Recognition of foreign arbitral awards in Colombia

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The adoption of Law 1563 of 2012, whose international section was based on UNCITRAL's Model Law on International Commercial Arbitration, represents a complete makeover of international arbitration in Colombia. It is widely recognised that the advantages brought by the adoption of such law are steadily positioning Colombia as an arbitral seat to be sought by national and international businessmen and law practitioners. However, the task of improving Colombia's position in the international arbitration scene cannot be fully achieved by Law 1563 of 2012. It also requires the fine-tuning of the judicial practice that applies its provisions in such a way that the legal system as a whole keeps up with the specificities and developments of international arbitration, recognising that despite the considerable differences existing between dispute resolution regimes, they are parts of a major system for the delivery of justice which needs of the mutual efforts of arbitral tribunals and national courts to be effective.

Law 1563 of 2012 it not alone in achieving this. There is a long history of international policy favourable to international commercial arbitration that has led the Colombian state to sign and ratify the following international treaties:

- Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979 (the Montevideo Convention), approved by Law 16 of 1981;
- Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention), approved by Law 44 of 1986; and
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), approved by Law 39 of 1990.

Against this background, experience has shown that the procedure and law applicable to the recognition in Colombia of an arbitral award rendered abroad remains controversial. Thus, an analysis of the case law on the matter is required in order to pave the way for a new generation of jurisprudence, to be produced under the umbrella of Law 1563 of 2012.

We will now turn to the most significant decisions issued by the Colombian Supreme Court regarding the recognition of foreign arbitral awards. Every one of them was issued while the aforementioned international conventions were in force in the country.

Sunward Overseas SA v SEMAR Ltda[1]

In 1992, the Colombian Supreme Court of Justice (the Supreme Court) was asked, for the very first time, to declare the recognition of a foreign arbitral award. In this case, the award had been rendered in 1988 by an arbitral tribunal seated in New York. Notwithstanding the fact that the Supreme Court accepted the applicability of the rules contained in the New York Convention, it refrained from declaring that the New York Convention had replaced the Colombian Code of Civil Procedure (CCCP) with regard to the list of grounds on which recognition could be denied, and ruled that both sets of requirements had to be satisfactorily fulfilled, hence adding the following requirements to those established in article V of the New York Convention:

- there must exist either legal or diplomatic reciprocity between Colombia and the country in which the award was produced;
- the award must not refer to real property constituted over assets located in Colombia the moment the foreign arbitral proceedings initiated;
- the matter of the dispute should not be one defined by the Law as of the exclusive jurisdiction of Colombian Courts; and
- there must not exist a judicial proceeding or final judgment in Colombia over the same dispute.

This rule evolved over time, but it helps explain the gap that still exists between national and international practice on the recognition of foreign awards.

Merck & Co Inc v Tecnoquímicas SA[2]

The second time that the Supreme Court addressed the issue of the recognition of foreign arbitral awards in Colombia was provided by a set of cases in which Merck & Co Inc sought the recognition of an interim arbitral award on jurisdiction and provisional measures rendered by an arbitral tribunal seated in the state of New Jersey and functioning under rules of the International Chamber of Commerce (the ICC Tribunal) in which the ICC Tribunal, among others, ordered the defendant, a Colombian based company, to refrain from starting arbitral proceedings in Colombia with regard to the same dispute that was being heard by the ICC Tribunal. The Supreme Court, in two decisions that were ultimately confirmed by the entirety of its Civil Chamber, reaffirmed its doctrine on the necessity to fulfil the requirements of both the New York Convention and the Colombian Code of Civil Procedure, as follows:

> *As a matter of fact, being the exequatur a special institution, its request must be subject to certain special requirements in order to be admissible. Among those requirements are: the jurisdiction of the Court to hear the claim; the foreign nature of the decision whose recognition is sought; the need for the concerned decision to have been rendered as the consequence of a process (Art. 695 para 1, CCCP); the fulfillment of the general requirements of complaints (Art. 75 CCCP); as well as the fulfillment of the special requirements for exequatur claims (Art. 695.2. CCCP), namely: that the claim does not relate to real property rights constituted over assets located in Colombia when the proceedings initiated; that the award is not contrary to the Colombian ordre public; that the award is final, according to the law of its country of origin; that duly certified and authenticated copy of the decision is presented; that the award does not relate to matters under the exclusive jurisdiction of Colombian courts (Arts. 695.2 and 694 paras. 1-4, CCCP).*[3]

