



Arbitration Guide  
IBA Arbitration Committee

# COLOMBIA

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## I. Background

- (i) **How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?**

Colombia has a long tradition of arbitration. Arbitration is increasingly used as a means of resolving commercial disputes. The main advantages of arbitration, as compared to litigation, are basically three: (i) timing (relatively simple judicial proceedings may take several years); (ii) the possibility to have the case adjudicated by individuals with experience and specialised knowledge; and (iii) flexibility, which, in the particular case of international arbitration, includes the right to choose the applicable procedural rules.

The disadvantages of arbitration would be the following: (i) unpredictable decisions in areas where the courts are to some extent predictable (even though there is no precedent, lower courts tend to follow the decisions of higher courts); and (ii) costs, which are significantly higher than those of litigation.

- (ii) **Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?**

Most arbitrations seated in Colombia are domestic and institutional. Even though there are more than 100 arbitral institutions in the country, the vast majority of domestic arbitrations are administered by the centres of arbitration of the Chambers of Commerce of Bogotá, Medellín and Cali. Domestic arbitration is normally subject to the local arbitration laws as opposed to institutional rules or rules agreed upon by the parties. As to international arbitration, the most commonly-used institutions are the International Court of Arbitration of the International Chamber of Commerce (ICC) and the International Centre for Dispute Resolution (ICDR).

- (iii) **What types of disputes are typically arbitrated?**

Most arbitrations in Colombia concern State contracts (mostly related to infrastructure) and commercial disputes on inter alia: agency; sale of goods; distribution; construction; insurance and carriage.

- (iv) **How long do arbitral proceedings usually last in your country?**

The length of the arbitral proceedings depends on the applicable arbitration rules. In domestic arbitration there is default rule whereby *'[i]f the arbitration clause or submission agreement does not indicate the term of the proceedings, it will be of six (6) months from the first procedural hearing [primera audiencia de trámite]. The term may be extended one or several times, at the request of the parties or*

*their counsel having express authorization to do so, as long as the total extension does not exceed six (6) months. In any case, those days during which the procedure was interrupted or suspended because of legal grounds will not be taken into account...* (Decree 2279/89, Art. 19).

**(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?**

Colombian international arbitration law does not contain express restrictions as to the nationality or residence of arbitrators or counsel. However, in domestic arbitration, if the dispute is to be decided in law, arbitrators must be attorneys admitted to practice law in Colombia and parties must be represented by counsel authorised to practice law in the country (Law 446/98, arts. 111 & 118; Decree 1818/98, arts. 115 & 122).

## **II. Arbitration Laws**

**(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?**

The foundation stone of arbitration in Colombia is article 116 of the Constitution. Law 315/96 governs international arbitration, while the statutes applicable to domestic arbitration are essentially, Decree 2279/89, Law 23/91, Law 446/98 and the Code of Civil Procedure (CCP). It is also worth mentioning Decree 1818/98, which compiles the provisions applicable to both domestic and international arbitration. However, the statute omits norms which are in force and includes others which are not. Finally, Law 80/93 (articles 68 to 75) governs arbitrations related to State contracts.

Colombian international arbitration law is not based on the Model Law on International Commercial Arbitration (MLA). Indeed, Law 315/96 only includes, with certain modifications, Art. 1(3) of the MLA.

**(ii) Is there is a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?**

Colombian law distinguishes between national and international arbitration.

Pursuant to article 1 of Law 315/96, an arbitration is international if the parties so agree and *'...1. The parties have their domicile in different States at the time of the conclusion of the arbitration agreement. 2. The place of performance of the substantial part of the obligations that is directly linked to the object of the*

*dispute is outside the State in which the parties have their main domicile. 3. The place of arbitration is outside the State in which the parties have their domicile, provided this eventuality is agreed in the arbitration agreement. 4. The matter that is the object of the arbitration agreement clearly involves the interest of more than one State and the parties thus expressly agreed. 5. The dispute referred to arbitration directly and unequivocally affects the interests of international commerce....*´ (Translation provided by the *International Encyclopedia of Laws*). The Constitutional Court has held that the third criterion also requires that *´...at least one of the parties is foreign...´* (Decision C-347/97).

The core difference between national and international arbitration is, that in the latter case, Colombian law grants the parties broad discretion to tailor the arbitration proceedings according to their needs. Particularly, article 2 of Law 315/96 expressly provides that *´...the parties are free to determine the applicable substantive law according to which the arbitrators shall decide the dispute. Equally they may also determine, either directly or by reference to arbitration rules, everything that concerns the arbitral proceeding, including summons, constitution, notification, language, appointment and nationality of the arbitrators, as well as the seat of the Tribunal, which may be in Colombia or in a foreign country...´* (Translation provided by the *International Encyclopedia of Laws*). Naturally, this freedom is subject to the mandatory provisions of Colombian law, where applicable, and international public policy.

**(iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?**

Colombia is a party to a number of treaties related to arbitration, that is: (i) The New York Convention, which was first enacted through Law 37/79 and later with Law 39/90; (ii) The Panama Convention, adopted through Law 44/86; (iii) The 1979 Montevideo Convention, approved by the Congress through Law 16/81; and (iv) The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) adopted through Law 267/95.

