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The New Colombian Legal Rules on International Arbitration

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THE NEW COLOMBIAN LEGAL RULES ON INTERNATIONAL ARBITRATION

Juan Antonio Gaviria¹

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Introduction

Following several failed attempts,² the Colombian Congress enacted a new statute, Law 1563/12 ("New Statute") on national and international arbitration on July 12, 2012, which was put into force on October

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² See, e.g., Arbitraje: Nuevo Revés de Londoño [Arbitration: A New Londoño's Set Back], El Tiempo.com (Jun. 6, 2003)(The Colombian government filed in 2003 a bill of law to modernize the legal rules on arbitration. This bill, unfortunately, was never enacted), http://www.eltiempo.com/archivo/documento/MAM-998251_(last visited Sep. 30, 2012); see also, Estudian Proyecto de Ley General de Arbitraje [A Bill on Arbitration is Under Analysis], El Portal del Abogado, http://macastroca.blogspot.com/2007/11/estudian-proyecto-de-ley-general-de.html (last visited Oct. 8, 2012).

12, 2012.³ This statute, partially based on the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law"), repeals many domestic legal rules⁴ and counteracts trends in alternative dispute resolution, which were not in sync with the newest trends of international arbitration.⁵

This Article, rather than analyze the New Statute in its entirety, limits itself to the discussion of the new legal rules on international arbitration, with special regard to the second section of the New Statute. Thus, the new legal rules on national arbitration included in Section 1,6 the arbitration mechanism known as "Amigable Composición," included in Section 2,7 and the rules of social arbitration include Section 48 are beyond the scope of this article.

To begin, Section I discusses some of the pros and cons of the future application of the new legal rules on international arbitration and compares Colombia's jurisprudence with other international rules—such as the International Chamber of Commerce rules ("ICC Rules")—and with comparative case law. Section II evaluates the New Statute against the background of the New York Convention and conflicting domestic law. Section III analyzes the future of the legislation and the prospective impact the law will have in Colombia. Finally, the Article concludes that new statute is a step in the right direction for arbitration and has provided a substantive upgrade in the arbitration system.

³ L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.] (Colom.) article 119 [hereinafter "L. 1563/12"].

⁴ See id. art. 118. See, e.g., L. 315/96, septiembre 16, 1996, DIARIO OFICIAL [D.O.] (Colom.); L. 1818/98, septiembre 7, 1998, DIARIO OFICIAL [D.O.] (Colom.).

⁵ See Fernando Mantilla, *El anteproyecto de ley de arbitraje: entre Dr. Jekyll y Mr. Hyde* [*The bill of law on arbitration: between Dr. Jekyll and Mr Hyde*], ÁMBITO JURÍDICO, Jul. 26, 2011, at 10, http://www.ambitojuridico.com/BancoConocimiento.

⁶ See L. 1563/12 supra note 3, art. 1-58.

⁷ See id. art. 59–61.

⁸ See L. 1563/12 supra note 3, art. 117 (The last section of the new statute repeals some legal rules and provides that L. 1563/12 will be in legal force as of October 12, 2012; L. 1563/12 supra note 3, arts. 118–19).

I. An Analysis of the New Statute and its Regulations on International Arbitration

A. Scope of "International Arbitration" Under the New Colombian Statute

Pursuant to the Colombia New Statute, Law 1563/12,⁹ an arbitration proceeding is considered to be "international" when the proceeding meets one of three sets of conditions. Though the first two categories are derived from UNCITRAL Model Law Article 1(3), the third category derives itself from domestic law.

In the first set, based on UNCITRAL Model Law Article 1(3)(a), ¹⁰ an arbitration proceeding is considered international if the parties' places of business were incorporated in different countries at the making of the arbitration agreement. In the second set, based on UNCITRAL Model Law Article 1(3)(b)(ii), an arbitration proceeding is international when its place of performance has a substantial part of the contractual duties or the place more closely connected with the subject-matter of the dispute, is outside the countries where the parties incorporated their places of business. ¹¹

Unlike the previous categories, the third set is based on the previous domestic law, Article 1.5 of Law 315/96, which finds no comparable article in the UNCITRAL Model Law. Though repealed by the New Statute's legislation, Article 1.5 of Law 315/96 survives in essence through the New Statute's provisions. Therein, an arbitration proceeding is international when the subject-matter of the dispute affects the interests of international commerce. Whether the subject-matter of an arbitration proceeding affects the interests of the international commerce is a difficult question, and the answer depends highly on the facts of the given dispute. This line of reasoning is not only in accordance with a globalized economy, but also with the UNIDROIT Principles for

See L.1563/12 supra note 3, art. 62.

The new Colombian statute, based also on UNCITRAL Model Law, provides that: (i) if a party has several places of business, the relevant place of business is the one with the closest relationship to the arbitration agreement; and (ii) if a party does not have a place of business, reference will be made to its habitual residence (this provision is more likely to be applied to individuals and not to corporations or other business associations, which are usually the parties to international arbitrations). *See* L. 1563/12 *supra* note 3, art. 62.

UNCITRAL Model Law Article 1(3)(b)(ii).

¹² See L. 1563/12 supra note 3, art. 118.

International Commercial Contracts, pursuant to which "the concept of 'international' contracts should be given the broadest possible interpretation, so as ultimately to exclude only those situations where no international element at all is." As such, an interpretation of the third set will likely be broadly construed, and, therefore, almost all questionable cases will be found to affect the interests of international commerce.

Despite a strong basis in UNCITRAL Model Law, the New Statute has notable shortcomings. To begin, the New Statute did not include UNCITRAL Model Law Article 1(3)(b)(i), which provides that an arbitration proceeding is international when its venue is located in a country outside the nation of the parties' domicile. Perhaps, Colombian legislators omitted this legal rule to avoid the domestic misuse of arbitration agreements; after all, two Colombian parties could make a domestic dispute into arbitration internal by providing a venue located outside Colombia in their contract.

Another, more persuasive, reason is that prior to the enactment of the New Statute, the preceding authority, L. 315/96, mirrored UNCITRAL Model Law Art. 1(3)(b)(i); accordingly, an arbitration was international when the arbitration agreement provided a venue situated outside the countries where the parties have their places of business. This provision was challenged before the Colombian Constitutional Court, which held that it was in accordance with the Colombian Constitution if and only if at least one of the parties to the controversy had its place of business outside Colombia. In light of this judgment, the legal rule based on UNCITRAL Model Law Art. 1(3)(a)—stating an arbitration is international when the parties' places of business are in different countries—conceptually undermines any legal rule based on a location of the venue in a country other than the States where the parties have their places of business, such as UNCITRAL Model Law Art. 1(3)(b)(1).

UNIDROIT Principles for International Commercial Contracts. *But see* Consejo de Estado [C.E.] [Council of State], agosto 1, 2002, C.P. G. Villamizar Expediente 11001-03-25-000-2001-0046-01(21041), Anales del Consejo de Estado [An.C.E.) (Colom.) (holding that a dispute over a power purchase agreement between TermoRio—a Colombian wholly-owned subsidiary of an U.S. corporation—and Electranta—a Colombian corporation—was a domestic dispute even though it affected the commerce between Colombia and the United States). *See also TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (2007).

