COLOMBIA

Law & Practice

Contributed by Cárdenas & Cárdenas Abogados

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Cárdenas & Cárdenas Abogados' specialist national and international arbitration team has represented clients in institutional arbitrations before the Chamber of Commerce in Bogotá and the International Chamber of Commerce in Bogotá among others. The team has also participated in ad-hoc arbitrations. Lawyers regularly serve as arbitrators in significant arbitration proceedings.

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1. General

1.1 Prevalence of Arbitration

Arbitration is recognised in Colombia as an alternative dispute resolution method with both constitutional and legal support, and has been used increasingly over the years, especially to resolve commercial and administrative contractual disputes. International arbitration, however, was under-used for years, due to the lack of a comprehensive legal framework, a flaw of the Colombian legal system which was remedied by the issuance of Law 1563 of 2015 (the "Arbitral Statute"), which constitutes a complete make-over of the legal landscape for arbitration in Colombia.

The Arbitral Statute adopted a comprehensive regime for domestic arbitration and a separate set of rules for international arbitration. The latter are heavily based on the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law"), as amended in 2010. One of the main features of the Arbitral Statute is that it did away with the previously existing legal provision pursuant to which an arbitration would only be considered international if, in addition to meeting the legal requirements to be international, the parties had to expressly call for international arbitration in the arbitration agreement. Following the enactment of the Arbitral Statute, international arbitration experienced a considerable increase, encouraged not only by the existence of a modern, comprehensive law regulating it, but also with the efforts undertaken by the principal national arbitration institutions towards the issuance of their own rules for international arbitrations, which differ from the rules for domestic arbitrations.

Nowadays, not only Colombian citizens are looking at international arbitration as their preferred mechanism of resolution of disputes concerning international transactions. Colombia is moving towards its objective to become an arbitral seat that is selected by national and international businessmen and legal practitioners.

1.2 Trends

The number of international arbitrations administered by Colombian arbitration centres is increasing, given that, as previously stated, Law 1563 now considers that any arbitration will be international if it meets the requirements for internationality that are established in the law, regardless of whether the

parties agreed that it would be international. Consequently, the most important arbitration centres in the country are for the first time issuing rules for international arbitrations, which are different to those designed for domestic arbitrations.

One of the most highly debated issues regarding arbitration in late 2014 and early 2015 is the attempt by the Presidency of Colombia to seriously reduce the frequency with which Governmental entities use arbitration. By means of Presidential Directive Order No. 4 of the 11th November 2014, the President of Colombia ordered its ministers and heads of administrative entities of the national level that public entities are to justify, in each case, the reasons why they chose arbitration. Additionally, the Directive Order limits the powers of administrative entities as to whom to select as arbitrator to resolve their disputes (administrative entities may not select as an arbitrator an attorney that is acting as opposing counsel to any other public entity of the executive branch at a national level, or that is involved simultaneously in more than 5 arbitrations (3 in the case of infrastructure transactions) in which a public entity is involved. The Directive Order seems to be a step backwards in Colombia's recognised favourable attitude towards arbitration, and an unfair limitation of arbitration practitioners' rights.

1.3 Key Industries
Most recurrent arbitration users in Colombia are found in the oil and gas, infrastructure, telecommunications and government procurement sectors.

1.4 Arbitral Institutions
The Arbitration and Conciliation Center of the Chamber of Commerce of Bogotá is the most prominent arbitral institution in Colombia. Another important arbitration centre is the Conciliation, Arbitration and Amiable Composition Center of the Chamber of Commerce of Medellín for Antioquia.

2. Governing Law

2.1 International Legislation
The Arbitral Statute is the legislation that governs international arbitration in Colombia. It is a dualist law that provides for one set of regulations for domestic arbitrations and one for international arbitrations, with the latter being strongly based on the UNCITRAL Model Law.

2.2 Changes to National Law
There have not been any changes to the national arbitration law in the past year, nor is there any pending legislation that may change the arbitration landscape in Colombia in 2015.