**(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?**

There is no specific provision to this effect in Colombian domestic arbitration law. Article 869 of the Code of Commerce incorporates the *lex loci solutionis* criterion, which will thus be relevant whenever Colombian conflict rules are applicable.

### III. Arbitration Agreements

- (i) **Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?**

In domestic arbitration, while the arbitration clause (*cláusula compromisoria/clause compromissoire*) must only include the name and domicile of the parties, the submission agreement (*compromise/compromis*) shall additionally provide all information necessary to identify the dispute that will be submitted to arbitration (Law 446/98, arts. 115-117).

According to Article II of the New York Convention, arbitration agreements must: (i) be in writing; (ii) express the parties' consent to submit to arbitration present or future disputes regarding a defined legal relationship; and (iii) concern a matter capable of being resolved by arbitration.

- (ii) **What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?**

The Colombian courts generally enforce arbitration agreements as long as the dispute is arbitrable and the requirements as explained in section III (i) above are fulfilled.

- (iii) **Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

The issue of the enforceability of multi-tiered arbitration clauses is not without discussion. On one hand, certain local arbitration tribunals have held that preventing a party from commencing arbitral proceedings on grounds that a precondition has not been fulfilled may amount to a denial of justice. On the other hand, in Decision T-058/09, when referring to a multi-tier arbitration agreement, the Constitutional Court stated: *'...only in case of lack of agreement in each direct settlement stage, or after its expiry, the next stage could be commenced. The constitution of an arbitration tribunal was the last instance to which [the parties] could have resort to. In this vein, it can only be concluded that if the dispute was settled in one stage, the proceedings would terminate; in turn, passing to one stage depended on the exhaustion of the former. Therefore, this Chamber concludes that, contrary to the opinion of the arbitral tribunal... [the non-*

*fulfillment] of the preconditions for said tribunal's constitution, barred its constitution, so that it had no jurisdiction to decide on the dispute... '.*

**(iv) What are the requirements for a valid multi-party arbitration agreement?**

There is no specific statutory provision on the requirements of multi-party arbitration agreements. Thus, the general requisites explained in the response to section III (i) above are applicable.

**(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?**

There is no express provision prohibiting agreements which grant one of the parties a unilateral right to arbitrate. However, in the present state of the jurisprudence on local arbitration, courts would not be likely to enforce a clause which grants only one party the right to resort to arbitration.

**(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?**

In principle, only signatories are bound by arbitration agreements. However, there is a rule in local arbitration under which if the award may affect a third party, such party must be called to the proceedings. This party has the option to either participate in the arbitration, accepting the arbitration clause or can refuse to participate. In the latter case, the arbitration clause would not apply to the particular case and the courts of law would have jurisdiction to hear the case (Law 446/98, arts. 126-127; Decree 1818/98, arts. 149-150)

#### **IV. Arbitrability and Jurisdiction**

**(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?**

Article 111 of Law 446/98 provides that only disputes which are capable of being settled may be submitted to arbitration (see also: Constitutional Court, Decision C-098/01).

The Colombian Civil Code (CCC) contains the rules applicable to settlement (CCC, arts. 2469-2487) and provides that claims related to family civil status, criminal matters, as well as issues which have been resolved by a decision having *res judicata* effects and unknown to any of the parties, cannot be settled.

In addition, the Constitutional Court has held that arbitration is excluded for obligations arising from provisions involving public policy and good usages (*buenas costumbres*), the rights of incapable persons, the rights which disposition is prohibited by law and the workers' minimum rights (Decisions C-294/95 and C-330/00). Generally speaking, a dispute is capable of settlement (ie a *transactio* is permitted) where it refers to obligations of an economic nature (Constitutional Court, Decision SU-174/07).

On the other hand, the Council of State, in two decisions dated 23 February 2000 and 8 June 2000, determined that the legality of administrative acts is not arbitrable. Similarly, in decisions C-1436/00 and SU-174/07, the Constitutional Court established that arbitrators cannot decide on matters involving public policy, sovereignty and the constitutional system, nor on the legality of administrative acts; however, they may rule on the economic effects of such acts.

Pursuant to Decree 1056/53, contracts for the exploration and exploitation of hydrocarbons entered into with the Colombian Hydrocarbons Agency may not be submitted to international arbitration.

Finally, Colombian law restricts arbitration regarding consumer protection and competition (Decree 3466/82 and Law 1340/09).

Issues of arbitrability may be decided by: (i) arbitrators, when deciding on jurisdiction or admissibility; (ii) courts, when accepting or rejecting an objection to their jurisdiction based on the existence of an arbitration agreement; (iii) the Council of State or Superior Tribunals, when deciding on an annulment recourse; or (iv) the Supreme Court of Justice in *exequatur* decisions.

Lack of arbitrability in local arbitration is a matter of jurisdiction.

- (ii) **What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

Pursuant to the CCP, if court proceedings are commenced, the existence of the arbitration agreement must be raised as a preliminary objection (*excepción previa*) within the statutory time-limit for submitting an answer to a claim (*término de traslado de la demanda*) (CCP, arts. 97.3 & 98). If no objection is raised and the parties take part in the proceedings, they will be deemed to have waived their right to arbitrate that particular dispute.