UNCITRAL Model Law Article 1(3)(b)(i)

See Corte Constitucional [C.C.] [Constitutional Court], julio 23, 1997, M.P.: J. Arango, Sentencia C-347-1997, Gaceta de la Corte Constitucional [G.C.] (Colom.).

Finally, the New Statute, in contrast with UNCITRAL Model Law, does not provide that an arbitration proceeding is international when "the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country." Likely, Colombian legislators refrained from enacting this legal rule to avoid its challenge before the Constitutional Court on the grounds that Colombian parties do not have the freedom of contract to subject entirely domestic disputes to international arbitration governed by both substantial and procedural foreign legal rules.

B. Formalities of an Arbitration Agreement

Pursuant to Article 69 of the New Statute, the arbitration agreement shall be in writing. This legal rule follows the UNCITRAL Model Law,¹⁷ which provides that a written agreement exists when the content of the arbitration agreement is recorded in any form, regardless of whether it "has been concluded orally, by conduct, or by other means."¹⁸ An electronic communication also amounts to a written agreement .¹⁹ Furthermore, a written agreement exists when there is an exchange of statements in which one party claims the existence of the arbitration agreement without the other party denying it.²⁰ More importantly, "the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing."²¹

This incorporation by reference reduces transaction costs because parties no longer have to renegotiate not requiring parties to relational contracts or to repeated transactions—such as long-term supply agreements or distribution agreements—to have to bargain for arbitration.²² These agreements are not only made at the original contract stage, but also at the formation stage of all subsequent contracts, regardless of their complexity. These subsequent contracts may be commercial orders or invoices, for instance.

¹⁶ UNCITRAL Model Law Article 1(1)(c).

¹⁷ *Id.* at art. 7(2).

¹⁸ *Id.* at art. 7(3).

¹⁹ *Id.* at art. 7(4).

²⁰ *Id.* at art. 7(5).

²¹ *Id.* at art. 7(6). *See generally* FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 272 (Emmanuel Gaillard & John Savage eds., 1999); and Gary B. Born, International Commercial Arbitration 189, 670 (2nd ed., 2001).

See Ian R. Macneil, The Many Futures of Contract, 47 S. Cal. L. Rev. 691 (1974).

Unfortunately, the New Statute, does not address the role of third party performers when addressing the key issue of arbitrability. When parties have played a significant role in the negotiation and performance of the underlying contract, but have not executed the arbitration agreement, they are often included in the arbitration procedure either as claimants or as respondents.²³ If Colombian arbitrators make a plain reading of the New Statute, then they should find that any non-signatory company or individual is not entitled to be a party to the arbitration agreement, regardless of its participation in the negotiation of the arbitration agreement or in the performance of the underlying contract.²⁴ Notably, Colombian jurisprudence historically limits a contract from the unintentional binding of third parties.²⁵

A more liberal interpretation, however, might be possible in exceptional cases. Such an exception may arise when a non-signatory company not only bargained for the arbitration agreement and performed the underlying contract, but also belongs to the same group of companies as one of the signatory parties. For instance, suppose that A, a whollyowned subsidiary of B, entered into an arbitration agreement with C regarding a distribution contract. Assume also that B did not execute the arbitration agreement, but actively participated in its negotiation and in the performance of the distribution contract. The issue becomes whether B, under the new Colombian statute, might be regarded as a party in the arbitration procedure. The answer, under theories such as

²³ See generally Fouchard Gaillard Goldman on International Commercial Arbitration 282–89 (Emmanuel Gaillard & John Savage eds., 1999); and Gary B. Born, International Commercial Arbitration 668–72 (2nd ed., 2001).

²⁴ See L. 1563/12 supra note 3, art. 69.

See Código Civil [C.C.] (Colom.). art. 1495 (providing that a party to a contract is bound to the other party but not to third-parties).

See ICC Case No. 4131, Interim Award (1982) (holding that Dow Chemical France and Dow Chemical Company were non-signatories parties to the arbitration agreements governing the dispute on the grounds that they not only controlled the subsidiaries which signed the arbitration agreements but also played a significant role in the underlying distribution contracts).

"group of companies" or "piercing the corporate veil," may be in the affirmative in certain cases.²⁷

The New Statute also omits any reference to the formalities with which an assignment of an arbitration agreement must comply. Suppose, paraphrasing the facts of a case law from the United States, that A and B execute a contract, which not only includes an arbitration agreement, but also a clause providing that a party's assignment is not valid without the other party's assent. Furthermore, suppose that during the performance of the contract, B assigned its contractual rights and duties to C without requesting A's assent. Since the New Statute is silent in this regard, the legal contract rules of the Colombian Commercial Code become applicable. Pursuant to the Colombian Commercial Code, the assignment of executory contracts is valid, unless the parties have contracted around this default rule. Therefore, in the example illustrated above, the assignment of the arbitration agreement would not be valid because the assignor (B) did not obtain the obligor's (A) assent.

C. Choosing the Governing Law of an Arbitration under the New Statute

Article 101 of the New Statute, based on Article 28(1) of the UNCITRAL Model Law, provides that the arbitral tribunal shall settle disputes in accordance with the governing law that the parties to the

To pierce the corporate veil, arbitrators will need to find that the party who signed the arbitration agreement was just an *alter ego*, an entity without any autonomy and wholly controlled by another company or individual. *See First Option of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (finding a corporation, fully controlled by two individuals, had signed an arbitration agreement. The other party initiated an arbitration procedure against both the corporation and the individuals, who had not signed the arbitration agreement. The arbitrators held that the individuals were part of the arbitration agreement because they had an unmistakable intent to subject the matter of the dispute to arbitration).

See generally Fouchard Gaillard Goldman on International Commercial Arbitration 417–46 (Emmanuel Gaillard & John Savage eds., 1999).

See Apollo Computer; Inc. v. Berg, 886 F.2d 469, 472–74 (1st Cir. 1989) (holding that the assignment of an arbitration agreement whose underlying contract provided a non-assignment clause was valid because under Massachusetts law a non-assignment clause bars only the delegation of duties but not the assignment of rights. This court, incidentally, might have failed to notice that an arbitration agreement does not only entitle a party to participate in an arbitration procedure (a right), but also forbids it to bring suit before a court (a duty)).

³⁰ See Código de Comercio [C. Com.] (Colom.). art. 887.

arbitration have chosen. Usually, the parties will settle on national or domestic law. Once again, the New Statute is silent on the choice of law issue. Consequently arbitrating parties might provide that two or more national laws will govern various aspects of the dispute, a practice referred to as a $d\acute{e}pe\acute{e}age$ in Colombia. This practice is in sync with modern contractual and arbitral statutes.³¹ For instance, the parties to a contract for the sale of a business which includes both real property and intellectual property might provide that the laws of Country X, where the property is located, will apply to settle any dispute related to the real property, while the laws of Country Y, where some patents are registered, will govern any dispute regarding the intellectual property.³²

The parties might also provide that international legal rules, such as the Convention on International Sale of Goods or the UNIDROIT Principles for International Commercial Contracts, will exclusively govern the settlement of the dispute.³³ Furthermore, parties may decide to use that the well-recognized principles of international commercial law, *lex mercatoria*, as the governing law.³⁴ Alternatively, parties could provide that the contract is self-sufficient and, therefore, no rules of law govern it.³⁵ However, parties should avoid a clause providing amorphous notions such as the *lex mercatoria*. Such a clause can be a likely cause of unnecessary and additional disputes about the applicable governing law, thus increasing the expenses and decreasing the predictability of an arbitral award settling a future dispute.³⁶

See, e.g., Rome Convention on the Law Applicable to Contractual Obligations art. 3 (1980) (enabling the parties to choose several laws to govern different parts of an international contract); and the 1997 AAA International Arbitration Rules art. 28(1) (entitling arbitrators to apply the substantive laws that the parties have provided).