3. The Arbitration Agreement

3.1 Enforceability
Pursuant to the Arbitral Statute, the arbitration agreement must be evidenced in writing. This is so even if the parties agreed to it verbally or through the performance of certain acts, or in any other fashion. Additionally, whenever a party invokes the existence of an arbitral agreement and the opposing party does not deny it, an arbitration agreement will be deemed to exist between such parties.

3.2 Approach of National Courts
Colombian courts have been slow in adapting to the legal principle according to which it is the tribunal's power and not their own to establish the jurisdiction of the tribunal. Some courts have refrained from referring the parties to arbitration and have established the scope of the arbitration agreement in order to assert jurisdiction over the matter.

3.3 Validity of Arbitral Clause
The Arbitral Statute refers expressly to the principle of separability, and thus the arbitration agreement is considered independent from the contract in which it is contained and, consequently, the arbitral tribunal may rule on the existence or validity of the arbitration agreement without risking the invalidation of its own jurisdiction.

4. The Arbitral Tribunal

4.1 Selecting an Arbitrator
There are no limits on the parties' autonomy to select arbitrators in Colombia for international arbitrations.

4.2 Challenging or Removing an Arbitrator
The challenge or removal of arbitrators is subject to the procedure agreed upon by the parties (including the procedures set forth in the rules of the chosen

arbitration centre). Failing such an agreement, the Arbitral Statute provides the following procedure:

The party that wishes to challenge an arbitrator must do so as soon as the reason for challenge is known. If the arbitral tribunal is constituted by a sole arbitrator, the challenge should be decided by the relevant arbitral institution or the competent judicial authority, in the case of ad-hoc arbitrations. If the arbitral tribunal is formed by three arbitrators and only one of them is challenged, the decision is to be adopted unanimously by the remaining arbitrators. Failing unanimity among the other arbitrators, the chairman of the tribunal shall decide, unless he or she is the one facing the challenge, in which case the decision will be referred to the concerned arbitration centre or the competent judicial authority. Whenever two or more arbitrators are challenged, the decision should be taken by the arbitration centre or, in absence thereof, by the judicial authority.

4.3 Independence, Impartiality and Conflicts of Interest

In international arbitrations arbitrators have a duty to disclose any circumstance that may raise justified doubts about their independence and impartiality.

Under the rules of the Arbitration and Conciliation Center of the Chamber of Commerce of Bogotá the duty to disclose has the same scope as in the Arbitral Statute. Arbitrators are compelled to sign a declaration of impartiality, as a requirement for their confirmation by the centre to participate in the proceedings.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

Any disputes related to rights of which the parties can freely dispose may be referred to arbitration. The law may also establish additional specific matters that may or may not be resolved by means of arbitration.

5.2 Challenges to Jurisidiction

The rules on the jurisdiction of international arbitration tribunals determine that the arbitral tribunal is competent to rule on its own jurisdiction, even regarding the validity or scope of the arbitration agreement. Judicial intervention in this regard is limited to the annulment recourse on the basis that the award ruled over a dispute is not contained in the relevant arbitration agreement or in excess of its scope. The Arbitral Statute requires that any court to which an action is brought in a matter which is the subject of an arbitration agreement will refer the parties to arbitration, if a party so requests. The law eliminated the exception established in article 8, numeral 1 of the UNCITRAL Model Law and article II, numeral 3 of the New York Convention, concerning agreements that are null and void, inoperative or incapable of being performed, thereby limiting the courts' ability to make any sort of decision as to the validity of the arbitration agreement.

5.3 Timing of Challenge

A party is entitled to judicial recourse regarding the jurisdiction of the arbitral tribunal by means of annulment recourse against the final award. However, in the event the arbitration tribunal decides it does not have jurisdiction at the outset of the proceedings but gives a partial award, an annulment recourse may be brought against the partial award.

5.4 Standard of Judicial Review for Jurisdiction/Admissibility

There exists no standard of judicial review as such for this specific matter.