- (iii) **Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the**



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**nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?**

Colombian domestic arbitration law expressly incorporates the *competence-competence* principle (Law 446/98, art. 124; Decree 1818/98, art. 147). Although no similar provision exists for international arbitration, there is no reported case that departs from said principle. Courts may review the arbitrators' ruling on jurisdiction when deciding on the annulment recourse or on recognition and enforcement of foreign awards (Decree 2279/89, art. 38.2; New York Convention, art. V.1.c).

**V. Selection of Arbitrators**

**(i) How are arbitrators selected? Do courts play a role?**

In domestic arbitration, arbitrators may be chosen by: (i) the direct agreement of the parties on the sole arbitrator or the entire panel (that is, no party-appointed arbitrator); (ii) an authority appointed by the parties; or (iii) civil circuit judges, if there is no agreement between the parties (on the latter scenario, see: Constitutional Court, Decision C-1038/02).

**(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?**

Under Colombian domestic arbitration law, arbitrators are bound to disclose any circumstance which constitutes a ground for challenge and must abstain from accepting the nomination or from acting as arbitrator until a decision is made thereon (Decree 2279/89, art. 13; Decree 1818/98, art. 133).

Grounds for challenge are the same as those listed in the CCP for judges. Nonetheless, if an arbitrator has been appointed by the parties, he or she can only be challenged for circumstances arising subsequent to the appointment.

Challenges must be raised in writing before the tribunal's secretary within five days following the appointment. Afterwards, the challenged arbitrator may accept or reject the challenge within a five day term. If he or she accepts, the other arbitrators will request the appointing party or authority to designate a substitute within five days; otherwise, the tribunal may request the civil circuit judge to do so. If the arbitrator rejects the challenge, a hearing will be held five days after the expiry of the deadline for accepting or rejecting the challenge. In the said hearing, the other arbitrators will decide upon the challenge (Law 446/98, art. 120; Decree 2279/89, arts. 12-14; Decree 1818/98, art. 130 & 133-134).

In international arbitration, the rules applicable to challenge depend upon the parties' agreement or the applicable rules adopted (Law 315/96, art. 2).

**(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?**

In domestic arbitration, if the award is to be rendered in law, arbitrators must be attorneys admitted to practice law in Colombia (Law 446/98, art. 111; Decree 1818/98, art. 115).

Arbitrators have the same ethical duties as judges (Law 23/91, art. 114). The duties of judges are listed, *inter alia*, in article 37 of the CCP and include: (i) to seek the prompt resolution of the dispute; (ii) to protect the parties' equality in the proceedings; and (iii) to abstain from revealing confidential information. Further, judges are subject to Law 732/02 and must fulfill the duties listed therein, including impartiality, legality, etc. (Law 732/02, art. 34).

In international arbitration, there are no statutory provisions which specifically refer to this matter.

**(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?**

With respect to the first question, please refer to the response in section V (iii) above. As to the second question, the IBA Guidelines on Conflicts of Interest in International Arbitration are increasingly used as a reference for determining whether certain circumstances amount to a conflict of interest.

## **VI. Interim Measures**

**(i) Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

Colombian domestic arbitration law allows for the adoption of interim measures in arbitral proceedings through an order, where the dispute is related to the title or right of ownership of real property or movable assets. The tribunal may order only two measures, that is: (i) where there is a public registry of the assets concerned, the registration of the arbitral proceedings therein; and (ii) seizure of movable assets, which does not require court intervention (Decree 2279/89, art. 32; Law 23/91, art. 111; Decree 1818, art. 152). Bearing in mind that article 114 of Law 23/91 provides that domestic arbitrators have the same powers granted by the

CCP to judges; such order will be directly enforced. For any other measure, court intervention will be required. There is no provision governing this issue in the context of international arbitration.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following constitution of the arbitral tribunal?**

Colombian law does not permit judges to adopt interim measures in support of arbitrations. Moreover, the interim measures available with respect to arbitral proceedings are limited and may only be adopted in restricted circumstances. Thus, in principle, parties must wait until the tribunal is constituted in order to obtain interim relief (Decree 2279/89, art. 32; Law 23/91, art. 111; Decree 1818, art. 152). Nonetheless, in some cases such measures have been obtained through a special constitutional action for the protection of fundamental rights.

There is no provision governing this issue in the context of international arbitration.

- (iii) **To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

In domestic arbitration, article 114 of Law 23/91 provides that domestic arbitrators have the same powers that the CCP grants to judges, so that judicial intervention is restricted.

In turn, there is no provision governing this issue for international arbitrations.

## **VII. Disclosure/Discovery**

- (i) **What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

In Colombia there is no discovery, as understood in the United States. The CCP allows a person intending to file a claim or fearing to be sued to: (i) ask its prospective counterparty to answer a questionnaire on the facts related to the subject matter of the proceedings (CCP, art. 294); (ii) request its prospective counterparty or third parties – where appropriate – to disclose documents or accounting books, as well as to exhibit movable goods (CCP, art. 297); (iii) ask for witness statements to be rendered (CCP, art. 298; Law 1395/10, art.12); (iv) request the practice of judicial inspections on persons, documents, locations or goods (CCP, art. 300); and (v) ask for the submission of expert reports (CCP, art.

