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Claudia Benavides[1] and Mariana Tique[2]

A. Legislation and rules

A.1 Legislation

Domestic and international arbitration in Colombia continue to be governed by Law 1563 of 2012 ("Law 1563"), which entered into force in October 2012. Law 1563 provides for a different set of rules depending on whether arbitration is domestic or international. Section 3 of Law 1563 which governs international arbitration, is mostly based on the UNCITRAL Model Law, albeit that it does have certain provisions which differ from the Model Law.

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. Law 1682 regulates contracts for infrastructure projects in the transportation sector. It 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.

[1] Claudia Benavides is a partner in Baker McKenzie's Bogotá office. She heads the Dispute Resolution practice group of the Bogotá office and represents a variety of clients in domestic and international arbitrations.
[2] Mariana Tique is a junior associate within the Dispute Resolution practice group of the Bogotá office.

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 (e.g. 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.

A.2 Institutions and rules

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

The Center of Arbitration and Conciliation of the Chamber of Commerce of Bogota, which is the most important arbitration center in Colombia, produced new sets of rules for domestic and international arbitration that 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 international arbitrations seated in Colombia has been continuously increasing.

A.2.2 Rules by the Superintendence of Corporations

In August 2015, a new set of rules put forth by the Superintendence of Corporations 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 proceedings 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 more expedited proceedings, 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.

A.2.3 The Presidential Directive

On 18 May 2018, the President of Colombia issued the Presidential Directive number four on the Subscription of Arbitration Agreements and the Selection of Arbitrators ("Presidential Directive"). It includes specific regulations for international arbitration against public entities.

Pursuant to the Presidential Directive, the director of the Colombian National Agency for the Judicial Defense of the State ("ANDJE") shall approve the subscription of any international arbitration agreement applicable to state contracts. The Presidential Directive establishes that arbitration agreements for state contracts cannot be governed by the ICSID Rules.

In regard to the selection of arbitrators, the Presidential Directive provides that at least ten business days prior to the date established by the parties for the constitution of the tribunal, the head of the legal office or legal director of the public entity shall send to ANDJE a list of at least five eligible candidates with specific experience in the topics that will be discussed within the proceedings. The list must include each candidate'sCV and a summary of the dispute. The public entity is not permitted to send identical lists, even if it has multiple arbitral proceedings, since these lists must be constituted on a case-by-case basis.

The director of ANDJE shall evaluate the appropriateness and convenience of the proposed candidates and shall present its recommendations to the legal secretary of the presidency of Colombia within the following three business days. The secretary shall approve or dismiss the candidates evaluated by ANDJE, subject to a prior consultation to the secretary-general of the Presidency of the Republic of Colombia.

This period of limitation may be exceptionally reduced if the public entity does not have timely knowledge of the call for the selection of arbitrators and the claimant does not agree to extend the period of time to select the arbitral tribunal. If the parties cannot reach an agreement

on at least one of the candidates proposed by the ANDJE, it is possible for the public entity to participate in a draw to appoint the arbitrators from the preexisting lists of the designated arbitration center. However, under no circumstance may a national entity or agency of the executive branch propose or select as an arbitrator a lawyer who acts as a counterparty in other proceedings involving a national public entity.

In relation to arbitration proceedings against public entities, the Presidential Directive also establishes that ANDJE shall publish any relevant procedural information related to international arbitral proceedings. Thus, such information in that respect must be sent to the ANDJE within five business days after service of the decision.

A.2.4 Dispute Resolution clauses in concession contracts

The Colombian National Agency of Infrastructure has several 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 and thus the decision is *res judicata*. 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 ICDR or ICC. The arbitral tribunal will be seated in Bogotá and the merits of the case will be decided under Colombian law.

B. Cases

B.1 Constitutional actions in international arbitration

Colombian constitutional law provides an action for the defense of fundamental constitutional rights, known as a "*tutela* action." The *tutela* action has been accepted against domestic awards on the same grounds of a *tutela* action against judicial decisions, related mainly with violations of due process, such as procedural errors of sufficient gravity, errors of sufficient gravity on the examination of evidence or evidently erroneous factual findings.

