LATINLAWYER

# LATINLAWYER Reference – ARBITRATION 2008

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## COLOMBIA

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### 1. Which legislation governs the enforcement of international commercial arbitration awards and arbitral agreements in international business contracts, and international commercial arbitration proceedings?

In Colombia, the enforcement of international commercial arbitration awards and arbitral agreements in international business contracts and international commercial arbitration proceedings are governed by Law 315 of 1996 and by Decree 1818 of 1998.

The decision and agreements to use arbitration are valid by virtue of article 116 of the Constitution.

### 2. Has the UNCITRAL model arbitration law been adopted in your jurisdiction?

Despite the fact that Law 315/1996, which governs international arbitration, was supposed to be based on the UNCITRAL Model Law, there are significant differences between the governing law and the Model Law. In this sense, Law 315 only includes the following matters: (i) the parameters to determine when a dispute can be submitted to international arbitration; (ii) the prior application of the principles of international law; (iii) the definition of "foreign arbitral award"; and (iv) the possibility to agree upon international arbitration in agreements with foreign parties and in those agreements that govern long-term financing and payment systems by means of the exploitation of the object or operation of the goods for the rendering of a public service.

### 3. Is your jurisdiction a party to both the New York Convention and the Panama Convention? Is it a party to any other conventions or treaties governing international commercial arbitration agreements, awards or proceedings?

Colombia subscribed to and ratified both the New York and the Panama Convention. Besides these, Colombia is party to the following treaties and conventions:

- the International Procedural Law Treaty of Montevideo, 1889. (Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay);
- the Convention between Spain and Colombia, 1908;
- the Washington Convention, 1965;
- the Montevideo Inter-American Conventions on Extraterritorial Validity of Foreign Judgements and Arbitrational Awards, 1979 (this Convention was implemented by Law 16 of 1981); and
- the Private International Law Treaty between Colombia and Ecuador.

### 4. Is your jurisdiction a party to the ICSID Convention? Have steps been taken to renounce the Convention or withdraw from the ICSID?

Yes. As mentioned above, Colombia is party to the ICSID Convention (or Washington Convention). This Convention entered into force on 14 August 1997, but it is still pending, dependant on the Colombian government's consent to include ICSID arbitral agreements. However, that consent is already included in several free-trade agreements.

### 5. Has your jurisdiction refused to honour an international arbitral award issued against it?

Yes, in the Termorio case, but it was because the arbitral agreement was subscribed to under a previous and deficient legislation. Currently, since Law 315 of 1996, that discussion no longer exists.

Also and indirectly, in the case of Unisys, in which despite the fact that the international award was complied with, the public patrimony control authority (Contraloría) considered that it was within its competency to disregard such award by ordering Unisys to repair the damages that were caused, in its view,, to the public patrimony of the head of the Bogotá Telephone Company (ETB).

## 6. Is a pre-dispute clause or separate agreement to resolve international commercial disputes by arbitration enforceable?

Yes. Currently there is no need for a post-dispute clause or agreement "compromiso"; a previous arbitration clause or agreement is enough.

## 7. What are the requirements for an enforceable arbitral agreement?

The requirements for an international arbitral agreement to be enforceable are the same as those established for domestic arbitration:

The arbitration agreement may be incorporated in a contract for future disputes (either as a clause or as an annex) or may be an autonomous agreement to settle a specific existent dispute (the "commitment").

The requirements, in general, of the arbitration agreement are those applicable to contracts under Colombian law, even though they will be effective only when the disputes under arbitration are suitable for settlement.

The arbitration agreement clause must be in writing and must reflect the parties' intention to submit their conflicts to arbitration. If it is in a separate document it must state the names of the parties and indicate in a precise way which contract it refers to.

The commitment, on the other hand, must contain: the name and domicile of the parties; an indication of the differences and conflicts that will be the subject of the arbitration; and an indication of the process to be followed when applicable.

## 8. Is there subject matter that is not legally subject to arbitration in the context of an international business transaction?

Generally, all conflicts that are suitable for settlement may be submitted to arbitration; in other words, those conflicts which the parties have the power to dispose of.