300). These rules are applicable to domestic arbitrations. As to international arbitral proceedings, there is no specific provision on this matter.

**(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?**

Please refer to our response in section VII (i) above.

**(iii) Are there special rules for handling electronically stored information?**

Besides the UNCITRAL Model Law on Electronic Commerce, adopted in Colombia through Law 527/99, there are no special rules for the handling of electronically stored information.

## **VIII. Confidentiality**

**(i) Are arbitrations confidential? What are the rules regarding confidentiality?**

In principle, arbitrations are confidential. However, in domestic arbitration, the award must be presented before a notary public and be incorporated in a public deed (Decree 2279/89, art. 35; Decree 1818/98, art. 159).

**(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?**

The general rules on the proceedings' confidentiality set forth by the CCP are applicable to domestic arbitration. However, it is worth noting that Colombian legislation only provides rules on the protection of trade secrets and confidential information for proceedings related to unfair competition (Law 256/96, art. 27). No specific rules on this matter exist in the context of international arbitration.

**(iii) Are there any provisions in your arbitration law as to rules of privilege?**

Although there is no specific provision on privilege in the context of arbitration, the Colombian constitution expressly recognises and protects professional secrecy (Constitution, art. 74). In addition, article 214 of the CCP expressly includes professional secrecy as an exception to the duty to render witness statements (CCP, art. 214).

## **IX. Evidence and Hearings**

**(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration**

**proceedings? Is so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?**

In domestic arbitration, the taking of evidence is generally governed by the CCP. In international arbitration, the application of the IBA Rules on the Taking of Evidence in International Arbitration depends on the parties' agreement or the tribunal's discretion. Although the Rules are used in practice, their use is not extensive.

**(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?**

In international arbitration, the tribunal's discretion to govern the hearings would be only limited by the parties' direct agreement or the applicable rules of arbitration. In institutional domestic arbitral proceedings, the issue would be governed by the applicable rules of arbitration. In non-institutional domestic arbitration, statutory provisions regulate certain hearings in detail (Decree 2279/89, art. 31-33; Decree 2651/91, arts. 23-24; Law 446/98, art. 124; Decree 1818/98, art. 147 & 151-157).

**(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?**

With respect to international arbitration, there is no provision which governs witness statements. For non-institutional domestic arbitrations, the general rules provided by the CCP are applicable (Law 446/08, art. 125; Decree 1818/98, art. 153). Witnesses must appear before the tribunal, which will require them to identify themselves. Afterwards, direct examination is conducted, followed by cross examination. Finally, the tribunal may ask the questions it may deem appropriate (CCP, art. 228).

**(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?**

In domestic arbitration, pursuant to article 213 of the CCP, *'[e]very person has the duty to render a testimony when it is so required, except in those cases determined by law'* (Free translation. CCP, art. 213). The statutory exceptions to this duty refer to persons whose knowledge of the facts of the case is protected by professional secrecy, those who lack legal capacity or have transitory mental disorders, as well as certain relatives of the parties (Constitution, art. 33; CCP, arts. 214 & 215). There is no provision on this matter for international arbitration.

In domestic non-institutional arbitration witness oath is always required (CCP, art. 227).

- (v) **Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?**

In domestic arbitration, the testimony of legal representatives is not considered as a witness statement and is subject to special rules. Two relevant differences would be the following: (i) express or implicit acknowledgement of facts by legal representatives may be considered as a confession; and (ii) while the joint deposition/declaration of witnesses (*careo*) is not allowed, the examination of parties or their legal representatives is permitted (CCP, arts. 202 & 209). There is no provision with respect to this matter for international arbitration.

- (vi) **How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?**

The CCP contains specific rules on the presentation of expert testimony, which are applicable in the context of domestic arbitration. Generally speaking, in addition to expert testimony provided by party appointed experts, the parties may request the tribunal for additional expert opinion on particular matters. It is also possible for arbitrators to order expert testimony *ex officio*.

The tribunal will determine which issues must be addressed in the expert opinion and set a date and hour for the expert to take his oath. After the expert opinion is rendered, parties may controvert it. In addition, the tribunal may require experts to clarify or complete their opinion (CCP, arts. 236, 238 & 240).

In domestic arbitration, experts may be challenged on the same grounds set forth by statutory law for judges (CCP, art. 235).

- (vii) **Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?**

As explained in section IX (vi) above, in non-institutional domestic arbitrations, tribunals may appoint experts *ex officio*. Pursuant to article 241 of the CCP, expert evidence is to be considered taking into account: (i) the clarity, accurateness and quality of the opinion; (ii) the expert's experience; and (iii) other pieces of evidence. Thus, the mere fact that an expert has been appointed by the parties should not affect the consideration that is given to the opinion. In court proceedings, experts are generally chosen from an official list. No such lists exist for arbitration proceedings.

- (viii) **Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?**

Witness conferencing is not used, at least in domestic arbitration.

