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In this issue

From the Co-Chairs 5

Editor's note 7

Committee Officers 8

Conference reports – IBA Annual Conference, Dublin 2012

- Mediator by day, arbitrator by night 9
- Counsel conduct 11
- Arbitration and criminal law 14

Interview with an arbitrator

- L. Yves Fortier (as interviewed by Rachel Bendayan) 16

Country developments

Africa

- Domestic arbitration in Nigeria: can foreign counsel still run the race? 20

Asia: East & Pacific

- Recent trends: can arbitrations be conducted in a just and efficient manner? 22

Asia: South & Central

- Reinforcing the faith in Indian arbitration 26

Middle East

- Issues of recognition and enforcement of international commercial arbitral awards in Egypt 29
- Conducting an ICC arbitration in Qatar: a few legal safeguards 32
- Qatar follows Saudi Arabia with a UNCITRAL-based Draft Arbitration Law 36
- New era in arbitration in Turkey 39
- Awards subject to Turkey's International Arbitration Law must be rendered before the expiration of applicable time limits or risk being set aside 41
- Setting Aside an Arbitral Award: integral principles laid down by the UAE courts 43
- On recent developments of "public policy" and their potential implications for the enforcement of New York Convention awards in the UAE: is it a camel or a trojan horse? 46

Europe

- Compulsory arbitration and incorporation of EU directives on legal expenses insurance 50
- Does EU competition law impose limitations on document production in international arbitration? 53
- Brussels regulation reform and arbitration 56
- Arbitrability of disputes governed by mandatory statutes 60
- May the force be with you: enforcing arbitration awards in England 62
- Recent developments in the challenge of arbitral awards under Italian law 65
- Choosing the right route to enforcement of awards in the Netherlands 68
- The winner takes all – document production costs in Sweden 71
- Anonymous publication of awards: an oxymoron or a workable programme? 74
- German court puts to bed challenge of arbitral award based on a sleepy arbitrator 76
- Arbitration trap and small claims: Russian recent experience and guidelines 78
- The binding effect of an arbitration agreement on non-signatories: the Finnish perspective 81
- The Supreme Court of Finland to decide on whether a third-party beneficiary of a contract can be compelled to arbitrate 84
- Relitigating issues lost in arbitration against non-parties: *Michael Wilson & Partners v Sinclair* 86
- Decision of the Swiss Federal Tribunal on the *exceptio arbitri* in state court proceedings: comments on the prima facie review and its scope of application 90
- What is the extent of a tribunal's duty to consider all of the issues that are put to it? 94
- Challenging partial awards in Italy: when is it possible? 96
- New provisions governing international arbitration in Romania 98
- The Ukrainian Arbitration Association: a step toward an arbitration-friendlier future 101

Latin America

- Brazilian Superior Court of Justice decides that state courts have no jurisdiction to grant urgent relief after the commencement of an arbitration proceeding 103
- New arbitration law in Colombia 106
- Awards are no longer mandatory in Mexico without prior judicial recognition. 109
- Enforceability of arbitration clauses in Insurance Agreements under Brazilian law: the *Enesa v Sulamerica* case 110

North America

- Timeframe for appealing a domestic arbitral award under the FAA 112
- What is arbitration? A Delaware Federal Court poses the primordial question 114
- The *Consorcio* decision and the need to account for discovery outside the arbitration procedure 118
- A new arbitration law in the British Virgin Islands may increase international arbitration activity there 121

Continued overleaf

Paradise found? Arbitration in the Bahamas with a focus on trust disputes 123

Midnight Express meets international arbitration: United States federal court denies enforcement of CIETAC award where the underlying contract was procured by police confinement 126

Investment Arbitration

When it rains it pours: three new cases add to the umbrella clause debate 129

Did the Indian Supreme Court reverse itself in *Bharat Aluminium v Kaiser Aluminium* because of the decision reached by the Investment Treaty Tribunal in *White Industries v India*? 132

Arbitration Institutions

10 questions about the DIS (German Institution of Arbitration) 136

LCIA India – strengthening the institutional arbitration movement in the world's largest democracy 139

New arbitration law in Colombia

COLOMBIA

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Introduction: a new arbitration statute

On 12 October 2012, the new Colombian law on domestic and international arbitration – Law 1563/2012 (the 'Arbitration Statute' or the 'Statute') – entered into force.