5.5 Breach of Arbitration Agreement

If a party commences court proceedings in breach of an arbitration agreement and the defendant does not raise the issue of the existence of the arbitration agreement in due course, such agreement is deemed to have been waived by the parties, and national courts are competent to rule over the dispute. Under international arbitration rules, the Arbitral Statute requires that any court to which an action is brought in a matter which is the subject of an arbitration agreement will refer the parties to arbitration, if a party so requests. Despite the fact that the Arbitral Statute eliminated the exception established in article 8, numeral 1 of the UNCITRAL Model Law and article II, numeral 3 of the New York Convention concerning agreements that are null and void, inoperative or incapable of being performed, as explained above, some Colombian courts continue to make their own assessment as to the scope of the arbitration agreement and assume jurisdiction in

cases where the matter could have been covered by the arbitration agreement.

5.6 Right of Tribunal to Assume Jurisdiction
Under Colombian law, arbitration without consent is, as a general rule, not possible. Whether a non-signatory party has, in fact, consented to the arbitration agreement, is something that the arbitral tribunal will decide on a case-by-case basis, given that the Arbitral Statute is silent on the matter.

6. Preliminary and Interim Relief

6.1 Types of Relief
Except if otherwise agreed by the parties, the arbitration tribunal is permitted to award interim relief in Colombia. The arbitral tribunal adopts an interim measure consisting of an order directed at one or both parties to; (i) maintain or restore the *status quo* while the dispute is solved; (ii) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm to the arbitral process itself; (iii) provide a means of preserving assets out of which a subsequent award may be satisfied, among others. In order for an arbitral tribunal to grant interim relief, the provisional measure must be reasonable, adequate and pertinent. Preliminary orders are also available, much in the same terms as they are regulated in the UNCITRAL Model Law.

6.2 Role of Courts
Any party may request interim relief from civil circuit judges before or during the arbitral proceedings, which will be regulated according to the local procedural law. The request for interim relief before the civil circuit judges will not constitute a waiver of the arbitration agreement.

Moreover, interim relief granted by an international arbitral tribunal even if seated abroad does not have to be recognised in Colombia and Colombian courts are obligated to comply with such relief, except when a legal case cause for not doing so is present.

6.3 Security for Costs
There is no provision in the Arbitral Statute that would prevent an arbitration tribunal to order security for costs. Courts have no such power.

7. Procedure

7.1 Governing Rules
In the absence of a set of rules validly chosen by the parties, the Arbitral Statute provides for procedural rules for the arbitration itself.

7.2 Procedural Steps
Procedural steps established in the law operate only in the absence of rules validly chosen by the parties.

7.3 Legal Representatives
There are no particular qualifications or other requirements for legal representatives appearing in Colombia for international arbitrations.

8. Evidence

8.1 Collection and Submission of Evidence
Given that international arbitration is relatively recent in the country, there is no general approach as such. In academic and professional circles there seems to be some consensus around the principles that inspire the IBA Rules on the Taking of Evidence in International Arbitration. Sensitive issues such as privilege have not really been discussed widely. We must also clarify that there is no discovery in the Colombian legal system.

8.2 Rules of Evidence
There is no general rule regarding the collection and submission of evidence in international arbitrations in Colombia, except for a few default legal provisions that are to be applied in the absence of an agreement of the parties or a decision of the arbitration panel on the matter.

8.3 Powers of Compulsion
The Arbitral Statute provides that the arbitral tribunal may require the courts to assist in the collection of evidence. The courts must proceed with respect to these requests from arbitral tribunals as if they were requests from any Colombian court.

In addition to the foregoing, the international section of the Arbitral Statute provides that, except when otherwise agreed by the parties, when one party fails to attend to the hearing or to submit documentary evidence, the arbitral tribunal may continue with the proceedings and render the award with the evidence that it has collected.

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9. Confidentiality

The Arbitral Statute remains silent regarding the confidentiality of the pleadings, documents and awards in Colombia.

10. The Award

10.1 Legal Requirements

The Arbitral Statute provides that awards in international arbitration must (i) be written and executed by the arbitrators (although the lack of signatures does not affect the validity of the award); (ii) express the reasoning of the arbitral tribunal, except if the parties have otherwise agreed; and (iii) enunciate the date and seat of the arbitration.

