivated the main arbitration centres, Chamber of Commerce of Bogotá and Medellín, to create its own international arbitration rules. Additionally, interpretation and application of article 62 of the Arbitration Statute to agreements to arbitrate entered before its the entry into force has paved the way to an increase number of arbitration clauses being considered as leading the parties to international arbitration if one of the criteria set out in said article is met, without regard to the rules in force at the moment of execution of the arbitration clause.

In addition, we have seen that local courts are increasingly using in its decisions on annulment and recognition of foreign awards, commentaries from specialised institutions and organisms (eg, the ICCA's Guide to the Interpretation of the 1958 New York Convention), specialised publications (eg, Arbitration International), as well as decisions related to such convention issued by foreign courts to properly address, inter alia, the grounds to vacate an international award, in particular the public order clause, and the participation of local courts in aid of international arbitration. This certainly is a definite step towards a truly consolidation of the international commercial arbitration in Colombia.

Investment arbitration is gaining an important part in the solution of investment disputes. In past years Colombia has signed several BITs and free trade treaties that include investment chapters authorising the investor to go to international tribunals in the event the state violates any relevant provision within such treaties.

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He is a lawyer graduated from Universidad de los Andes (Bogota) and LLM, with distinction, from the Queen Mary University of London, specialised in international disputes resolution, international arbitration, international litigation and settlement of controversies involving investment projects. In addition to having received a partial scholarship from the University of London (Queen Mary) to attend the programme, he obtained the School of Law prize as the best student of the master's degree in such a field of specialisation.

He has been professor at Universidad de Los Andes in Bogotá, Colombia, in subjects covering Roman Law, Business Law and Obligations (Civil Liability, Effects, Transfer and Termination of Obligations).

He has more than 13 years of experience in commercial transactions, national litigation and national and international arbitration, in areas that include construction, commercial distribution of goods and services, infrastructure and, in general, in complex commercial disputes.

David has represented various national and multinational companies in commercial lawsuits before Colombian courts and arbitration courts. Likewise, he has provided advice in matters of contractual and extracontractual liability of the producer, as well as group and popular actions defending various multinational companies in issues involving environment, personal damages and consumer protection.

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