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Colombia

Claudia Benavides¹ and María Lucía Casas²

A. Legislation and rules

A.1 Legislation

Domestic and international arbitration in Colombia continues to be governed by Law 1563 of 2012, which entered into force on 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 it does have certain provisions that differ from the Model Law. Law 1682 of 2013 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

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 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

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 María Lucía Casas is a junior associate within the Dispute Resolution Practice Group of the Bogotá office.

international arbitrations seated in Colombia has been continuously increasing.

A.2.2 Applicable rules to transport infrastructure projects

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 readjust 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.

The Colombian National Agency of Infrastructure (*Agencia Nacional de Infraestructura*) 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 a dispute board but is 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 the ICDR or ICC. The arbitral tribunal will be seated in Bogotá and the merits of the case will be decided under Colombian law.

A.2.3 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 fewer 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 Independence and impartiality of an arbitrator

The Colombian Supreme Court of Justice recently ruled on the recognition and enforcement of an arbitral award issued in an ICC case seated in Santiago de Chile.³ This ruling made a distinction between the standards to be applied under domestic and international

³ Supreme Court of Justice. Decision of 12 July 2017. File No. 11001-02-03-000-2014-01927-00. Judge Aroldo Wilson Quiroz Monsalvo.

arbitration when the independence and impartiality of an arbitrator is challenged.

Tampico filed for recognition and enforcement of the ICC award in Colombia before the SCJ. Alqueria opposed the recognition of the award arguing a public policy violation given that Tampico's counsel and Tampico's appointed arbitrator in the ICC arbitration were also acting in an ICSID arbitration, where Tampico's counsel was acting as arbitrator and the firm of Tampico's appointed arbitrator was acting as counsel. The SCJ pointed out that although the situation alleged by Alqueria may be unacceptable from an ethical point of view, it did not prevent the recognition of a foreign arbitral award because it did not imply a violation of Colombia's international public policy.

Furthermore, the SCJ ruled that for domestic arbitration, Article 16 of Law 1563 establishes the specific grounds to challenge an arbitrator. However, Article 75 of Law 1563, which governs international arbitration, dictates different criteria to establish whether an arbitrator will be impeded from participating in an arbitral proceeding. Therefore, one cannot infer the application of the same standards.

The SCJ concluded that the existence of different provisions regulating domestic and international arbitration under Law 1563 is clear evidence that, under international arbitration, the standard of impartiality must be read according to international norms and not depending on dispositions of domestic law. The SCJ, by relying on the IBA Guidelines on Conflicts of Interest in International Arbitration, concluded that the independence and impartiality of the arbitrator was not compromised in this case.

B.2 Recognition and enforcement of foreign awards

In a recent ruling, the SCJ granted recognition of an international award rendered by an arbitration tribunal seated in Peru, in respect of the resolution of a construction contract.⁴ The ruling established that

⁴ Supreme Court of Justice. Decision of 7 September 2016. File No. 11001-02-03-000-2014-02737-00. Judge Luis Armando Tolosa Villabona.



regarding recognition of foreign awards, Section 3 of Law 1563 is applicable without prejudice to any multilateral or bilateral treaties in force in Colombia.

According to Law 1563, recognition of a foreign award could be denied if such award is contrary to Colombian international public order. The SCJ has repeatedly held that Colombian international public order is a means of protection, defense and preservation of the fundamental principles of the Colombian legal system and the country's essential interests within its economical, political, social and ethical structure. However, the SCJ said, such protection should not become a means to destroy regional integration or cooperation among different nations on the basis of false nationalisms. Therefore, an analysis of the Colombian international public order must be addressed from the criterion of dynamic, tolerant and constructive public order demanded by the international community in the contemporary world. The SCJ concluded that 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 Annulment of awards issued by international arbitration tribunals

The SCJ recently decided an action to annul an award issued in an international arbitration procedure seated in Colombia.⁵ The party that filed for annulment alleged several different grounds established in Article 108 of Law 1563. The SCJ made several important determinations.

First, the SCJ expressly ruled that the annulment grounds applicable for domestic arbitration are not applicable to international arbitration tribunals seated in Colombia.

⁵ Supreme Court of Justice. Decision of 18 April 2017. File No. 11001-0203-000-2016-01312-00. Judge Luis Alonso Rico Puerta.