When there is more than one arbitrator, the award shall be decided, except when otherwise agreed by the parties, by the majority of the arbitrators, and have not been possible, by the president of the tribunal.

10.2 Types of Remedies

Colombian arbitration law establishes no limits on the types of remedies that an arbitral tribunal may award. Arbitration tribunals award the remedies that applicable substantive laws indicate.

10.3 Recovering Interest and Legal Costs

The possibility of recovering interest will depend on the substantive law applicable to the dispute. The Arbitral Statute remains silent concerning the allocation of costs in international arbitrations and, therefore, the provisions established in the applicable rules will apply.

11. Review of an Award

11.1 Grounds for Appeal

Arbitral awards made by arbitration tribunals seated in Colombia are not subject to appeal; nevertheless they can be challenged through an annulment recourse.

The grounds for annulment of an award rendered by an international arbitral tribunal which seat is Colombia are the same as those established under article 34 of the UNCITRAL Model Law. The local court will annul the arbitral award as requested by the party, when it proves that (i) at the moment of executing the arbitration agreement it 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; (ii) it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; (iii) 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 (iv) 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 law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this law. The local court shall annul the arbitral award *sua sponte* when: (i) the subject-matter of arbitration is not capable of settlement by arbitration under Colombian law; or (ii) the award is contrary to Colombian international policy.

The annulment recourse must be filed and sustained within the month following the day in which the arbitral award was served. If the recourse is admitted the opposing party shall have one month to argue upon the recourse, and the local court will decide within the next two months.

The Constitutional Court established general and special grounds for the admissibility of the *acciones de tutela* against arbitral awards. Hence, the plaintiff must prove each and every one of the general grounds as well as at least one of the special requirements for an award to be annulled *via acción de tutela*.

11.2 Excluding/Expanding the Scope of Appeal

Parties can agree in the arbitration agreement or in a written statement after the arbitration agreement to partially or totally exclude the annulment recourse if both parties are domiciled outside Colombia. In this event the arbitral award must be recognised before being enforced in Colombia.

11.3 Standard of Judicial Review
The local court deciding upon the annulment recourse is not entitled to amend the contents of the arbitral award and, therefore, the standard of review can be considered deferential.

12. Enforcement of an Award

12.1 New York Convention
Colombia signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on September 25th 1979. The convention was finally approved by Law 39 of 1990. No reservations were made by Colombia regarding the convention.

Colombia is also a party to the; (i) Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965; (ii) Inter-American Convention on International Commercial Arbitration of 1975; and (iii) Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979.

12.2 Enforcement Procedure
In order to enforce a foreign award in Colombia it is imperative for it to be previously recognised by the local authority in Colombia. This also applies when the seat of the arbitration is Colombia and the parties validly waived the annulment recourse.

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In order to seek the recognition of a foreign award the interested party must submit to the Supreme Court of Justice the request with a copy of or the original arbitral award. The Supreme Court of Justice will then admit the request and give ten days to the opposing party to state his case. The only grounds for denying the recognition are the ones stated under article 36 of the UNCITRAL Model Law, which are identical to the grounds for annulment of an award. The Supreme Court of Justice must decide in the following 20 days.

12.3 Approach of the Courts
After struggling with the issue for decades, the Colombian Supreme Court today strictly applies the New York Convention to the recognition of foreign arbitral awards, including a notion of Colombian International Public Policy that is narrower than domestic public policy and consistent with internationally accepted standards on the matter. The Supreme Court of Justice has defined Colombian International Public Policy as a set of the most basic and fundamental principles of Colombian juridical institutions such as; (i) due process; (ii) impartiality of the arbitral tribunal; (iii) good faith; and (iv) prohibition to abuse of rights. Hence an arbitral award may contradict Colombian domestic public policy and not necessarily Colombian international public policy, which refers exclusively to the most fundamental principles of Colombian juridical institutions.