- (ix) **Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?**

The use of secretaries is common in both institutional and non-institutional domestic arbitrations. There are also specific rules as to the secretaries' duties. Indeed: (i) national arbitration rules must expressly indicate the secretary's duties (Law 23/91, art. 93; Decree 1818/98, art. 125); and (ii) non-institutional domestic arbitral tribunals are required to have secretaries and several provisions establish specific duties for them (Decree 2279/89, arts. 20-23, 33, 34 & 37; Law 23/91, art. 105; Law 446/98, art. 123; Decree 1818/98, arts. 140, 143, 144, 156, 158 & 161).

## **X. Awards**

- (i) **Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?**

Although there is no statutory list of validity requirements for an award, in domestic arbitration – besides the particular requirements set by the applicable rules of arbitration – the award is subject to the same requisites as a judicial decision and in addition it must: (i) liquidate the costs of arbitration; (ii) be signed by all arbitrators and the secretary, so that it shall be in writing; and (iii) order the award's registration before a notary public (Decree 2279/89, arts. 22, 33-35; Law 23/91, art. 105; Decree 1818/98, arts. 144, 154 & 158). It is also understood that, in light of the constitutional right of due process, the award has to be duly

motivated or in other words, the reasons supporting the decisions of the arbitrators must be expressed. (Constitution, art. 29).

As to international arbitrations seated in Colombia, the content of an award will depend on the applicable arbitration rules. In addition, from the rules on the annulment procedure it may be deduced that awards must be in writing (Decree 2279/89, art. 37; Decree 1818/98, art. 161).

**(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?**

The available damages depend on the law applicable to the subject-matter of the dispute. If Colombian law is applicable, only two kinds of damages would be available. First, non-material damages (*perjuicios extrapatrimoniales*), which refer to damages sustained by those affected by a wrongdoing causing pain and affliction, moral damages or damages giving rise to difficulties for developing normal social activities (*daño a la vida de relación*); the amount payable for such damages is to be reasonably fixed at the tribunal's discretion (Supreme Court of Justice, Decision of 18.09.09; Constitutional Court, Decision C-916/02). Second, material damages, which comprise both the actual losses of the aggrieved party (*daño emergente*) and the income that such party did not receive as a result of the breach of contract or wrongful act (*lucro cesante*) (Civil Code, arts. 1613 & 1614). It is worth mentioning that only damages which are certain are compensable (Supreme Court of Justice, Decision of 09.08.99). Thus, it is not possible to award punitive damages.

Interest may also be awarded. However, it should be noted that: (i) interest cannot exceed the current rate of bank interest as defined from time to time by the Superintendence of Finance (CCP, art. 884; Criminal Code, art. 305); and (ii) interest cannot be charged over pending interests (Code of Commerce, art. 886).

**(iii) Are interim or partial awards enforceable?**

The question of whether interim or partial awards are enforceable has been addressed in the past in *exequatur* decisions issued by the Supreme Court of Justice. In *Merck v. Tecnoquímicas*, enforcement of an ICC award on jurisdiction was sought in Colombia. In a decision dated 26 January 1999, the Supreme Court of Justice stated: ... '[e]ven if it [the decision] is formally defined as an 'arbitral award'... according to Art. I(1) of the [New York] Convention, such a decision is not a foreign arbitral award enforceable in Colombia, since... it is simply a preliminary and preparatory interim decision, this is, it does not settle the dispute on the merits submitted to arbitration...' (Free translation). Consequently, the Court denied the award's enforcement.



**(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?**

In the case of domestic arbitration, Colombian law expressly provides that arbitrators may submit dissenting opinions (Decree 2279/89, art. 34; Decree 1818/98, art. 158). The dissenting opinion must be signed by the dissenting arbitrator and attached to the award. In the case of international arbitrations, the issue would depend on the applicable arbitration rules.

**(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?**

In domestic arbitration, settlements taking place during arbitration proceedings are not incorporated into awards and take either of the following forms: (i) direct settlement (*transacción*), which is drafted in an independent document and, when submitted to the tribunal, is cause for terminating the proceedings; or (ii) settlement before the tribunal (*conciliación*), which is analogous to a mediated resolution of the dispute and is incorporated into the minutes of the respective hearing. In the case of disputes with governmental entities, the said agreement must be approved by the arbitral tribunal. The parties may, at any time, request the tribunal to hold a conciliation hearing in which the arbitrators will act as a conciliation body (Law 640/01, art. 43).

In international arbitration, the possibility of directly or indirectly settling the dispute during the proceedings will depend on the agreement of the parties and the applicable procedural rules (Law 315/96, art. 2).

**(vi) What powers, if any, do arbitrators have to correct or interpret an award?**

Awards may be corrected by arbitrators of their own volition, as long as the correction does not amend the decision as such. Arbitrators may also correct expressions in the award that are ambiguous or confusing, as long as they belong to the decision itself or have an impact on it. Otherwise, it is the judge who enforces the decision and who will make any necessary interpretations required to proceed with enforcement. A correction to an award must be through a procedural order (*auto*), which forms part of the award and should be annexed to it. The time for a party to request a correction of the award is five business days after the award has been issued. The same term applies for the tribunal to correct the award at its own initiative (CCP, art. 309; Decree 2279/89, arts. 36-37).