For international tribunals in which the arbitrators have applied more than one law to the controversy, see, e.g., Saudi Arabia v. Arabian Am. Oil Co. (ARAMCO), 27 INT'L L. REP. 117, 166 (1963). For an analysis of dépeçage in international commercial arbitration, see generally FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 794, 879 (Emmanuel Gaillard & John Savage eds., 1999).

For international tribunals in which the arbitrators have applied general principles of commercial law, *see*, *e.g.*, ICC case No. 53333 (unpublished).

³⁴ See generally Fouchard Gaillard Goldman on International Commercial Arbitration 801–07 (Emmanuel Gaillard & John Savage eds.,1999);); Gary B. Born, International Commercial Arbitration 556–57 (2nd ed., 2001).

³⁵ Id.

³⁶ See generally Emmanuel Gaillard & John Savage (Ed.), Fouchard Gaillard Goldman on International Commercial Arbitration 795, 799 (1999).

Pursuant to Article 101 of New Statute, based on UNCITRAL Model Law Art. 28(2), if the parties failed to provide the governing law, the arbitral tribunal will apply the laws that are more closely connected to the subject-matter of the dispute.³⁷ Needless to say, neglecting to provide the governing law in an arbitration agreement underlying an international contract is unwise and likely the result of negligence; in such a case, the arbitrators are free to apply legal rules that neither party would have chosen.³⁸

On the other hand, Article 92 of the New Statute provides that parties to an international arbitration are not only allowed to choose the laws applicable to the substance of the dispute, but also to choose the rules governing the arbitral proceedings.³⁹ In short, the parties with a Colombian venue are allowed to exclude the application of the Colombian procedural rules in international arbitration. Thus, the rules governing the substance of the dispute might be the federal laws of the United States while the rules applicable to the arbitral proceedings might be ICC rules.⁴⁰

D. Arbitration Procedure under the New Statute

1. The Nomination of Arbitrators in Multi-party Arbitration

Article 74 of the New Statute provides the guidelines for multi-party arbitration. Therein, if an arbitral tribunal is composed of three arbitrators and either party is composed of two or more members, the parties shall act together to appoint their arbitrator.⁴¹ However, parties may contract around this rule and choose another method. If the members of

In strict sense, the arbitrators do not choose the law but just apply the laws of the national system with most connection to the subject-matter of the dispute based on the elements of the contract and on the will of the parties.

³⁸ See generally David V. Snyder & Martin Davies, International Transaction IN Goods 20 (2012) (categorizing as professional negligence an attorney's failure to include a governing law clause in a contract with some transnational component).

Regarding the distinction between substantial and procedural laws, *see* Gary B. Born, International Commercial Arbitration 540 (2nd ed., 2001).

⁴⁰ See generally ICC Interim Arbitral Award 4695, Parties from Brazil, Panama and the United States v. Party from Brazil, ZI Y.B. Com. Arb. 149 (1986) (holding that the parties chose the Brazilian law for the underlying contract but the ICC rules regarding the procedural aspects for the arbitration and that, therefore, the Brazilian Civil Procedure Code was not applicable to the dispute).

⁴¹ L. 1563/12 *supra* note 3, art. 108.1(b).

the multi-party claimant or respondent cannot agree on the individual to be appointed as an arbitrator, any of the parties might request a court to consider an outside measure, such as the appointment of the arbitrator.

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This legal rule, an innovation in Colombian law, efficiently resolves a traditionally difficult issue in international commercial arbitration: multi-party situations. ⁴² A multi-party situation is a controversy in which one or both sides are, in turn, composed of two or more parties. ⁴³ Indeed, if the new Colombian legal rule on multi-party arbitration was omitted, a losing party would be left with limited options. The party would either apply for setting aside the award, on the grounds of not having been able to defend its rights, ⁴⁴ or file a legal recourse, named a *tutela*, ⁴⁵ against the award, contending that the lack of equal opportunities in the appointment of the arbitrators breached its fundamental right of due process. ⁴⁶

A multi-party arbitration, the matter discussed here, should not be confused with a different notion: a multi-contract situation, in which several contracts are subject to the same or to similar arbitration agreements (e.g., a master or an umbrella distribution contract and its subsequent sale contracts). Regarding multi-contract situations, two different issues may arise: (1) some of the contracts have an arbitration clause but the others lack it; and (2) all contracts have arbitration clauses, which differ in some substantial aspect, such as, for instance, the venue of the arbitration. In respect of the first issue, L. 1563/12, based on UNCITRAL Model Law Art. 7(6) provides that "the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing." The new Colombian statute, however, is silent on the second issue, although the parties might fill this gap by providing, for instance, that the ICC Rules will govern the arbitral proceedings. See ICC Rules art. 9 (For the ICC Rules on multi-contract situations. "Subject to the provisions of Articles 6(3)–6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules."); and Art.10 ("The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration . . . c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.").

⁴³ See generally Fouchard Gaillard Goldman on International Commercial Arbitration 468–70 (Emmanuel Gaillard & John Savage eds., 1999).

⁴⁴ See L. 1563/12 supra note 3, art. 108.1(b).

The so-called *tutela* is a writ for the protection of fundamental rights. For a deeper analysis of the *tutela* in arbitration, *see infra* p. 25.

See generally Constitución Política de Colombia [C.P.] art. 29, 86.

The issue of multi-party arbitration arose in Siemens AG/BKMI v. Dutco Construction Company, 47 where BKMI executed a contract to build a cement factory for an Omani company. Later, BKMI entered into a silent consortium agreement with Siemens and Dutco, which contained an arbitration agreement under the ICC Rules.⁴⁸ A dispute arose between the parties to the consortium agreement and Dutco initiated arbitral proceedings against BKMI and Siemens. 49 Although the respondents argued that Dutco should have filed two separate claims against them, only one arbitral tribunal was established, with BKMI and Siemens listed together as the Respondent, and nominated their joint arbitrator under protest.⁵⁰ BKMI and Siemens then challenged the ICC award on the grounds that they did not receive the same opportunities as Dutco in the nomination of the arbitrators.⁵¹ France's highest court for judicial matters, the Cour de Cassation agreed with BKMI and Siemens and set aside the award. 52 This holding led to an amendment of the ICC Rules, which now guarantee that all parties have the same rights in the nomination of arbitrators.⁵³

2. Grounds for Challenging the Appointment of an Arbitrato

Based on UNCITRAL Model Law Art. 12(2), Article 65 of the New Statute provides that the appointment of an arbitrator may only be challenged when existing circumstances give rise to justifiable doubts to the arbitrator's impartiality or independence, or if the arbitrator's qualifications are not in accordance with the agreement of the parties.⁵⁴ As a general rule, a party challenging an arbitrator will have more success

See Siemens AG/BKMI v. Ducto Construction Company, XVII YBCA 140 (1993).