In regards to the restrictions, we can mention Law 80 of 1993, article 70, which states that in arbitrations with state-owned entities, the arbitration tribunals may not resolve:

- the legality of administrative acts (they may only decide over the economical effects of these acts); or
- the legality of the application of "exceptional powers" of the administration that are: unilateral interpretation, unilateral modification, unilateral termination and caducity of the public contract. However, the economical consequences of the above can be submitted to arbitration.

Also consider Law 315 of 1996, article 1, which states that the international arbitration is only possible if at least one party is not national and if the award is not contrary to the Constitution or the national public order; and Law 963 of 2005, article 7, whereby matters concerning legal stability contracts are not subject to international arbitration. These matters are only subject to domestic arbitration.

## 9. Does the law specify whether an arbitration will be in equity or under law if the parties do not expressly specify the nature of the arbitration in the agreement?

There is no specific rule for international arbitration, but according to the regulation of domestic arbitration, if the arbitration clause does not indicate the nature of arbitration, this should be under law. (Article 115, Decree 1818 of 1998).

## 10. How does the law limit party-autonomy with respect to the terms of an arbitral agreement?

The only limitation in relation to the designation of arbitrators refers to the proscription of party-arbitrators in domestic arbitration. Consequently, in domestic arbitration, the arbitrator must be appointed: by both parties, jointly; by a third party named by the parties (ie, an arbitration centre); or by a civil circuit court.

In international arbitration, the law does not limit the party-autonomy in regards to the terms of an arbitral agreement, as long as it contains the minimum requirements already indicated in question 7.

Thus, the parties may designate the arbitrators by agreement or delegate the decision to a third party. However, the number of arbitrators should always be an odd number.

If the parties do not determine the number of the arbitrators or the method of their appointment, the tribunal shall consist of three arbitrators, one appointed by each party (party-arbitrator) and the third, who shall be the president of the tribunal, by agreement of the parties. (Law 267 of 1998, article 37, incorporated by Decree 1818 of/98, article 203).

## 11.In what circumstances does the law allow a non-signatory to an arbitral agreement to pursue a claim in an international arbitration against a party that signed the arbitral agreement and vice versa?

In Colombia the arbitral agreement (clause or commitment) must always be in writing and to be enforced it has to be executed for both the plaintiff and the defendant.

Colombian law does not allow an arbitral tribunal to assume jurisdiction over individuals or entities that are not themselves signatories of an arbitration agreement, unless they expressly adopt a decision towards arbitration.

In consequence, a non-signatory to an arbitral agreement (third party to the agreement) can never pursue a claim against a party that signed the agreement. On the other hand, a signatory to the arbitral agreement can sue a third-party non-signatory of the agreement, who can – at its sole discretion – adhere or not adhere to the arbitral pact.

## 12.Are foreign arbitral institutions authorised to administer arbitrations in your jurisdiction?

According to Decree 1818 of 1998, any institution in Colombia needs an authorisation from the Justice Department to administer arbitration, whether national or international.

However, it is possible to designate a foreign arbitral institution not established in Colombia to hold an arbitration proceeding with its seat in Colombia, and the arbitral award issued under the auspices of that foreign institution is valid and enforceable.

## 13.Does the law require that arbitrators in international arbitrations be citizens or residents of your jurisdiction? Does your law require that arbitrators in international cases be lawyers? Are the fees of foreign arbitrators serving in an arbitration seated in your jurisdiction subject to taxation?

According to article 197 of Decree 1818 of 1998, the parties involved in an international arbitration can determine the nationality of the arbitrators, which means that it is not necessary for the arbitrators to be citizens or residents in Colombia.

Notwithstanding the above, if the arbitration is under law, the arbitrators must be lawyers, but not necessarily Colombian lawyers. In this case, the arbitrators can be foreign lawyers. If the arbitration is in equity, the arbitrators can be non-lawyers.

Regarding taxation, the fees for foreign arbitrators serving in arbitration seated in Colombia are subject to withholding income tax at the rate of 33 per cent. The fees are also accrued with VAT, which shall be assumed by the Colombian payer without any withholding or deduction on the amount of the payment. .