Second, according to the SCJ, when the award rules on issues that were not requested or claimed in the lawsuit, such situation could give rise to a ground for annulment under domestic arbitration provisions but not under international arbitration provisions. The SCJ said that, under international arbitration provisions, the award could be annulled if the award rules on a controversy not covered by the arbitration agreement or has decisions that exceed the terms of the arbitration agreement. The point of reference under international arbitration provisions is the *arbitration agreement* rather than the *lawsuit*. Thus, an award issued by an international arbitration tribunal seated in Colombia could not be annulled on the basis of inconsistencies between the claims contained in the lawsuit and the issues decided in the award. The SCJ once again clearly differentiated the grounds to annul an award issued by an international arbitration tribunal seated in Colombia, from the grounds to annul a domestic award.

Third, the SCJ ruled that inconsistencies between the claims contained in the lawsuit and the issues decided in the award cannot be considered a violation of Colombian international public order and, therefore, are not a ground for annulment under international arbitration provisions.

C. Funding in international arbitration

C.1 Third-party arbitration funding

Third-party funding is understood as a financing method in which an entity that is not a party to a particular dispute funds another party's legal fees or pays an order, award or judgment rendered against that party, or both.⁶

Several issues have been raised in the use of third-party funding in domestic and international arbitration. For instance, one of the most relevant issues is whether a funded party is required to disclose the

⁶ Chapter 1: "Introduction to Third-Party Funding," in Lisa Bench Nieuwveld and Victoria Shannon Sahani, *Third-Party Funding in International Arbitration* (Second Edition), (Kluwer Law International 2017).



existence of a third-party funding agreement to the opponent and the arbitral tribunal. Since it is highly unlikely that voluntary disclosure will be adopted, different institutions and guidelines are now beginning to regulate the obligation to disclose this information.

C.2 Third-party financing in Colombia

In Colombia there is no specific regulation on third-party funding. Law 1563, which governs arbitration in Colombia, does not regulate this matter. However, the absence of regulation has not been seen as an impediment to its practical use.

For instance, Chilean scholars have considered that third-party funding is a viable mechanism in continental legal systems under the principle of freedom of contract (*libertad de pactos*) and provisions that already exist to govern the parties' right to assign their litigious rights (*cesión de derechos litigiosos*).⁷ In principle, the same analysis would be applicable in Colombia.

In Colombia, the assignment of litigious rights implies the assignment of the uncertain outcome of a dispute that is already in court. The assignor cannot assure the assignee of how the controversy will be resolved. The assignment of litigious rights was established to allow a third party to replace the original party in a court case. Third-party funding is, in principle, different to the assignment of litigious rights, given that under third-party funding the third-party funder does not necessarily become a party to the case. Rather, thanks to the agreement with the third-party funder, the party obtains the financing conditions that enable such party to exercise its rights and better access to justice.

⁷ Elina Mereminskaya (Arbitrator of the Santiago Chamber of Commerce), *Financiamiento de litigios a través de terceros y su aterrizaje en Chile*, available at: www.camsantiago.cl/informativo-online/2017/01/docs/Articulo_Elina.pdf.

C.3 How can the Colombian legal system solve the gray area of disclosure in third-party funding?

The Colombian legal system does not expressly require the disclosure of a third-party funder in arbitral procedures. However, there are certain constitutional and procedural principles⁸ that may imply the duty of the parties to disclose in the context of domestic arbitration. For instance, the principles of good faith and procedural loyalty may imply that all parties acting within the realm of Colombia's legal system should disclose information that may have an impact on the arbitration or affect the equality of the parties. Nonetheless, we are not aware of judicial decisions that have provided such an interpretation.

In respect to international arbitration, Law 1563 does not regulate a duty of the parties to disclose. In this context, it is likely the parties would apply the non-binding IBA Guidelines on Conflicts of Interest in International Arbitration. The IBA Guidelines solve this problem by establishing the duty to disclose any relationship between the arbitrators and the parties with the third-party funders. The awareness and use of the IBA Guidelines in the context of international arbitration has been steadily growing in Colombia and even local courts have acknowledged in their rulings the use of soft law by international arbitration tribunals.

⁸ Article 29 and 83 of the Colombian Constitution; Article 4, 12 and 78 of the General Procedural Code.