⁴⁸ See id.

⁴⁹ See id.

⁵⁰ See id.

See id. Under ICC Rules the parties do not appoint but nominate the arbitrators subject to the approval of the ICC Court. See ICC Rules art. 12.2

See Cass. 1e civ., Jan. 7, 1992, B.K.M.I. v. Dutco, 1992 Bull. Civ. I, No. 2; 1992 Rev. Arb. 470 (holding that, as a matter of public policy, the parties shall be in equal conditions regarding the designation of arbitrators unless they have waived their rights after the dispute has arisen). See also Fouchard Gaillard Goldman on International Commercial Arbitration 468 (Emmanuel Gaillard & John Savage eds.,1999).

⁵³ See ICC Rules art. 6.4(i).

See also ICC Rules art. 11 ("Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.").

in proving that he or she is not independent—an objective notion—as opposed to proving than he or she is not subjectively impartial.⁵⁵ In addition, Article 73.1 of the New Statute partially based on UNCITRAL Model Law Art. 11(1),⁵⁶ provides that an individual shall not be precluded by reason of his or her nationality from acting as an arbitrator.⁵⁷ The New Statute, however, is silent on whether an arbitrator may have the same nationality of any of the parties.⁵⁸

II. Awards and Arbitral Measures under the New Statute

A. Provisional and Conservatory Measures

Under Article 80 of the New Statute, which is based on UNCITRAL Model Law Art. 17, the arbitral tribunal is entitled to order provisional and conservatory measures unless the parties agreed otherwise.⁵⁹ According to the new Colombian statute,⁶⁰ a provisional or conservatory measure is any measure by which the arbitral tribunal orders one of the parties to (1) maintain or restore the status quo; (2) take action that would prevent or to refrain from taking action that is likely to cause harm or prejudice to the arbitral proceedings; (3) preserve assets that may be used to enforce a future award; and (4) preserve evidence that may be relevant and material to the resolution of the dispute.⁶¹

See generally Fouchard Gaillard Goldman on International Commercial Arbitration 553-54 (Emmanuel Gaillard & John Savage eds.,1999);); and Gary B. Born, International Commercial Arbitration 626–28, 642–43 (2nd ed., 2001).

The word "partially" is used because the Colombian legal rule omits the text: "[U] nless otherwise agreed by the parties", which is part of UNCITRAL Model Law Art. 11(1). In spite of this omission, this article contends that the principle of freedom of contract allows the parties to an arbitration agreement to contract around L. 1563/12 Art. 73(1).

⁵⁷ L. 1563/12 *supra* note 3, art. 73.1.

See generally ICC Rules art. 13.1 ("In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2).").

⁵⁹ L. 1563/12 *supra* note 3, art. 80.

⁶⁰ *Id*.

See generally Fouchard Gaillard Goldman on International Commercial Arbitration 709–34 (Emmanuel Gailard & John Savage eds.,1999); and Gary B. Born, International Commercial Arbitration 935–80 (2nd ed., 2001).

In practice, the provisional and conservatory measures that arbitral tribunals order might face some challenges. First, Article 89 of the New Statute, partially based on UNCITRAL Model Law Art. 17(I), provides the grounds by which a court may refuse the enforcement of a provisional or conservatory measure. A judicial authority, for instance, may *ex officio* deny the enforcement of either a provisional or a conservatory measure that is against Colombian public policy. Taken broadly, courts may refuse the enforcement of some provisional and conservatory measures otherwise needed for the proper development of arbitral proceedings. To mitigate this concern, a recent judgment of the Colombian Court of Supreme Justice restricted the scope of conservatory measures for the defense of public policy.

Perhaps a more important concern, the New Statute entitles domestic authorities to order provisional and conservatory measures before and during an arbitration procedure. Thus, to accord with the New Statute, the arbitration procedure must comply not only with the features of international arbitration, but also with domestic procedural law.⁶⁴ In certain instances, these provisional and conservatory measures, ordered by a domestic court, may very well conflict with the measures that the arbitral tribunal has ordered. For example, the arbitral tribunal might have ordered the attachment of funds that the defendant has, while the court orders the opposite.⁶⁵ To provide a clearer illustration, a court may order the suspension of work under a construction contract,

See also UNCITRAL Model Law art. 17(I)(1)(b)(2).

⁶³ *See supra* p. 16.

⁶⁴ See L. 1563/12 supra note 3, art. 90. This legal rule is based on UNCITRAL Model Law Art. 17.J., whose last part reads: "The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration." See generally Fouchard Gaillard Goldman on International Commercial Arbitration 716 (Emmanuel Gaillard & John Savage eds., 1999) ("Most laws now recognize that courts and the arbitrators have concurrent powers to take certain conservatory measures.").

See, e.g., McCreary & Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032, 1038 (3d Cir. 1974) (refusing to grant a foreign attachment on the grounds that it would be a violation of the parties' agreement to arbitrate their dispute). (refusing to follow the McCreary rationale and maintaining an attachment of a debt that a third-party owed to the defendant); see also Fouchard Gaillard Goldman on International Commercial Arbitration 712 (Emmanuel Gaillard & John Savage eds., 1999) (categorizing the McCreary's decision as plainly wrong because measures intended to ensure the enforcement of a future award fall within the exclusive jurisdiction of courts). But see, e.g., Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1049–50 (1977).

while the arbitral tribunal may issue an opposing order. 66 These scenarios are more likely if the tribunal is applying a foreign procedural law or the rules of an international institution, such as the ICC Rules, while the court decides to apply Colombian procedural law. Hopefully, Colombian courts will give more weight to the specific features of international arbitration than to its procedural law in cases where the former are in conflict with the latter.

B. Grounds for Setting Aside an Award

Colombian law, partially based on Article 34 of the UNCITRAL Model Law, gives exhaustive means by which a Colombian court may set aside an award under Article 108 of the New Statute.⁶⁷ This legal rule also provides that the same court that sets aside an award is not allowed to review the subject-matter of the dispute. Thus, Colombian courts legally cannot second-guess the decisions made by the arbitrators.⁶⁸

Pursuant to Article 108 of the New Statute, ⁶⁹ an award may be vacated by a party's request or *ex officio*. A party may file a recourse against an arbitral award on the following grounds: (1) a party to the arbitration agreement was incapacitated or the agreement was invalid under its governing law (for example, a party may claim that it executed the arbitration agreement under duress or by mistake); (2) the party filing the recourse was not given proper notice for the appointment of the arbitrators, the beginning of the arbitral proceedings or, for any other reason, in which the party was unable to make its case; (3) the award relates to a dispute which is beyond the scope of the arbitration agreement; and (4) the composition of the arbitral tribunal or proceedings were not in accordance with either the arbitration agreement or a mandatory rule preempting any provision of such agreement. In turn, a court may, *ex officio*, set aside an award when: (1) the subject-matter of the

See Fouchard Gaillard Goldman on International Commercial Arbitration 723 (Emmanuel Gaillard & John Savage eds., 1999) (contending that in case of conflict between provisional decisions intended to prevent irreparable harm, the decision of the arbitral tribunal should prevail). See also Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1054–55 (1990) (upholding an arbitral decision which had vacated a preliminary judicial injunction).