## 14.Must arbitrators in international arbitrations be independent and impartial? What is the legal standard governing conflicts of interest and disclosure by arbitrators in international arbitrations?

Most certainly, the arbitrators should be independent and impartial. Arbitrators may be subject to impediments or recusals for the same reasons established in article 150 of the Civil Procedure Code for national judges and courts. These causes refer mainly to kinship, litigation or commercial relations with one of the parties. There are no specific impediments established for arbitration. However, arbitration institutions may enforce their impediment causes.

If the arbitration agreement refers to any specific arbitral institution, the regulations of that institution should be applied also.

## 15.Does the law require that arbitral proceedings be held in a specific language?

In domestic arbitration, the proceedings must be held in Spanish. However, in international arbitration the parties may, directly or by reference to any specific arbitration rules, determine the language they wish to adopt during the proceedings.

## 16.Can foreign lawyers serve as advocates in arbitral proceedings in your jurisdiction? If so, can they do so alone or must a local lawyer serve as co-counsel? Are their fees subject to local taxation?

There are no particular provisions applicable to this matter. However, it is our opinion that foreign lawyers can serve as advocates in arbitral proceedings since international arbitration is not regulated under the Civil Procedure Code.

Regarding domestic arbitration, since it is mandatory under the Civil Procedure Code to be a fully licensed lawyer in order to act as an advocate in such proceedings, it is not possible for foreign lawyers to serve in domestic arbitration.

Finally, the fees of foreign lawyers serving as advocates in arbitral proceedings in Colombia will be considered as Colombian-source income, and consequently payments are subject to withholding income tax at the rate of 33 per cent. The fees are accrued with VAT, which shall be assumed by the Colombian payer without any withholding or deduction on the amount of the payment.

17.In what circumstances, if any, does your law allow the consolidation of multiple arbitral proceedings?

There are no particular provisions applicable for such scenarios. In fact, neither arbitrators nor authors have agreed on this issue.

There is no rule for arbitration that permits or prohibits the consolidation of multiple arbitral proceedings. In regards to this matter, some arbitrators consider it is impossible for such consolidation to occur, mainly because the arbitrators appointed for the parties are only designated for one or more specific matters, and so in case of consolidation, the arbitrators appointed for the first arbitration would not be competent to know of the second one.

However, some arbitrators consider it possible, since there is no rule to prohibit it. For them, the consolidation of multiple arbitral proceedings is provided for in the provisions under the Civil Procedural Code (article 157). According to this article, it is possible to consolidate two or more proceedings as long as they have the same procedural rules; they are in the same instance; and the claims of both lawsuits could have been formulated in the same lawsuit.

18.Is the principle of 'Kompentenz-Kompetenz' followed in the courts, and do the courts follow the principle of the independence and separability of the arbitration clause?

Actually, the highest courts in Colombia consider the principle of "Kompetenz-Kompetenz" as mandatory, and in its latest decisions the Supreme Court has stated that arbitrators are the only ones allowed to determine its own jurisdiction. According to those judgments, the only recourse that may be interposed against the jurisdiction decision is that of reconsideration before the same arbitrators.

With regard to the principle of the independence and severability of the arbitration clause, it is also accepted, and therefore the clause can be enforceable and considered valid even if the contract or agreement containing such stipulation is declared null or void.

19.If a party files a lawsuit in violation of agreement to arbitrate, will a petition by the defendant to remit the lawsuit to arbitration be granted by the courts under normal circumstances? If so, will that petition be treated as a threshold matter or will it be rolled into the merits of the litigation such that the defendant will also need to defend the merits of the lawsuit in court?

If one party, despite the existence of an arbitral agreement with the defendant, files a lawsuit before any court in its jurisdiction, then the defendant can object to such lawsuit arguing the existence of such agreement to ask the court to dismiss the claim. If the party does not proclaim the arbitration clause, the lawsuit can not be dismissed by the court, since it is understood that the arbitration agreement was resigned to. The courts only deny jurisdiction over the matter if the defendant addresses the existence of an arbitration agreement. Otherwise, the courts must assume jurisdiction over the matter.