Besides strengthening its doctrine in the accumulation of requirements for the recognition of foreign arbitral awards in Colombia, the Supreme Court found that interim awards, given that they do not provide a final resolution of the dispute between the parties, cannot be considered as awards for the purpose of the application of the New York Convention and the relevant national regulation for recognition of foreign awards in Colombia. The rationale of the Court is summarised as follows:

> *the New York Convention […] establishes in numeral 1 of article I, as susceptible of exequatur, not only those decisions considered as 'arbitral awards' in the state where they were made, but also those arbitral awards 'not considered as domestic awards in the state where their recognition is sought', as long as, in any case, they 'arise out of differences between persons whether physical or legal'. As can be seen, not any decision that settles a dispute can be enforced in the State where its recognition is sought. Only those that settle, totally or partially, a 'difference between persons whether physical or legal' can. […] It is then a mistake to assert that the Convention relates to 'arbitral awards' that 'have their origin' in disputes, rather than to arbitral awards that 'settle disputes' or 'put an end to disputes', because, if that were the case, the Convention would be construed mistakenly, accepting that an 'arbitral award' is not only the one that settles the 'differences between persons, whether physical or legal' but also the one that decides 'differences' that 'arise out of' the 'arbitral proceedings', as those that decide on jurisdiction and other issues, when that, by no means, can be extracted out of the whole context of the convention.*[4]

Therefore, for the Supreme Court, the only decisions that could be subject to recognition in Colombia were those that materially put an end to disputes between the parties. Accordingly, the Court expressly excluded from recognition those decisions that, even when being formally final, were not 'definitive' awards. As a consequence, in every case, the claims for recognition where dismissed on the grounds that interim awards were not 'awards' as understood by the New York Convention and local regulations.

Pollux Marine Services Corp v COLFLETAR Ltda[5]

This decision, on the admissibility of an exequatur claim, took place in 2011. In it, the Supreme Court considered that the claimant should have fulfilled the formal requirements set forth by the CCCP and, since the Supreme Court found that Pollux failed to provide evidence that the award was final (ie, a certification issued by the arbitral tribunal that rendered the award) or a certified translation of the arbitration agreement, the Supreme Court rejected the claim. This decision is representative of the regrettable approach adopted by the Supreme Court in its reading of the rules in the New York Convention and their link with relevant national regulation, which leads not only to an increase in the formal requirements that the claimant in the recognition proceedings must fulfil, but also to an unjustified establishment of further substantive requirements not included in the New York Convention. In this specific case, the Supreme Court failed to take into account that the New York Convention does not require that any recourse against the award be final and resolved prior to its recognition being sought – thus highlighting the extraordinary nature of annulment procedures.

Petrotesting Colombia SA and Southwest Investment Corporation v Ross Energy SA[6]

This decision, rendered in 2011, marks the stating of a new position in the Court's jurisprudence, informed by a recognition of globalisation as a tangible phenomenon that affects every aspect of modern society and calls for freedom of movement, not only of people, goods and services, but also of judicial and arbitral decisions.[7] In this case, the defendant in the recognition proceedings posed as defence against the recognition sought by the claimants that the legal requirements for the exequatur laid down in the CCCP were not met. The Court, in its analysis of the case, overruled its position from the *Sunward Overseas* and *Merck* cases and determined that, pursuant to article V of the New York Convention, the only defences available to the respondent in this kind of proceedings are those set forth in the New York Convention. However, the Supreme Court still departed from the New York Convention in one key aspect: despite the fact that Colombia made no reservations when ratifying the convention (especially concerning reciprocity as allowed by article I.3 of the New York Convention), the Supreme Court still demands that reciprocity exist between the country where the award is rendered and Colombia as a condition for granting recognition.

The decision in the *Petrotesting* case is also relevant as it is the first time the Court addresses the issue of ordre public with regard to international commercial arbitration. In order to determine of the content of Colombian International Public Policy, the Court performed an exercise of comparative law, after which it declared that such concept relates only to the fundamental values upon which Colombian basic institutions are based, including, but not limited to: due process; independence and impartiality of the courts and tribunals; and the prohibition of abuse of rights. In other words, Colombian International Public Policy, as understood by the Supreme Court in the context of recognition of foreign arbitral awards, is in keeping with international jurisprudence and encompasses a much narrower realm than domestic public policy.