In international arbitration, the rules of procedure chosen by the parties, or determined as applicable by the arbitrators in the absence of such agreement, will govern any correction or interpretation of the arbitral award (Law 315/96, art. 2).

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## **XI. Costs**

**(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?**

In domestic arbitration, the unsuccessful party generally bears the costs of arbitration; in the case of partial success, the tribunal will have certain discretion to allocate costs between the parties (CCP, art. 392). In international arbitration, the allocation of costs will depend upon the applicable rules of arbitration.

**(ii) What are the elements of costs that are typically awarded?**

For domestic arbitration, the costs of the arbitration include: (i) arbitrators' fees; (ii) fees of the tribunal's secretary; (iii) fees of the arbitration centre (if the arbitration is institutional); (iv) applicable taxes; (v) fees of experts; and (vi) costs of the notarisation of the file after the arbitration is finished. In addition, the cost of collecting evidence is usually borne by the party requesting the respective means of evidence and is later taken into account by the tribunal at the end of the proceedings, as are attorneys' fees.

In international arbitration, the elements of costs depend on the applicable arbitration rules.

**(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?**

In non-institutional domestic arbitration, the arbitral tribunal is empowered to decide on the fees of arbitrators (based on the criteria set forth by Decree 5089/07). As to institutional domestic arbitration, it should be noted that all domestic arbitration centres have their own fees' schedule, which must be approved by the Ministry of Justice (Law 23/91, art. 93; Decree 1818/98, art. 125).

In international arbitration, the issue will depend on the parties' agreement or the applicable rules of arbitration.

**(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?**

Please refer to our response in section XI (i) above.

- (v) **Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?**

In principle, the courts cannot review the tribunal's decision on costs. However, in extraordinary circumstances, such a review could take place pursuant to a constitutional action for the protection of fundamental rights.

## **XII. Challenges to Awards**

- (i) **How may awards be challenged and on what grounds? Are there limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?**

There are mainly three means of challenge for awards rendered in Colombia:

### **1. Annulment:**

The grounds for setting aside an arbitral award are exhaustively listed in article 38 of Decree 2279/89. They are '...1. *The absolute nullity of the arbitration agreement for the unlawfulness of its object or cause. Further grounds of absolute or relative nullity can be invoked only when they have been raised in the arbitral proceeding and have not been cured or validated in the course of that proceeding;* 2. *When the arbitral tribunal was not legally constituted, provided that this ground was expressly alleged at the first hearing...* 4. *Where duly-requested evidence was not ordered or the necessary steps to collect it were not taken, provided that these omissions had an impact on the decision and the interested party's request was duly and timely made;* 5. *When the award was rendered after the time-limit set for the arbitration has expired;* 6. *If the decision was rendered ex aequo et bono and should have been at law, provided that this circumstance manifestly appears in the award;* 7. *When the dictum of the award contains mathematical errors or contradictory provisions, provided that such issue has been duly alleged before the arbitral tribunal;* 8. *If the award refers to issues that were not submitted to the arbitrators or awards more than what [the tribunal] was asked to; and (9) When issues which were referred to arbitration were not resolved...*' (Free translation).

In *Empresa Colombiana de Vías Ferreas [Ferrovías] v. Drummond Ltd.* (24 October 2003), the Council of State held that these grounds apply to awards rendered in both domestic and international arbitral proceedings.

Finally, an action for the annulment of an award must be submitted in writing to the president of the arbitral tribunal within the five days following the notification of the award or any decision correcting, clarifying or complementing it.

The action is decided by Superior Tribunal of the Judicial District of the seat of arbitration or, in disputes related to State contracts, by the Council of State (Decree 1818/98, arts. 161 & 162).

## 2. Revision:

Both the award and the court decision setting it aside are subject to the extraordinary recourse of revision (Decree 2279/89, art. 41), which may be raised in the exceptional situations listed in article 380 of the CCP, that is: (i) if, after the decision has been adopted, documents that could have influenced the decision have appeared and the applicant could not submit them during the procedure because of force majeure, an act of God or due to its counterparty's actions; (ii) where a criminal court has declared that the documents upon which the decision relies are false; (iii) in the instance that the decision was based on witness statements rendered by persons who have been subsequently condemned for having falsely testified therein; (iv) when the decision was based on reports issued by experts who have been subsequently criminally condemned for illicit acts incurred in the production thereof; (v) if a criminal court declares that violence or bribery surrounded the issuance of the challenged decision; (vi) where collusive or fraudulent actions by the parties to the proceedings have caused damage to the applicant, regardless of whether criminal investigations have been initiated; (vii) in the case of improper representation or lack of notification affecting the interests of the applicant, under the circumstances described in article 152 of the CCP, as long as the nullity has not been cured; (viii) when the decision putting an end to the proceedings is null, provided that no recourse was available against it; (ix) if the decision contravenes a preceding decision having *res judicata* effects between the parties, as long as the applicant was unable to raise the *res judicata* exception in the second proceedings for having acted through an *ad litem* representative and ignored the existence of such proceeding. However, the recourse is not admissible when the *res judicata* exception has been raised and denied.