⁶⁷ See L. 1563/12 supra note 3, art. 68, 108.

⁶⁸ See generally Fouchard Gaillard Goldman on International Commercial Arbitration 977–83 (Emmanuel Gaillard & John Savage eds., 1999); and Gary B. Born, International Commercial Arbitration 704–07, 757–58 (2nd ed., 2001).

⁶⁹ L. 1563/12 *supra* note 3, art. 108.

dispute was not capable of settlement by arbitration under Colombian law but by a court;⁷⁰ or (2) the award stands against the Colombian international public policy. Thus, an award may be set aside if the losing party proves that it was unable due to prejudice to make its case,⁷¹ or if such award is contrary to the Colombian international public policy.⁷²

From a theoretical standpoint, the New Statute provides exhaustive grounds to set aside an award, which may contribute to the efficiency of arbitral proceedings by making them shorter and more predictable. In practice, however, the future does not look as promising. First, Colombian courts might attempt to review substantial issues using any one of the exhaustive grounds as a pretense. While Colombian courts are not allowed to review the substance of the dispute, they might yield to the temptation; indeed, many of the grounds to set aside an award, for instance, are very general and vague, facilitating a *de novo* analysis of the subject matter of the dispute. Second, arbitration awards may be set aside without merit if the court finds they stand contrary to Colombian international public policy.

A recent judgment of the Colombian Court of Supreme Justice partially alleviates the concern that a court will find an award stands against Colombian international public policy.⁷³ In *M.P.R. Diaz*, the Colombian Supreme Court held that the notion of public policy should be limited to the fundamental principles of Colombian institutions, such as the prohibition of abuse of rights, good faith, the impartiality of the arbitral tribunal, and the compliance with the due process.⁷⁴ In this sense, the Court reasoned, the fact that an arbitral tribunal did not apply

⁷⁰ See Consejo de Estado [C.E.] [Council of State], agosto 29, 2012, C.P. O. Valle, Expediente 11001032600020120002601 (43456), Anales del Consejo de Estado [An.C.E.) (Colom.).

See L. 1563/12 supra note 3, art. 108(1)(b). Admittedly, the ambiguity of this provision is also existent in the almost identical text of UNCITRAL Model Law Art. 34(2)(a)(2) ("[T]he party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.").

⁷² See Eco Swiss China Time Ltd v Benetton Int'l NV, 1 June 1999, European Court of Justice, Case C-126/97 [1999]. Compare L. 1563/12 supra note 3, art. 108(2)(b), with UNCITRAL Model Law art. 34(2)(b)(2) ("[T]he award is in conflict with the public policy of this State.").

⁷³ See Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ., julio 27, 2011, M.P. R. Díaz, Expediente 11001-0203-000-2007-01956-00, Gaceta Judicial [G.J.] (Colom.).

⁷⁴ See id. at 46.

a Colombian mandatory rule does not *per se* entail that the enforcement of the award shall be refused.⁷⁵ While the judgment was related to the enforcement of a foreign arbitral award, the court's rationale may be applied to future proceedings deciding future awards.

The risk that a Colombian court reviews the subject-matter of the dispute on a *de novo* basis may also be eliminated, or at least mitigated, if all the parties to an arbitration have their places of business outside of Colombia. In such a case, the parties are allowed to either exclude the recourse to set aside the award or limit the award on grounds provided by the New Statute (e.g., the award can be vacated on grounds of validity).⁷⁶

As a consequence, the recourse to set aside an award shall be filed within the following month of its notification. To Surprisingly, such a time frame is shorter than the three-month lapse provided by Article 34(3) of the UNCITRAL Model Law. At first glance, this new Colombian legal rule might improve the efficiency and predictability of arbitral proceedings by reducing the number of cases in which a Colombian court might be tempted to review, when deciding whether to set aside an award. Naturally, informed and sophisticated parties that did not prevail in the arbitral proceedings should not face great difficulties to file the recourse for setting aside the award during the time frame indicated above.

Another reason courts should not review the substance of an award is because of the writ for the protection of fundamental rights, the *tute-la*. Article 108 of the New Statute is silent about whether the losing party in an arbitration procedure may file a *tutela* against an award. Admittedly, Article 109.5 of the New Statute strictly prohibits the filing

⁷⁵ See id.

⁷⁶ See L. 1563/12 supra note 3, art. 108. In the globalized economy, it might be possible that one of the places of business of one or more parties is situated in Colombia. Notwithstanding, if the relevant place of businesses for the subject-matter of the dispute is located outside Colombia, the parties would be allowed to exclude the recourse to set aside the award. See L. 1563/12 supra note 3, art. 62.

See L.1563/12 supra note 3, art. 108. On a separate note, the new Colombian statute does not include UNCITRAL Model Law Art. 34 (4), which provides: "The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."

⁷⁸ See Constitución Política de Colombia [C.P.] art. 86.

of recourse against the judgment refusing to set aside an award. It would appear that an arbitral award would not be subject to a *tutela*. The *tutela*, however, is a recourse enshrined in the Colombian Constitution, which preempts any legal authority of inferior hierarchy, including those stated in the New Statute.⁷⁹ A losing party in an arbitral procedure, therefore, would be entitled to file a *tutela* against the award, on the grounds that a fundamental right, much like due process, has been violated.⁸⁰

While recourses intended to protect fundamental rights in other contexts can be beneficial, the *tutela* might make arbitral proceedings and awards unpredictable, expensive, and lengthy. As an additional rationale, informed and sophisticated parties deciding to settle their disputes through international arbitration should be aware that the procedures and arbitrators that they have chosen and appointed are enough of a guarantee to protect their fundamental rights.

The rationale of courts, however, may differ. Under the rationale of protecting the fundamental rights of the losing party, a court deciding a *tutela* might yield to the temptation of reviewing the substance of the subject-matter of the dispute. ⁸¹ Moreover, even if the court holds that the award did not breach the fundamental rights of the party who filed the *tutela*, and the enforcement would be greatly delayed and the litigation expenses enlarged. As a result, sophisticated and farsighted parties might prefer, at the making of arbitration agreements in international contracts, to choose a venue outside Colombia.

C. Enforcement of Awards against the Landscape of the New York Convention

While Colombia ratified the New York Convention on Enforcement and Recognition of International Awards ("NY Convention") in 1990,82 domestic law predating the New Statute provided additional grounds for

⁷⁹ See id.

⁸⁰ See id. art. 4.

