10th
Anniversary
Edition

2016-2017

The Baker McKenzie **International Arbitration Yearbook**

Colombia

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A. Legislation and rules

A.1 Legislation

Law 1563 of 2012 ("Law 1563"), which governs domestic and international arbitration in Colombia, entered into force on October 2012. To date, the interpretation of several provisions in the area of international arbitration is yet to be finalized. In addition to Law 1563, Law 1682 of 2013 ("Law 1682") includes specific provisions that regulate arbitration when state-owned companies or public entities are involved in disputes related to infrastructure projects in the transportation sector.

A.2 Institutions, rules and infrastructure

A.2.1 Center of Arbitration and Conciliation of the Chamber of Commerce of Bogota

As a consequence of Law 1563, the Center of Arbitration and Conciliation of the Chamber of Commerce of Bogota (the most important arbitration center in Colombia) produced new sets of rules for domestic and international arbitration. The rules entered into force on 1 July 2014 and apply to all requests for arbitration filed after that date.

After the entry into force of Law 1563, and by applying the internationality criteria set forth by that law, the number of

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international arbitrations seated in Colombia has been continuously increasing.

A.2.2 Applicable rules to transport infrastructure projects

Law 1682, which regulates contracts for infrastructure projects in the transportation sector, provides that disputes arising from such contracts may be submitted to arbitration. However, parties may only resort to arbitration when the case is going to be decided under the rule of law and not *ex aequo et bono*.

The arbitral agreement must contain suitability requirements that must be met by the arbitrators, but the contract or any document related to the contract may not contain the specific nomination of arbitrators that will compose the tribunal. State entities must establish in the arbitration agreement a cap on arbitrators' fees, but contracts may contain a formula to re-adjust such fees. Due to the public nature of state entities, the arbitrators' fees and the costs of arbitration must be included in the budget of the state-owned company.

Law 1682 also echoes previous jurisprudence by establishing that the arbitral tribunal does not have jurisdiction to decide upon the legality of an administrative act of a state-owned company or public entity when exercising exceptional powers (eg, unilateral termination, interpretation or modification of the contract). This means that the arbitration tribunal may only decide upon the economic effects of such administrative acts. Additionally, having recourse to arbitration does not immediately impede the state-owned company or public entity from performing exceptional powers inherent to these types of legal entities unless interim relief has been granted.

The Colombian National Agency of Infrastructure (*Agencia Nacional de Infraestructura* - ANI) has a few model concession contracts that contain dispute resolution clauses. Although the model dispute resolution clause is not identical in every model concession contract, there are certain common features to highlight. It contains provisions to constitute an *amiable compositeur* panel, which shares some of the

characteristics of the dispute boards but are not the same. The *amiable compositeur* resolves the dispute through a binding decision that has the legal effects of a settlement agreement (*contrato de transacción*) under Colombian law. The decision delivered by the *amiable compositeur* may be subject to arbitration if a party questions its validity.

The model clause also contains provisions for domestic and international arbitration. According to the model clause, the internationality of the arbitration is defined by the parameters established by Law 1563. International arbitration cases could be administered either by the ICDR or the ICC. The arbitral tribunal will be seated in Bogotá and the merits of the case will be decided under Colombian law.

A.2.3 New Rules by the Superintendence of Corporations

In August 2015, a new set of rules put forth by the Superintendence of Corporations (SoC) came into force (the "SoC Rules"). The SoC Rules contain a General set of rules and a Specialized set of rules. The General Rules provide for a proceeding similar to domestic arbitration established under Law 1563 and aim to resolve any type of dispute.

The Specialized Rules aim to regulate arbitration for corporate matters, resolving disputes faster and with less associated costs. These rules provide for shorter terms and a more expedited proceeding, and allow the tribunal and the parties to establish a procedural schedule for the gathering of evidence. The SoC handles the administrative costs of the tribunal and the costs of the secretary.

B. Cases

B.1 Applicable regime with which to determine document requirements

In a recent case, the Supreme Court of Justice (SCJ), based on the principles of pro-execution or pro-application, stated that when the

New York Convention applies simultaneously with Law 1563, the rules that impose fewer requirements will be applied.