If the defendant argues the existence of an arbitral agreement, the court will then order the plaintiff to file the lawsuit before the arbitral tribunal as a threshold, without any consideration of the merits of the case.

Usually the court will give a plaintiff a specific time during which the lawsuit should be brought before the arbitral tribunal, in order to avoid the consequences of the statute of limitations. However, this does not mean that if the plaintiff does not file the lawsuit during the time established by the court it will not be able to do it later. It only means that after that time, the statute of limitations will no longer be suspended.

20.Are arbitral tribunals empowered to grant interim relief? If so, how is that relief enforced in the courts?

During the course of arbitration, arbitrators may adopt interim measures (claim registrations and seizures), as long as the dispute relates to property rights. However, no preliminary awards or interim relief are permitted. The courts do not have jurisdiction over arbitration procedures.

The arbitrators are empowered to enforce their orders, even though sometimes it can be difficult to effect such orders.

21.Can arbitrators issue subpoenas or use other legal processes to compel the production of evidence by a third party or compel a third-party witness to appear before them? If so, will a court lend its aid in enforcing such an order against a recalcitrant third party?

Since arbitrators are temporarily vested with the power to administer justice over the cases subject to their review, they possess the same powers and abide by the same duties imposed on judges under the Colombian Constitution.

Like any court, arbitrators have the powers to order the exhibit and disclosure of documents, including third-party disclosure. The tribunal shall determine whether or not the documents are relevant or privileged.

In principle, the courts do not have the power to intervene in the exhibit and disclosure of documents. However, exceptionally,

in case of gross violation of due process, a court may intervene through injunctive relief (*acción de tutela*).

### 22. Can a party in an international commercial arbitration seek interim or provisional relief from a court without first seeking relief from the arbitral tribunal?

As noted above, courts do not have jurisdiction over arbitration, except through injunctive relief as a transitory measure in case of gross violation of a Constitutional fundamental right.

### 23. Have the courts issued injunctions enjoining arbitral proceedings from going forward?

Not recently. It did happen many years ago under different applicable law, but since the current applicable law was enacted, no.

### 24. Does the law provide that post-award interest accrues on an unpaid arbitral award?

The default interest runs automatically event though the arbitral tribunal does not expressly grant it. The rate is an issue of discussion. Some judges consider it is the commercial rate (around 36 per cent), while others think it is the legal civil rate (6 per cent), that applies. In order to avoid such discussion we recommend that the award should indicate the rate.

### 25. Is an arbitral tribunal empowered to award attorneys' fees to the prevailing party or is that power reserved to the courts?

In fact, the award must determine the fees and the costs of the process, including the attorneys' fees. These will be assumed by the defeated party and if there is a partial award, the tribunal will fix these fees proportionally.

### 26. What are the grounds for challenging an international award issued in an arbitration seated there and what is the period of time a party has to challenge that award?

Since Colombia signed the Washington Convention, the grounds for challenging an international award issued in an arbitration seated in this country are regulated in that Convention. The term is 120 days counted from the date of the award.

Additionally, the grounds for challenging an award are also given by Decree 1818 of 1998, and through injunctive relief if gross violation of due process occurs.

### 27. Please describe the standard used by the courts in deciding whether to vacate an international arbitral award. Is 'lack of reasonableness' of an international award grounds to vacate it? To what degree have international awards rendered in your jurisdiction been vacated on the grounds of 'public order'?

To date, there have not been discussions concerning vacating international awards. However, in Colombia neither public order nor lack of reasonableness is a ground for annulment.

The above does not imply that the control authorities see their faculties limited to taking part in the defence and guard of the public patrimony.

### 28. Please describe any recent significant experiences or cases that illustrate the attitude of your courts toward the vacatur of international awards.

Under the current legislation there is no experiences or cases that illustrate the attitude of our courts toward the vacatur of international awards. In Colombia, with the enactment of Law 315 of 1996, there is no longer the discussion about the validity and enforcement of international awards.

### 29. Do the courts consider themselves empowered to vacate an arbitral award rendered in another jurisdiction?

Yes. Through the exequatur and just by the exequatur, the courts are empowered to vacate an arbitral award rendered in another jurisdiction.