See Corte Constitucional [C.C.] [Constitutional Court], febrero 2, 2009, M.P.: J. Araujo, Sentencia T-058-2009, Gaceta de la Corte Constitucional [G.C.C.] (Colom.). See also Fernando Mantilla, Colombia, ¿sede de arbitraje internacional? [Colombia, A Venue for International Arbitrations?], ÁMBITO JURÍDICO, Jul. 24, 2012, at 8 (available at http:// http://www.ambitojuridico.com/BancoConocimiento/N/noti-120724-06%28colombia_sede_de_arbitraje_internacional%29/noti-120724-06%28colombia_sede_de_arbitraje_internacional%29.asp).

⁸² See L. 39/90, noviembre 20, 1990, DIARIO OFICIAL [D.O.] (Colom.).

the refusal of an enforcement of a foreign arbitral award.⁸³ In particular, Article 694 of the Code of Civil Procedure⁸⁴ provided that an award could only be enforced in Colombia if: (1) the dispute did not center on real property located in Colombia at the beginning of the arbitral proceedings; (2) the award was not against any Colombian immutable rule other than procedural laws; (3) the award was not only in legal force in the country of origin but also duly legalized and authenticated; (4) the subject-matter of the dispute did not fall under the exclusive jurisdiction of Colombian courts; (5) no process or judgment on the same facts exist in Colombia; (6) the award was issued in a litigious process that complied with the due process of the respondent; and (7) the party complied with the *exequatur* requirement—the procedure by which the Supreme Court of Justice decides whether a foreign award or judgment is enforceable in Colombia.⁸⁵

Prior to the enactment of the New Statute, the Colombian Supreme Court of Justice held that an award whose enforcement was sought shall comply, not only with the requirements of the NY Convention Art. V, but also with the conditions set forth by Article 694 of the Code of Civil

Regarding the literature on enforcement of foreign awards, *see generally* FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 889-98 (Emmanuel Gaillard & John Savage eds., 1999) and Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION 711–744 (2nd ed., 2001).

This Code of Civil Procedure will be gradually replaced by a new Code, the so-called Code of General Procedure (hereinafter "C.G.P."), enacted by L. 1564/12, julio 12, 2012, Diario Oficial [D.O.] (Colom.). Some provisions of this Code have been in legal force since July 12, 2012 while the remaining provisions will be in legal force between October 1, 2012 and January 1, 2014. *See* C.G.P. art. 627.

 $^{^{85}}$ $\,$ $\,$ See C.P.C. art. 695; Law 1564 of 2012 (Code of General Procedure) art. 30.4–5.

Procedure.⁸⁶ This case law was in breach of the NY Convention, whose Art. V provides the exhaustive grounds to refuse the enforcement of a foreign arbitral award.⁸⁷

The new Colombian statute resolves this issue through some of its provisions.⁸⁸ First, Article 112 of the New Statute provides that the enforcement of the award can only be refused on the exhaustive grounds that the NY Convention provides.⁸⁹ Second, pursuant to Article 114 of the New Statute, the rules of the Code of Civil Procedure related to the grounds, requirements, and proceedings to refuse the enforcement of foreign decisions are applicable to judgments, but not to arbitral awards.⁹⁰

Other provisions of the New Statute also contribute to the enforcement of foreign arbitral awards. Article 111.1, for instance, provides

See, e.g., Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ., mayo 12, 2011, M.P. W. Namen, Expediente 11001-0203-000-2011-00581-00, Gaceta Judicial [G.J.] (Colom.) (refusing to enforce a foreign award because it did not comply with Colombian Procedural Civil Code Art. 694, which requires evidence that the award is not subject to further legal resource); and Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ., marzo 1, 1999, M.P. J. Ramírez, Expediente E-7474, Gaceta Judicial [G.J.] (Colom.) (refusing the enforcement of a foreign award on the grounds that it was not a final award). But see Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ., noviembre 19, 2011, M.P. F. Giraldo, Expediente 1100102030002008-01760-00, Gaceta Judicial [G.J.] (Colom.) (holding that a party challenging the enforcement of a foreign award cannot claim grounds other than those that the NY Convention Art. V provides); and Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ., julio 27, 2011, M.P. R. Díaz, Expediente 2007-01956-00, Gaceta Judicial [G.J.] (Colom.) (denying to refuse the enforcement of an award on an alleged non-compliance with Colombian Procedural Civil Code Art. 694 because the only grounds to refuse such enforcement are those that the NY Convention provides). In any event, the lack of uniformity of the case law on enforcement of foreign arbitral awards was not conducive to the predictability and efficiency of arbitral proceedings.

⁸⁷ See New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) art. V.

Hopefully, these provisions will contribute to reduce the time that enforcement of a foreign arbitral award currently takes, which is very long. *See* Fernando Mantilla Serrano, *Colombia ¿Sede de Arbitraje Internacional?* Ámbito Jurídico, July 24, 2012, at 8, *available at* http://www.ambitojuridico.com/BancoConocimiento/N/noti-120724-06%28colombia_sede_de_arbitraje_internacional%29/noti-120724-06%28colombia sede de arbitraje internacional%29.asp.

These grounds are reproduced in UNCITRAL Model Law Art. 36.

⁹⁰ See also Law 1563/12 art. 118 (repealing the last part of Code of Civil Procedure Art. 693, which provided that the legal rules on the enforcement of foreign judgments were also applicable to the enforcement of foreign awards).

that all arbitral awards, regardless of the country where they were issued, are enforceable in Colombia, provided the awards comply with the requirements set forth in the NY Convention. In another example, Article 111.3 of the New Statute provides that an international arbitration award issued in Colombia is to be regarded as a national award and, therefore, automatically enforceable without need of further proceedings. This provision, which is only inapplicable when the parties both have their places of business outside Colombia and have waived the recourse for setting aside an award, 91 might contribute to making Colombia a favorable place for international arbitrations. However, the law raises the question of whether any translation is needed in case the award is written in any language other than Spanish. This question appears to be answered in the affirmative, based on an extensive interpretation of Article 111.2 of the New Statute. This legal rule provides that a court deciding a case in which a party invokes an arbitral award may request its translation to Spanish.92

III. Challenges on the Horizon for the New Statute in International Arbitration

Many questions remain regarding how arbitrators and, more particularly Colombian courts, will apply the new legal rules on international arbitration. Inherent to the development of a new law, the New Statute will face some challenges in its application among scholars and courts against arbitration as an alternative method to settle disputes, and the negative effects that the *tutela* may have on the efficiency and predictability of arbitral proceedings.

⁹¹ See L. 1563/12 supra note 3, art. 107 and 111.3.

Regarding the language of the arbitration, L. 1563/12 art. 95, based on UNCITRAL Model Law Art. 22, provides that the parties may agree on the language or languages that will be used in the arbitration procedure. This legal rule, an innovation in Colombia law, may save transaction costs for multinational companies deciding to arbitrate disputes in Colombia without the need of spending money and time in the translation of voluminous documents or in the hiring of translators for its lawyers, experts and advisors. As a result, this provision might contribute to make Colombia, and particularly Bogotá—its capital—a favorable venue for international arbitrations.