Finally, the Court also examined and determined the content and extent of the defence posed pursuant to article V.1.b. of the New York Convention regarding the due process of the defendant in the arbitral proceedings. For the Court, such a defence should be interpreted in a restrictive fashion, limiting the events for its application only to those set forth by the convention; that is, the lack of due notice and the impossibility for the defendant to present its claim. This last event is completed by the Court with considerations made by the Colombian Constitutional Court, which determined that the opportunity for a party to present its case is violated whenever such a party is prevented from:

- accessing the judiciary and presenting its claim before a competent Court;
- being duly served of the decisions that lead to the creation, modification or extinction of a right;
- expressing its opinions freely;
- controverting the claims or defenses presented;
- achieving a decision in a reasonable term, without unjustified delays; and
- producing and presenting evidence, and being able to contradict the evidence presented by its counterpart.

Additionally, as an expression of the pacta sunt servanda principle, the Court determined that any such circumstance should have been submitted by the interested party to the arbitral proceedings in a timely fashion.

After the analysis summarised here, the Court granted the recognition of the foreign arbitral award.

Drummond Ltd v Ferrovías and FENOCO SA[8]

Also in 2011, the Supreme Court was asked to declare the recognition of two arbitral awards, one interim and one final, with their

respective addenda, as rendered by an arbitral tribunal constituted under the rules of the International Chamber of Commerce. This case is, in essence, the application of the doctrines developed in the prior cases, given that the Court was asked to rule on the recognition of an interim award and on the defences posed by the respondents based on the regulation laid down in the Colombian Code of Civil Procedure.

As per the possibility of granting recognition of an interim award, the Court repealed its doctrine from the *Merck* cases, according to which, disregarding their denomination, the only arbitral decisions to be recognised in Colombia are those that settle in a definitive manner a dispute between the parties. According to the Supreme Court, as one of the decisions in these proceedings is called an 'interim award', it holds, as per its nature and scope, the nature of an award because it puts an end to several of the claims. In that regard, the doctrine has pointed out that:

> *numerous regulations relate to the possibility of an arbitral tribunal to issue interim awards. ICC, LCIA, UNCITRAL and AAA rules all include the possibility for arbitrators to issue interim awards […] The doctrine refers to such awards as decisions that are final, in a manner, not because they put an end to the arbitration or to the functions of the tribunal, but because they settle in a definitive matter a part of the disputes that have been submitted to arbitration, leaving the rest unsettled […] an interim award is then final with regard to the dispute it settles, but partial, with regard to the totality of the disputes under arbitration.*[9]

Contrary to what was decided in the *Merck* cases, the Court found that the so-called interim award could be recognised in Colombia given that, despite its 'preliminary' character, it settles in a definitive fashion some of the disputes between the parties as it decides on several of the claims in the complaint.

As regards the requirements for the declaration of recognition, the Court again dismissed all the defences asserted pursuant to the Colombian Code of Civil Procedure, recognising that the only ones available for the respondents were those based on article V of the New York Convention.

As a novelty, while reviewing the defences posed by one the claimants, the Supreme Court established, following jurisprudence from the Colombian Council of State[10], that the fact that a state entity appears as defendant in an international commercial arbitration proceeding does not affect Colombian ordre public, given that the possibility for public entities to enter into international commercial arbitrations has not been limited by any relevant law and, further, that the New York Convention is applicable to awards rendered in proceedings where a state entity has acted because, as per its article I, the Convention applies to awards that arise out of differences between persons, whether physical or legal, without distinction between their private or public nature. Consequently, the Supreme Court concluded that disputes arising out of Colombian governmental contracts are not subject to the exclusive jurisdiction of the Colombian judiciary and, therefore, can be decided by arbitral tribunals, as long as the arbitrators refrain from ruling on the legality of the administrative acts produced by such entities in the exercise of their exceptional powers, as had previously determined the Colombian Constitutional Court.[11] Accordingly, the Court granted the exequatur of the concerned arbitral awards.