The time-limit for filing this recourse is two years. If its submission is based on grounds (i), (vi), (viii) or (ix) this period runs from the date on which the decision becomes final (*ejecutoria de la sentencia*). Where the applicant relies on ground (vii), the period runs from the date when the affected party (or its representative) became aware of the decision. Finally, when the recourse concerns grounds (ii), (iii), (iv) or (v), and the criminal procedure has not yet finished, the revision shall be suspended until the issuance of the criminal court decision (CCP, art. 381). The recourse against the award is to be decided by the Superior District Tribunal of the seat of arbitration; if it challenges the ruling setting aside the award, the

competent authority will be the Supreme Court of Justice (Decree 1818/98, art. 166). On the other hand, if the arbitration involves the State, this recourse is the only one available to challenge the Council of State decision on the validity of the award (Decree 1818/98, art. 162).

### 3. Tutela:

The *acción de tutela* is a special action for the protection of fundamental rights created by article 86 of the Colombian Constitution. Decree 2591/91 governs the respective procedure. This action is aimed to provide immediate relief in cases where the acts or omissions of authorities or private persons threat or violate fundamental rights. It proceeds only in the absence of any other judicial remedy or, where there is another action available, as a transitory mechanism for avoiding irreparable harm.

In decision SU-174/07 (among others), the Constitutional Court determined that the *tutela* can only be raised against judicial or arbitral decisions, where there is a *vía de hecho* directly affecting fundamental rights. According to the Court, a *vía de hecho* appears whenever an adjudicator: (i) uses its legal powers for a purpose different to that justifying their use; (ii) has no competence to decide on the subject-matter of the dispute; (iii) deviates from the procedure indicated by law; or (iv) makes its decision with no evidentiary support.

Annulment proceedings may take approximately three years.

Revision may take approximately two years.

A *tutela* does not take more than ten days.

A stay of enforcement would only be available if the award is challenged through an action to set aside. However, even in such case, a bond requirement must be fulfilled by private parties; no such requirement is imposed on State entities (CCP, art. 331).

- (ii) **May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?**

Waiver of challenge is not allowed by Colombian law.

- (iii) **Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?**

Awards cannot be appealed in Colombia.

- (iv) **May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?**

In principle, remand of an award to the tribunal is not possible.

### **XIII. Recognition and Enforcement of Awards**

- (i) **What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?**

Enforcement of foreign awards in Colombia requires following a two-tier procedure, that is: (i) recognition (*exequatur*) from the Supreme Court of Justice; and (ii) enforcement by the competent courts.

Please note that, once *exequatur* has been granted, the award will be enforced as a final judicial decision.

The *exequatur* claim must be submitted before the Civil Chamber of the Supreme Court of Justice. In this regard, the interested party is required to: (i) provide the documents indicated in Article IV of the New York Convention; (ii) summon the losing party before the Court; and (iii) request the production of any pertinent means of evidence (CCP, art. 695; Supreme Court of Justice, Decision of 27.07.11).

The decision admitting the claim must be notified to: (i) the losing party in the arbitration; and (ii) a Delegate Civil Attorney (*Procurador Delegado en lo Civil*) who both have a five day period to become parties to the court proceedings. During this time, the losing party and the Civil Attorney will request the production of any means of evidence they deem necessary. Once the five day term has expired, the Supreme Court will order the production of the means of evidence it deems appropriate. Once the Court declares that the evidentiary stage has ended, each party must submit its closing arguments within a five day period; afterwards, the Court will render its judgment.

Recognition can only be denied on the grounds listed in Article V of the New York Convention. Since its controversial decision in *Semar v. Sunward Overseas*, the Supreme Court had held that the *exequatur* requirements listed in Article 694 of the CCP were *additional* to those listed in the New York Convention (Supreme Court of Justice, Decision of 20.11.92). However, on 27 July 2011, in *Petrotesting Colombia S.A. & Southeast Investment Corp. v. Ross Energy S.A.*, the Court determined that recognition could only be denied in the cases exhaustively listed in Article V of the Convention.

- (ii) **If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?**

If *exequatur* is granted, the claimant will be entitled to obtain enforcement of the award through executory proceedings (*proceso ejecutivo*), before the competent judge.

- (iii) **Are conservatory measures available pending enforcement of the award?**

It is not possible to request conservatory measures in *exequatur* proceedings. However, if recognition has been granted, interim measures are available in the executory proceeding.

- (iv) **What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?**

As long as the requirements explained in section XIII (i) above are fulfilled, courts are likely to recognise and enforce foreign awards.

In *Empresa Colombiana de Vías Férreas v. Drummond* (22.04.02), the Colombian Council of State explained that, under Article V.1.e of the New York Convention, a decision to suspend or annul an arbitral award could be issued only by the competent authority of: (i) the place where the award was made; or (ii) the country under which procedural law the decision was rendered. Since the arbitral seat was Paris, the Colombian court held that the annulment recourse fell beyond its jurisdiction.

- (v) **How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?**

Enforcement of an award rendered abroad takes from between three to four years.