Regarding the first challenge, legal systems may be either proarbitration or anti-arbitration.⁹³ France⁹⁴ and the United States⁹⁵ are examples of pro-arbitration legal systems. Colombia, on the other hand, has struggled to embrace a cohesive pro-arbitration system. For one, the Council of State has struck down domestic arbitral awards based on a broad interpretation of the exhaustive grounds that Colombian laws provide.⁹⁶ Moreover, as discussed earlier in this Article,⁹⁷ the Colombian Supreme Court of Justice has refused to enforce foreign arbitral awards, because the award did not comply with domestic procedural rules.⁹⁸ Finally, the Colombian Constitutional Court struck down an arbitral award in order to protect fundamental rights,⁹⁹ and has held that arbitration is a judicial procedure and, therefore, subject to all procedural

To be sure, most legal systems are located at some point of a spectrum whose polar modes are a system that is completely anti-arbitration and a system that is completely pro-arbitration.

⁹⁴ See NOUVEAU CODE DE PROCÉDURE CIVILE (N.C.P.C.) art.1448 (providing that the jurisdiction will hold itself incompetent in matters concerning an arbitration agreement except when the tribunal has not yet been constituted or when the arbitration agreement is null and void or inapplicable).

Regarding statutory law, *see* Federal Arbitration Act Section 2 ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). In respect of case law, *see*, *e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615 (1985) (reminding that federal policy favors arbitration); and *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1753 (2011) (concluding that federal arbitration law preempts state judicial rulings by which some arbitration agreements in consumer contracts were held unconscionable).

See, e.g., Consejo de Estado [C.E.] [Council of State], agosto 9, 2012, C.P. M. Fajardo, Expediente 110010326000201200013 00 (43.045), Anales del Consejo de Estado [An.C.E.) (Colom.); and Consejo de Estado [C.E.] [Council of State], febrero 18, 2010, C.P. E. Gil, Expediente 11001-03-26-000-2009-00058-00(37004), Anales del Consejo de Estado [An.C.E.) (Colom.). See also D. 1818/98, septiembre 7, 1998, DIARIO OFICIAL [D.O.] (Colom.). art. 163.

⁹⁷ See supra part A.

⁹⁸ See, e.g., Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ., mayo 12, 2011, M.P. W. Namen, Expediente 11001-0203-000-2011-00581-00, Gaceta Judicial [G.J.] (Colom.).

⁹⁹ See Corte Constitucional [C.C.] [Constitucional Court], febrero 2, 2009, M.P.: J. Araujo, Sentencia T-058-2009, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

legal rules. 100 Indeed, the Colombian case law of its three highest courts indicates that Colombia is governed by an anti-arbitration legal system.

The development of arbitration as an efficient method for dispute resolution has been a polarized topic of academic discussion in Colombia.¹⁰¹ On the one hand, scholars defending the procedural nature of arbitration argue that the rules of civil procedure are mandatory and, therefore, parties to arbitration agreements should not be allowed to exclude or contract around them.¹⁰² On the other hand, some scholars defend the contractual nature of arbitration;¹⁰³ as a result, they argue that parties are allowed to provide their own procedural rules as long as the right to due process is not compromised.¹⁰⁴

In any event, the anti-arbitration stance of some courts and scholars may signal that some structural and cultural elements favorable to the development of arbitration, present in other legal systems, are absent in

¹⁰⁰ See Corte Constitucional [C.C.] [Constitucional Court], noviembre 28, 2002, M.P.: E. Montealegre, Sentencia C-1038-2002, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

See generally Gabriel Hernández, Medidas Cautelares en los Procesos Arbitrales ¿Taxatividad o Enunciación de las Cautelas? [Interim Measures in Arbitral Proceedings, Mandatory or Optative Measures?] 9(1) Rev. Estudios Jurídicos 183 (2007).

See, e.g., Ramiro Bejarano, El Sofá del Arbitraje [The Couch of Arbitration], 30 Rev. del Instituto Colombiano de Derecho Procesal 237 (2004); and Ramiro Bejarano, Falacias del Arbitraje Nacional y Sugerencias para su Reforma [Fallacies of Domestic Arbitration and Suggestions for its Amendment), in Memorias del XXIII Congreso Colombiano de Derecho Procesal (Minutes of the XXIII Colombian Congress on Procedural LAw) 69 (2002).

Incidentally, the nature of arbitration in the United States is clearly contractual. *See Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2776 (2010) ("[A]rbitration is a matter of contract.").

See, e.g., Fernando Mantilla, ¿Existe Hostilidad hacia el arbitraje de inversión en América Latina? [Is there a hostility towards international arbitration in Latin America? [Is There an Hostility Against Investment Arbitration in Latin America?], in 789 LIBER AMICORUM IN HONOR OF BERNARDO CREMADES (2010); and

Eduardo Silva, Reflexiones Sobre el Contrato de Arbitraje – Algunas Confusiones Conceptuales en Derecho Colombiano [*Thought on the Arbitration Agreement – Some Fundamental Misconceptions in Colombian Law]*, in Estudios de Derecho Civil, Obligaciones y Contratos [Studies on Civil Law, Obligations and Contracts] 284 (2003).

Colombia.¹⁰⁵ This article develops the view that a wise application of the new legal rules will create a better future for international arbitration in Colombia. To take an example, ¹⁰⁶ Article 67 of the New Statute provides that in matters related to international arbitration, courts are not allowed to intervene unless such law expressly authorizes them to do so (e.g., to order provisional and conservatory measures, ¹⁰⁷ to appoint an arbitrator, ¹⁰⁸ or to appoint an expert). ¹⁰⁹

Notwithstanding, it is still uncertain whether Colombian courts will construe the new rules according to its plain meaning, which is proarbitration, or increase the scope of their judicial powers by means of a broad interpretation based on fundamental rights. The key issue is whether Colombian courts will uphold the arbitration agreements and proceedings that the parties provided in accordance with freedom of contract, a basic legal principle, which underlies the New Statute.

The second challenge relates to the so-called recourse of the *tutela*. As indicated above, any individual or judicial person may file before a court a *tutela* requesting an injunction intended to protect its fundamental rights. Thus, an individual or company who has lost in arbitration may file a *tutela* claiming that the award breached any of its fundamental rights. The party filing the *tutela*, for example, might claim that the

See generally Ronald J. Scalise, Why No "Efficient Breach: in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract, 55 Am. J. Comp. L. 721, 725 (2007) (mentioning, in reference to the doctrine of efficient breach, that "[j]ust as human life needs a certain percentage of oxygen and other elements in the Earth's atmosphere in order to thrive, so too the theory of efficient breach flourishes when a legal system contains certain structural and cultural elements favorable to the development of the doctrine. Perhaps Anglo-American common law, like Earth, contains an abundance of favorable elements that seem not to exist – at least to the same extent – in other systems or on other planets." An analogy might be made to the success of arbitration in Colombia).

This illustration is in addition to many other provisions of L. 1563/12, already mentioned in this article (e.g., Art 92 – allowing the parties to international arbitration to provide the rules governing the arbitral proceedings; Art. 97 – allowing the parties to agree that no hearings shall be held and that the proceedings shall be conducted on the basis of documents and other materials; and Art.108 – providing the exhaustive grounds by which a court may set aside an award).

¹⁰⁷ L. 1563/12 *supra* note 3, art. 71, 90.

¹⁰⁸ L. 1563/12 *supra* note 3, art. 74.