However, there is still discussion regarding the possibility of presenting a *tutela* action against an award issued by an international arbitration tribunal seated in Colombia. A few *tutelas* against awards rendered in international arbitrations seated in Colombia have been permitted to commence, although none of these have ever been overruled since no violation of fundamental rights has ever been found. Under Law 1563, the only remedy against an international arbitration award is a motion to set it aside. This should be interpreted in the sense that the *tutela* action cannot be presented against the decision of an international arbitration tribunal. Nonetheless, the specific issue has not been addressed by the Colombian courts.

A very recent clarification of a decision to deny a *tutela* action against an international arbitration award represents a major step on the topic. In this clarification, the judge pointed out that a *tutela* action cannot be presented against an international arbitration award. He stated that UNCITRAL recommended limiting and clearly defining court involvement in international commercial arbitration. This limitation of the local judge involvement in international arbitration is recognized by the legislature, since Law 1563, in accordance with the UNCITRAL Model Law, establishes that the only remedy against an arbitral award is a motion to set it aside. Permitting a *tutela* action against an international arbitration award would breach this, because it may even allow local judges to review substantive errors.

The clarification also states that a *tutela* action may only proceed against acts or omissions of a public authority which violate fundamental rights. Accepting a *tutela* action against an international arbitration award would be recognizing that international arbitrators are public authorities under Colombian law, implying that their actions may lead to the responsibility of the state, despite the fact that the seat of arbitration may be another country and the arbitrators may be nationals from another state. Deriving state responsibility for actions and omissions performed in another country or by national from another state would be unacceptable, which leads to the conclusion that a *tutela* action cannot be presented against awards issued by international arbitration tribunals seated in Colombia.

B.2 Recognition and enforcement of foreign awards

Colombia has traditionally recognized and enforced foreign awards and has been developing solid and consistent jurisprudence un that respect.

Recently, the Colombian Supreme Court of Justice ("SCJ") granted recognition to another foreign award rendered under the rules of the Court of Arbitration of the Official Chamber of Commerce and Industry of Madrid.[3] Since the party against whom enforcement was sought did not object to the enforcement proceeding, the SCJ analyzed the *sua sponte* grounds to refuse the recognition of the arbitral award of Law 1563, in accordance with the New York Convention: non-arbitrability and public policy. The SCJ has consistently applied the grounds for non-recognition of foreign awards in a restrictive manner, as it can be seen in this ruling.

In regard to the non-arbitrability, the SCJ established that the subject matter of the arbitration proceedings was arbitrable, since the award related to a valid transaction which involved an economic interest and

[3] Supreme Court of Justice. Decision of March 23 2018. File No. 11001-02-03-000-2017-00080-00. Judge Ariel Salazar Ramírez.

referred to disposable rights, fulfilling the objective arbitrability standard.

As to the public policy, the SCJ has consistently stated that the protection given to Colombian international public policy should not become a means to destroy regional integration or cooperation among different nations on the basis of false nationalism. Therefore, an analysis of the Colombian international public order must be addressed from a criterion of dynamic, tolerant and constructive public policy demanded by the international community in the contemporary world. The SCJ concluded that the recognition of a foreign award essentially comprises the formal control of the award aimed to ensure that the most fundamental values and principles of the internal order are not violated.

B.3 Evidence gathering in proceedings to set aside an international arbitration award

The SCJ dismissed a request made by one of the parties to a motion to set aside an arbitration award issued under the ICC Rules since the claimant was seeking to present additional evidence after the presentation of the motion to set aside the arbitral award.[4]

Under Law 1563, the judge who hears a motion to set aside an award issued by an international arbitration tribunal seated in Colombia shall rule with the evidence provided by the parties in the opportunity provided for in the arbitration proceeding. The annulment judge cannot accept further evidence presented by either party during the annulment procedure.

One of the main goals of Law 1563 is to provide the parties with expedited proceedings. Therefore, a motion to set aside does not provide a specific evidence gathering stage: the claimant shall present his evidence along with the motion to set aside, and the respondent, after the motion was served. Since the Colombian General Code of

[4] Supreme Court of Justice. Decision of July 4 2018. File No. 11001-02-03-000-2016-03020-00. Judge Aroldo Quiroz Monsalve.

Civil Procedure states that a decision of any judge shall take into account only evidence filed in a timely manner, any request to present evidence after the prescribed time limit shall be dismissed.