Tampico filed with the SCJ a request for recognition of a foreign award rendered by an arbitration tribunal seated in Chile in 2009. Even though the request did comply with requisites of the simplified procedure under Law 1563, the SCJ did not admit the recognition request, given that it did not comply with the more stringent requisites set forth in the Civil Procedural Code and in the New York Convention. The SCJ argued that Law 1563 entered into force in October 2012 and would only apply to the recognition of awards rendered in arbitrations initiated after that date.[4]

Due to a reconsideration motion filed by Tampico, the SCJ changed its position and acknowledged that the requirements will be those enshrined in Law 1563. The SCJ argued that Law 1563 entered into force before the filing of the request for recognition and based on the principle of pro-execution or pro-application, between Law 1563 and the New York Convention, the less stringent regime will apply.[5]

B.2 Recognition of foreign arbitral awards and the exception of public policy

In previous cases,[6] the SCJ analyzed the public policy defense within the context of international arbitration and the New York Convention. The court stated that the recognition or enforcement of a foreign award could be denied pursuant to the public policy defense established in the New York Convention whenever the award is contrary to the basic or fundamental principles that form part of Colombian public policy. The SCJ ruled that the disregard of an

[4] Information about this case was kindly provided by E. Zuleta at the 2015 meeting of the ICC Latin American group.
[5] Supreme Court of Justice. Decision of Aug. 18, 2016. File No. 11001-02-03-000-2014-01927-00. Judge Aroldo Wilson Quiroz Monsalvo.
[6] Supreme Court of Justice. *Petrotesting Colombia S.A. and Southeast Investment Corporation,* July 27, 2011, File No. 2007-01956; Supreme Court of Justice. *Drummon Ltd. v. Ferrovias en Liquidación and FENOCO,* December 19, 2011, File No. 2008-01760.

internal mandatory provision will not necessarily result in the denial of recognition of the award for violation of public policy, unless the disregard of such internal mandatory provision also breaches fundamental and basic principles of Colombian law.

In a 2016 decision,[7] the SCJ stated that an award issued by an international arbitration tribunal to resolve issues related to a commercial agency contract that was subject to a foreign law and performed in Colombia, will be recognized in Colombia despite an internal mandatory provision that expressly forbids the application of foreign law to agency agreements performed in Colombia.

In that case, HTM LLC (HTM) requested that the SCJ grant recognition of a foreign award rendered by an arbitration tribunal seated in Houston, Texas. Fomento de Catalizadores Foca S.A.S., HTM's alleged agent, opposed to such recognition based on Articles 869 and 1328 of the Colombian Commercial Code, according to which agency agreements to be performed within Colombian territory must be subject to Colombian laws. The agency agreement expressly stated it was subject to the laws of Texas.

The SCJ first stated that rights derived from an agency agreement are tradable and consequently, capable of settlement through arbitration.[8] Then the SCJ analyzed whether the recognition of the award would be contrary to Colombian public policy.[9] The SCJ concluded that the expression "public policy of that country" enshrined in the New York Convention refers exclusively to "international public policy," which is different from the "internal public order" of a country.

The court then divided imperative rules into two categories: (i) public policy rules of direction; and (ii) public policy rules of protection. The first category includes those rules related to the political, economical and social fundamental principles of the institutions and of the basic

[7] Supreme Court of Justice. File No. 11001-02-03-000-2014-02243-00. Ruling of June 24, 2016. Judge: Ariel Salazar Ramirez.
[8] In the terms of Article 5.2.(a) of the New York Convention.
[9] In the terms of Article 5.2.(b) of the New York Convention.

structure of the state. The second category includes the rules designed for the protection of a determined group or association. The concept of "international public policy" refers exclusively to those rules included in the first category and excludes those included in the second category. Specifically, Article 1328 of the Colombian Commercial Code belongs to the second category. Consequently, Article 1328 cannot be used as the basis to refuse the recognition of an arbitral award under the New York Convention.

B.3 The international nature of arbitration

Pursuant to Article 62 of Law 1563, arbitration is international when one of the following three criteria is met: (i) the parties to an arbitration agreement have their domicile in different states at the time the arbitration agreement is entered into; or; (ii) a substantial part of the obligations of the commercial relationship are performed outside the state where the parties have their domiciles; or (iii) the controversy affects the interests of international trade.

At the time Law 1563 entered into force, some argued that Article 62 is a substantial rule that may only apply to arbitral agreements executed after October 2012. Others argued that Article 62 was an imperative procedural rule that must be applied to all arbitration proceedings filed after October 2012. To date, several international arbitral tribunals have established that Article 62 is a procedural rule and that the requirements enshrined in this article apply to arbitral proceedings filed after Law 1563 came into force without regard to the date on which the arbitral agreement was executed.