This Arbitration Statute is very timely, as previously Colombian statutory provisions regarding arbitration were spread among different legal instruments that only dealt with international arbitration tangentially. In fact, the only law in effect specifically governing international arbitration was Law 315/96, which addressed but three elements of this unique procedure:

- the criteria to determine when an arbitration is international;
- the determination of the law applicable in international arbitrations; and
- the concept of a foreign award.

The need for a comprehensive legal regime governing international arbitration, based on the UNCITRAL Model Law (the 'Model Law'), was pressing.

Additionally, as a consequence of the vast improvements in security and its strong and steadily growing economy, Colombia has received significant foreign investment in recent years. In the first ten months of 2012 alone, foreign direct investment in Colombia reached US$13.988m.[1] From 2010 to 2011, exports increased 55.7 per cent; and from January to September 2012 exports increased 7.5 per cent as compared to last year.

As is customary in international contracts, Colombian parties frequently agree international arbitration clauses in international commercial contracts to which they are party. However, since the legal regime governing international arbitration was insufficient, and there were consequently few decisions from Colombian Courts on questions related to international arbitrations, Colombia was rarely designated as a seat or place of arbitration.

The new Arbitration Statute – the international arbitration provisions of which are based almost entirely on the Model Law – constitutes an important step in establishing Colombia as a modern 'arbitration-friendly' jurisdiction. Indeed the Statute, along with several recent decisions by the Supreme Court strongly supporting international arbitration and fully applying the New York Convention, establish Colombia as a reliable, safe and favourable arbitral seat.[2]

New domestic arbitration law

One of the main changes introduced by the Statute is that it established two types of arbitration: institutional[3] and ad hoc arbitration. Institutional arbitration applies: (i) by default, when parties have not specified the type of arbitration; and (ii) when a public entity or someone who performs public functions is a party to the arbitration agreement. In this last scenario, even when the arbitration proceeding is administered by an institution, the applicable rule is Law 1563/2012 and not the institutional rules.

Another addition worth mentioning is that the Arbitration Statute gives arbitrators the power to order interim or conservatory measures that they consider reasonable. For example, arbitrators may order measures to prevent the breach of the contract(s) in dispute or prevent damages, amongst others.

In the case of monetary claims, the party against which an interim measure is ordered may prevent its enforcement or request its lifting or modification by providing a bond to ensure compliance with a final award that goes against it or compensation for damages in case of failure to comply. A bond may not be given where interim measures are not related to financial claims or seek to anticipate the award.

Additionally, the Statute has lowered the costs for domestic arbitration. According to Law 1563, the fees of a member of an arbitral tribunal are capped at one thousand times the amount of the minimum legal salary (COP 566,700,000; approximately US$314,833). For a sole arbitrator, the fees may increase by 50 per cent above that level. The fees of an administrative secretary are limited to 50 per cent of the arbitrator's fees.

New international arbitration law

Regarding international arbitration, the Statute has mostly adopted the Model Law, the benefits of which are well known. Therefore, for the purposes of this note, we will refer only to the main changes to the Model Law introduced in Colombia.

The first modification to the Model Law regards the criteria to determine when an arbitration is international. According to the Statute, whether the 'place of the arbitration [is] situated outside the State in which the parties have their places of business' (Article 1(b)(i) of the Model Law) is no longer a criterion to determine the internationality of the arbitration.[4] In addition, the criterion that 'the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country' (Article 1(c) of the Model Law), which was included in the previous Colombian law of international arbitration, is not found in the new Statute.

Hence under the new Statute, an arbitration is international if one of the following criteria is met:

- the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their domiciles in different states;
- the place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected, is situated outside the state in which the parties have their domiciles; or
- 'the dispute submitted to arbitration affects the interests of international trade'.

This last criterion has the effect of increasing the likelihood that an arbitration will be considered international under Colombian law. The Cour d'Appel de Paris, for example, has interpreted the phrase 'the dispute submitted to arbitration affects the interests of international trade' in the following terms:

> 'For the arbitration to be international, it is sufficient that the economic transaction under consideration involves the cross border movement of goods or services or a cross border payment. […]The payment for the work was to be made partially in Tunisian dinars and partially in French francs. […] Hence the operation presupposed the cross border transfer of material, a cross border transfer of technology as well as cross border payments. It thus has an international character and the arbitration is an international arbitration.'[5]

In other words, almost any dispute relating to cross-border transactions could be said to fall under the criterion of 'the dispute submitted to arbitration affects the interests of international trade'.