#### **XIV. Sovereign Immunity**

- (i) **Do State parties enjoy immunities in your jurisdiction? Under what conditions?**

The Colombian State does not enjoy immunity of jurisdiction. Thus, public entities may not claim sovereign immunity to avoid appearing in a binding arbitration or even to avoid the enforcement of an unfavorable arbitration award.

However, the Nation (a legal person of public law, which acts as responding party in proceedings involving certain public entities lacking standing) does enjoy immunity of execution. In this regard, it should be borne in mind that: (i) exceptions to immunity of execution are provided in article 177 of the Contentious-Administrative Code (CAC) (CCP, art. 336); (ii) the CCP does not allow seizure of sources of income (*rentas*) and resources incorporated into the general budget of the Nation (CCP, art. 513); and (iii) the Constitutional Court established special conditions for the application of these provisions in relation to labour obligations (Constitutional Court, Decisions C-546/92 & C-103/94). It is also worth noting that seizure of goods set aside for public use is constitutionally prohibited (Constitution, art. 63).

Although such prerogatives are not extendable to State parties, special rules on execution are provided for them. In this regard, please refer to our answer in section XIV (ii) below.

**(ii) Are there any special rules that apply to the enforcement of an award against a State or State entity?**

In order to enforce an award against a State entity a petition must be made to an administrative judge. Such request is subject to the special rules provided by article 336 of the CCP and article 177 of the CAC. Pursuant to the latter provision, execution can only commence 18 months after the award has been rendered.

**XV. Investment Treaty Arbitration**

**(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?**

The ICSID Convention was signed by Colombia on 18 May 1993, approved by the Congress through Law 267/95 and declared as adjusted to the Constitution by the Constitutional Court's decision C-442/96. The ratification was deposited on 15 July 1997 and the treaty entered into force on 14 August 1997. No steps to withdraw from ICISD have been reported.

**(ii) Has your country entered into bilateral investment treaties with other countries?**

BITs with the following countries are currently in force: (i) Mexico; (ii) Peru; (iii) Spain; and (iv) Switzerland.



FTAs with the following countries are currently in force: (i) Chile; (ii) G3 (El Salvador, Guatemala and Honduras); and (iii) EFTA (Switzerland, Norway, Island and Liechtenstein).

## XVI. Resources

### (i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

In Spanish:

- Eduardo Silva-Romero (Ed.), *El contrato de arbitraje*, Legis, 2005.
- Eduardo Zuleta & Guido Tawil (Eds.), *Arbitraje comercial internacional: la Convención de Nueva York. Estudios con motivo de su 50 aniversario*, Universidad del Rosario, 2006.
- Fernando Maniñela-Serrano (Ed.), *Arbitraje Internacional: tensiones actuales*, Legis, 2007.
- Gilberto Castrillón, Humberto Martínez & Néstor Peña, *Pacto arbitral y arbitramento en conciencia*, Temis, 1988.
- Hernán Fabio López, *La jurisprudencia arbitral en Colombia* (Four volumes), Universidad Externado de Colombia, 2002-2008.
- Jorge Enrique Ibáñez, *La acción de tutela contra laudos arbitrales*, Pontificia Universidad Javeriana, 2009.
- Jorge Hernán Gil, *Nuevo régimen de arbitramento: manual práctico*, Cámara de Comercio de Bogotá, 2004.
- Julio Benetti Salgar, *El arbitraje en el derecho colombiano*, Temis, Bogotá, 2001.
- Leonardo Charry, *Arbitraje mercantil internacional*, Pontificia Universidad Javeriana, 1989.
- Myriam Salcedo, *El arbitraje en los contratos concluidos por la administración: estudio de derecho comparado francés y colombiano*, Universidad del Rosario, 2006.
- Nicolás Gamboa, *Apuntes sobre arbitraje internacional*, Universidad del Rosario, 2006.

- Nicolás Gamboa, *La inmunidad soberana de jurisdicción en el marco del arbitraje comercial internacional: Evolución y actualidad*, Universidad del Rosario, 2007.

In English:

Relevant reports published in English are regularly published on the Kluwer Arbitration website.

- (ii) **Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?**

The Chamber of Commerce of Bogotá organizes certain major educational events and conferences every year. Dates are published at [www.cacccb.org.co](http://www.cacccb.org.co).

## **XVII. Trends and Developments**

- (i) **Do you think that arbitration has become a real alternative to court proceedings in your country?**

Yes. For high-profile businesses, arbitration has become a real alternative providing parties with the option to obtain a prompt resolution to their dispute, through fast and high-quality proceedings.

- (ii) **What are the trends in relation to other ADR procedures, such as mediation?**

It is worth mentioning that the current public policy appears to favor conciliation in civil, family and administrative cases. Where the subject-matter of the dispute is capable of being directly settled by the parties, extrajudicial conciliation is a prerequisite to commence litigation (Law 640/01, art. 35).

- (iii) **Are there any noteworthy recent developments in arbitration or ADR?**

On 26 July 2011, the Colombian Government submitted a Draft National and International Arbitration Statute before the Congress. The Bill's international arbitration chapter is based on the MLA and includes the 2006 amendments.