Is the arbitration international if one of the parties to the arbitration agreement is a foreign company with headquarters in a foreign country but with a branch in Colombia, and the other party is a company domiciled in Colombia? In the last few yew years, some tribunals have ruled that if the home office of the branch is domiciled in a different state to that in which the counterparty is domiciled, the arbitration proceeding may be considered international.

In case one of the parties has multiple domiciles, the domicile that has the closest relation to the arbitral agreement is the one that should be taken into account to determine the international nature of the arbitration.

The interpretation of Article 62 of Law 1563 is not yet unanimous. However, several international arbitration tribunals seated in Colombia have consistently sought the application of international principles and criteria when interpreting Article 62.

B.4 Action for the protection of constitutional fundamental rights against arbitral awards

Traditionally, the Colombian Constitutional Court has ruled that the constitutional action for the protection of fundamental rights (*acción de tutela*) proceeds only exceptionally against judicial decisions. It had been granted to protect the fundamental right to due process in court rulings, but has also been granted in a very small number of domestic arbitration cases.

The Constitutional Court extended this doctrine to arbitral awards on the grounds that, in Colombia, arbitral awards have the same status and produce the same effects as court rulings. In this respect, the Constitutional Court set forth the following requirements for the *tutela* action to proceed:[10]

a) The subject matter of the dispute must have constitutional relevance.

b) The party pursuing the constitutional protection must have made previous use of every available ordinary and extraordinary judicial recourse, except when the *tutela* intends to prevent an irreparable act of harm.

c) The *tutela* must be filed within a reasonable period of time.

[10] Constitutional Court. Ruling T-244 of 2007 and Ruling T - 430 of 2016.

d) The procedural irregularity must have a decisive effect on the ruling and must affect the fundamental rights of the party pursuing the constitutional protection.

e) The claim must indicate the fundamental rights allegedly violated and the facts that caused such violation.

f) The party pursuing the protection must have claimed such violation within the arbitral proceeding, if possible.

An arbitral award would have violated a party's fundamental rights if at least one of the following defects is demonstrated by the party pursuing the constitutional protection:

a) **Substantive defect**: When the award is adopted based on inapplicable laws, or the interpretation given to such laws causes damage to the party's fundamental rights, or when the decision is not reasoned or such reasoning is openly irrational.

b) **Organic defect**: When the tribunal has no jurisdiction to decide the controversy.

c) **Procedural defect**: When arbitration is carried out without due compliance with the applicable arbitral rules and laws, and such irregularity has a decisive effect on the final decision.

d) **Factual defect**: When the decision is not grounded on the evidence gathered within the proceeding, when such evidence is wrongfully appreciated or when in appreciating the evidence, fundamental rights were violated.

However, this analysis is unrelated to the question of whether the *tutela* action proceeds or not in the context of international arbitration cases seated in Colombia. Law 1563 expressly provides that the only recourse allowed against an arbitral award issued by an international arbitration tribunal seated in Colombia is the action to set aside the award. However, the interpretation of this provision by Colombian

courts is yet to be seen, specifically whether the *tutela* action proceeds or not in the context of international arbitrations seated in Colombia.

B.5 Tacit waiver of arbitration agreements

In 2013,[11] the State Council modified its longstanding position with respect to the tacit waiver of arbitration agreements. For many years, the State Council upheld that parties to an arbitration agreement may tacitly waive the arbitral jurisdiction if one party filed a lawsuit before the state courts and the other party did not object, in a timely manner, to the state court's jurisdiction on the grounds that an arbitration agreement exists. The State Council's position changed in the ruling of 18 April 2013 and currently, such tacit waiver is no longer allowed when it comes to arbitration agreements in which one of the parties is a state-owned company or a state entity.

C. Trends and observations

Colombia has a strong arbitral tradition. Both private and public sectors use it as a mechanism to settle their disputes. With the introduction of Law 1563, the number of cases submitted and decided by international arbitration tribunals seated in Colombia has increased.

Today, Colombia has highly competitive arbitration centers that offer services in accordance with international standards.

Additionally, Colombia has signed free trade agreements with other countries and regional organizations. It is likely that this trend will continue, as indicated by several pending negotiations with foreign countries. These free trade agreements include provisions for dispute settlement that diminish risks for investment and potential disputes.

[11] State Council. Ruling of April 18, 2013. File No. 17.859 (R-0035).