On the basis of the foregoing criterion, in combination with Article 64 of Law 1563, which states that 'in the interpretation of international arbitration its international character and the need to promote uniformity in its application and the observance of good faith, shall be taken into account',[6] it is possible for two companies domiciled in Colombia to agree that a dispute between them will be resolved by international arbitration, if there is a ground for determining the internationality of the dispute.

Regarding arbitrators, Law 1563/2012 provides that, depending on the agreement of the parties, arbitrators are not required to be lawyers; and, helpfully, that it is not necessary for counsel to be admitted to practise law in the place of arbitration in order to represent a party before an arbitral tribunal.

As established in the Model Law, annulment is the sole recourse against an award that can be filed before the courts, and those grounds are the same as those for denying recognition of a foreign award set out in the New York Convention. The novelty is that Law 1563/2012 provides for different outcomes depending on the grounds on which the award is vacated, as follows:

- If the award is vacated for any of the grounds that may be alleged by a party according to Article V(1)(a) of the New York Convention,[7] the award would be void and the parties may refer their dispute to the courts.
- If the award is vacated for any of the grounds that may be alleged by a party according to Article V(1)(b)(c)(d) of the New York Convention,[8] the award would be void, without affecting the arbitration agreement.
- If the award is vacated for any of the grounds that may be declared by the judge according to Article V(2) of the New York Convention,[9] the award would be void.

If the award is vacated, the evidence submitted during the arbitral proceeding may nonetheless be evaluated by a subsequent arbitral tribunal or judicial authority (Article 110).

Finally, Article 111 of the Arbitration Statute states that awards rendered in international arbitrations with Colombia as the seat will be considered as domestic awards, hence they do not require any recognition or enforcement proceedings in Colombia. Such awards can be directly executed in Colombia, unless parties to the extent permitted by law have waived their right to seek annulment, in which case recognition and enforcement proceedings are necessary, as they are for foreign awards.

Particular relevance of the new legislation

This new legislation, especially Article 111 of the Statute, is particularly relevant for international companies that set up subsidiaries or divisions domiciled in Colombia by which they perform their obligations under contracts entered into with Colombian parties. Given the courts' traditional support for arbitration, there is every reason to expect that they will adopt a broad approach to Article 111 when considering the internationality of awards rendered in arbitrations seated in Colombia involving such parties.

Significantly for parties doing business with the state or state entities, the Statute adds the following final paragraph to the first article of the Model Law, effectively foreclosing any discussion of capacity or arbitrability in cases involving states parties: 'No state, or a state-owned company or a state-controlled organization that is party to an arbitration agreement may invoke its own national law to challenge their capacity to take part in an arbitration or the arbitrability of a dispute covered by an arbitration agreement'.[10]

Conclusion

The new Arbitration Statute constitutes a major step forward in the law and practice of international arbitration. In adopting the Statute, Colombia has chosen to incorporate into its law the most modern international standards. Colombia must now be considered among the world's arbitration-friendly jurisdictions, as a favourable place of international arbitration and an efficient and effective jurisdiction for the recognition and enforcement of arbitral awards.

Notes

1 See: **www.portafolio.co/economia/inversion-extranjera-colombia-crecio-14-octubre**.
2 The Statute is expected to pass Constitutional review during the next few months.
3 Despite the existence of institutional arbitration, please note that the possibility of applying rules that greatly differ from the Arbitration Statute is very limited. In any case, those rules must ensure the due process.
4 Even though it was considered as a criterion in the Law 315/96.
5 France No 25, *Ministry of Public Works v Société Bec Frères*, Cour d'Appel [Court of Appeal], Paris, Not Indicated, 24 February 1994, in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 1997 – Volume XXII, Volume XXII (Kluwer Law International, 1997) pp 682–690.
6 Unofficial translation. Article 64, Law 1563/2012.
7 Article V(1)(a) of the New York Convention: '(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'.
8 Article V(1)(b)(c)(d) of the New York Convention: '(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place'.
9 Article v(2) of the New York Convention: '(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country'.
10 Article 62, Law 1563/2012.