Poligráfica CA v Columbia Tecnología Ltda[12]

The latest decision made by the Court on the matter took place with regard to an arbitral award rendered against a Colombian based company by an arbitral tribunal constituted under the rules of the Arbitration and Conciliation Centre of the Chamber of Commerce of Guayaquil, Ecuador. This decision is important because it is the first one rendered after Law 1563 of 2012 came into force, and is representative of the most evident shortcoming of Colombian judicial practice with regard to the recognition of foreign arbitral awards (ie, the seemingly everlasting quest for reciprocity).

As per the effects of the adoption of law 1563 of 2012, the Court recognised that it includes a new, more expeditious proceeding for achieving the recognition of foreign arbitral awards that exclude the use of exequatur rules contained in the CCCP. Nevertheless, pursuant to rules found in the very Law 1563 of 2012, the Court concluded that this specific case should be conducted as an exequatur because the foreign arbitral proceedings started before Law 1563 of 2012 came into force.

Consequently, the Court initiated its accustomed study on the existence of either legal or diplomatic reciprocity between Colombia and Ecuador. In doing so, the Court found that there were three international treaties applicable to the case: the New York Convention; the Montevideo Convention; and a Treaty on Private International Law signed by Colombia and Ecuador in 1903.

In light of the latter, the Court had to determine which of the aforementioned treaties apply to the specific case. With regard to the New York Convention, the Court concluded that, as per article VII, said instrument holds a 'residual' nature and must yield when faced with other bilateral or multilateral agreements on the matter. The Treaty on Private International Law between Colombia and Ecuador was also discarded as non-applicable. Hence, the court decided to rule according to the provisions found in the Montevideo Convention.

In the absence of defences posed by the respondent, the Court found that all the applicable requirements were met in the case, thus granting the recognition of the award.

Current situation and expectations for the future

Upon reviewing the arguments developed by the Court in its rather limited experience with the recognition of foreign arbitral awards in Colombia, it is interesting to note how the highest civil Court in Colombia has been growing in its awareness of the importance of arbitral justice and of its specificities. Jurisprudential evolution, though rather slow, is on the right track, without evidence of arbitrary reasoning by the Court or of a decided wariness against international commercial arbitration. However, challenges remain. The constant quest for reciprocity, even if it has had no regrettable material effects, constitutes a clear misapplication of the relevant international rules by the Court, which in this regard has failed to grasp the logic behind international regulations such as the New York Convention.

The decision in the *Poligráfica* case, while partially flawed (as explained above), gives room to a more optimistic prospect as to the future of recognition of foreign arbitral awards in Colombia. The fact that the Court expressly recognised the ending of the regime of recognition based on exequatur, and acknowledged, as applicable to future cases, in an exclusive basis, that the rules laid down in Law 1563 of 2012 – essentially a compilation of the rules found in the New York Convention – enhances the expectations and allows practitioners and businessmen to anticipate a favourable environment for the recognition of foreign arbitral decisions.

Notes

1 Colombian Supreme Court of Justice, Civil Chamber, Judgment of 20 November 1992.
2 Colombian Supreme Court of Justice, Civil Chamber, Judgments of 12 November 1998, 26 January 1999 and 1 March 1999.
3 Colombian Supreme Court of Justice, Civil Chamber, Judgment of 1 May 1999.
4 Supra Note 3.
5 Colombian Supreme Court of Justice, Civil Chamber, Judgment of 11 May 2011
6 Colombian Supreme Court of Justice, Civil Chamber, Judgment of 27 July 2011.
7 Ibid. The Supreme Court expressly stated: The dynamics imposed by globalization of all activities of modern society, characterised by economic and cultural interconnections, derived from the traffic of people, goods and services, has influenced the current trend of private international law to advocate for the recognition and enforcement of decisions rendered abroad, on a prior basis of reciprocity, constituting a clear exception to the sovereign authority to administer justice through the Judiciary in its territory.
8 Colombian Supreme Court of Justice, Civil Chamber, Judgment of 29 December 2011.
9 Ibid.
10 Colombian Council of State, Decision of 22 April 2004, case 2003-00034-01
11 Colombian Constitutional Court, Judgment C-1436 of 2000.
12 Colombian Supreme Court of Justice, Civil Chamber, Judgment of 19 December 2013.

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