### 30. Please describe the process for enforcing an arbitral award rendered in another jurisdiction.

Arbitral awards issued in a foreign country are enforceable in Colombia in accordance with the New York Convention and international treaties executed by Colombia, as well as Colombian Civil Procedure Code.

An exequatur proceeding is required to enforce arbitral awards issued in a foreign country. The award must fulfil the express requirements mainly addressed to protect international public order and verification of the binding final effects of the award.

The exequatur must be filed before the Supreme Court, which must summon the party affected by the award, and will verify whether the following requirements have been observed:

- the foreign award presented in Colombia for enforcement does not refer to in rem rights on assets located within Colombian territory at the commencement of the proceedings in the foreign court that issued the judgment;
- the foreign award presented in Colombia for enforcement does not conflict with public order laws of Colombia;
- the foreign award, in accordance with the laws of the country in which it was obtained, is final, and a duly certified, legalised copy with the corresponding apostille seal together with an official translation into Spanish has been presented to the court in Colombia;
- no proceedings are pending in Colombia with respect to the same causes of action, and no final judgment (other than the foreign judgment referred to in the third point above) has been awarded in any proceeding on the same subject matter and between the same parties; and
- in the proceedings commenced in the foreign country that issues the judgment, the defendant was served in accordance with the laws of such jurisdiction and in a manner reasonably intended to afford an opportunity to the defendant to defend the action. Proceedings for execution of a money judgment by attachment or execution against any property located in Colombia would be within the exclusive jurisdiction of Colombian courts.

### 31. Assuming that the award emanates from a jurisdiction that is a party to a Convention enforceable in your jurisdiction, how long does it take to obtain an order of enforcement in the first instance and a final order of enforcement in the last instance?

The average time to obtain an exequatur in Colombia is approximately a year or two.

### 32. How long does it take to confirm an arbitral award rendered abroad compared with obtaining a judgment in the courts of your jurisdiction in a similar commercial dispute?

Even though the exequatur can take about a year or two, this proceeding is much shorter than an ordinary proceeding. In fact, in the best-case scenario, a final judgment of a similar commercial dispute in ordinary courts in Colombia can take at least six years.

However, after the exequatur it is necessary to initiate a new proceeding in order to execute the decision, which can take about two or three more years.

### 33. Please describe some significant recent experiences with the enforcement of foreign arbitral awards.

In Colombia most of international awards have been honoured voluntarily.

### 34. To what degree has 'public order' been a ground to refuse enforcement of an international award rendered abroad?

The violation of public order could be a very good reason to refuse enforcement of an international award. Public order has been understood as a rule for the safeguard of the society, in relation to the essential interests of the country, given the particular ideas prevailing at the time, such as political, economic or moral interests.

The role of public order is to guarantee the organisation upon which public institutions operate in the country.

The public order that needs to be considered when deciding on the exequatur is that applicable during the course of such decision, not the one valid at the time when the foreign ruling under consideration came about.

Our jurisdiction understands public order as a reserve clause designed to avoid that any law enacted abroad, which would normally qualify to be enforced on any particular matter, has to be locally accepted even if it clearly conflicts the fundamental principles upon which our national laws are founded, and therefore it is not an imperative law.

### 35. What is your view of the future of international arbitration and is the trend positive? What advice do you have with respect to dispute resolution for a foreign lawyer advising a foreign client contemplating entering into a business deal with a company from your jurisdiction?

We are of the opinion that with the enactment of Law 315 of 1996, which embraced international arbitration as valid and abiding in the country, the discussion on its admissibility as brought by the famous Termorio case no longer exists.

Nowadays, our courts accept the possibility for Colombian individuals or companies to enter into international arbitration clauses without any discussion. Thus, all questions about the validity of foreign arbitral awards have disappeared.

Still, even as we are confident that international arbitration is on the right path, we cannot help to be concerned as to the

intervention of the Colombian Control Authorities as the "Contraloria" in arbitrations in which a public entity is one of the parties thereto. This undoubtedly prevents the use of international arbitration as an alternative means to dispute resolution.

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