¹⁰⁹ L. 1563/12 *supra* note 3, art. 100.

See Colombian Constitution art. 86; Decree 2351 art. 1.

arbitral proceedings breached its fundamental right of due process,¹¹¹ or that the arbitral award was based *de facto* standard of review—in Spanish "*via de hecho*"—and not in legal proceedings.¹¹² Regrettably, the notion of due process is nebulous; therefore, the court deciding a *tutela* against an arbitral award might yield to the temptation of adopting a *de novo* standard of review, setting aside the arbitral procedure to review its substance.¹¹³

In theory, a *tutela* against an arbitral award would rarely succeed because this recourse is only available when the claiming party either suffers an irreparable harm or would not have any other judicial recourse. While the losing party usually suffers an irreparable harm because of the award, it is a harm that the law authorizes. Indeed, any party that fails to prevail in trial will suffer financial risk or harm. Moreover, the losing party not only argued the merits of its case during the arbitral proceedings, but was also entitled to judicial recourse for setting aside the award.

In practice, however, a *tutela* is a judicial recourse that losing parties frequently use to strike down awards with some likelihood of success, as seen in *Empresa de Telecomunicaciones de Bogotá S.A.*

See, e.g., Corte Constitucional [C.C.] [Constitucional Court], julio 15, 1992, M.P.: J. Hernández, Sentencia T-460-1992, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); and Corte Constitucional [C.C.] [Constitucional Court], octubre 26, 2001, M.P.: J. Sanín, Sentencia T-572-1992, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

See Corte Constitucional [C.C.] [Constitucional Court], febrero 2, 2009, M.P.; J. Araujo, Sentencia T-058-2009, Gaceta de la Corte Constitucional [G.C.C.] (Colom.). A de facto proceeding (in Spanish: "vía de hecho") occurs when an arbitrator takes a decision that breaches or limits the scope of a fundamental right, does not include the reasons that support the decision, or directly breaches the Colombian Constitution. See Corte Constitucional [C.C.] [Constitucional Court], junio 8, 2005, M.P.: J. Córdoba, Sentencia C-590-2005, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

Even worse, in strict sense, a *tutela* is composed of three instances: the trial court, the court of appeals and the revision by the Constitutional Court; thereby, the delay in the enforcement of an award that a *tutela* challenges might be longer. Indeed, a losing party would usually have the incentive to file a *tutela* against an arbitral award. If it prevails in court, the award would be stricken down; if the *tutela* is refused, the benefit resulting from the delay of the enforcement of the award might outweigh the expenses of this proceeding.

See Constitución Política de Colombia [C.P.] art. 86 and Decree 2351/91, noviembre 19, Diario Oficial [D.O.] (Colom.). art. 1.

("ETB") v. Telefónica Móviles Colombia S.A. ("Telefónica"). ¹¹⁵ In this infamous domestic case, often considered a stumbling block for the development of both national and international arbitration in Colombia, the Colombian Constitutional Court held that the party filing a *tutela* against an award does not have another judicial recourse because the application for setting aside an award is not intended to protect fundamental rights. ¹¹⁶

In *ETB*, the dispute between the parties focused on the contracts allowing ETB access, use, and interconnection of the telecommunication network of Telefónica in consideration for a price. An arbitral award held that ETB breached the contracts and ordered ETB to pay Telefónica around \$60 million in damages. ETB filed a recourse for setting aside the award before the Council of State and, simultaneously, a *tutela*. Both the trial court and the court of appeals denied ETB's claims. The Colombian Constitutional Court, however, reversed the decision of the court of appeals and granted the *tutela*, and under the guise of protection of fundamental rights, reviewed the substance of the dispute and struck down the arbitral award.

The court struck down the award on the grounds that the arbitrators had applied the wrong legal rules to the subject matter of the dispute; and, as a result, the fundamental right to due process was violated. This decision would suggest that the award was manifestly against Colombian laws, and the arbitrators were either unskilled lawyers or not very knowledgeable regarding the legal rules applicable to the dispute. However, neither of these assumptions seems to be correct. First, the legal rules applicable and the economic nature of the transaction that gave rise to the lawsuit were ambiguous and complex. As a result, there were as least as many arguments in support of the award as there were in support of the court's judgment. Therefore, the award was not manifestly illegal. Second, the arbitrators were seasoned lawyers.¹¹⁷ Paradoxically, the president of the arbitral tribunal, Juan Carlos Henao, was later appointed as the Chief Justice of the Colombian Constitutional

See Corte Constitucional [C.C.] [Constitutional Court], febrero 2, 2009, M.P.: J.
Araujo, Sentencia T-058-2009, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).
See id.

Corte Constitucional [C.C.] [Constitutional Court], febrero 2, 2009, M.P.: J. Araujo, Sentencia T-058-2009, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) (The arbitrators were Juan Carlos Henao, Jorge Enique Ibáñez, and Anne Marie Mürrle Rojas.).

Court. It is unlikely for a person holding the expertise and credentials to be appointed as Chief Justice of the highest Colombian court to have misapplied Colombian laws as an arbitrator.¹¹⁸

Unfortunately, the new legal rules on arbitration will likely have little effect on the Colombian Constitutional Court to change this jurisprudence. Indeed, the new Colombian statute is silent on the issue of whether an arbitral award, either domestic or international, may be subject to a tutela. 119 Ideally, the New Statute would have provided that arbitral awards, at least the international ones, were not subject to any tutela. However, the Colombian Constitutional Court would have likely struck down such a provision because it unreasonably restricts a constitutional recourse intended to protect fundamental rights. Similarly, a provision in an arbitration agreement by which the parties agree not to file a tutela against an arbitral award would likely be struck down because the *tutela* is part of the fundamental tenets of Colombian law and, therefore, the parties cannot waive this recourse before a dispute arises. Consequently, in practice, parties to international arbitrations whose venue is in Colombia must take into account the great likelihood that the losing party will file a *tutela* to avoid or delay the enforcement of a multimillion-dollar award. 120

¹¹⁸ See Santiago Talero, La Tutela Contra el Laudo Arbitral del Caso ETB: Un Golpe al Arbitraje y a la Seguridad Jurídica [The Tutela Against the Arbitral Award in the Case ETB: A Blow to Arbitration and to the Legal Certainty], PORTAFOLIO, (Mar. 4, 2009), available at http://www.portafolio.co/opinion/blogs/juridica/la-tutela-contra-el-laudo-arbitral-del-caso-etb-un-golpe-al-arbitraje-y-la-se.

¹¹⁹ L. 1563/12 *supra* note 3, art. 108 provides that the recourse for setting aside an award is the only resource available. At first sight, this legal rule seems to exclude the *tutela*. The new law, however, does not repeal the legal rules on *tutela* and is also of inferior hierarchy to the constitutional rules entitling individuals and juridical persons to file this recourse.

This concern may lead parties to international contracts to choose a venue outside Colombia. *See supra* text accompanying note 90. (Where it mentions a recent case in which sophisticated parties, both with assets in Colombia and one of them with its place of business in this country, decided to choose New York as the venue instead of Bogotá, Colombia to avoid two risks: (i) the application of the Colombian procedural law to the arbitral proceedings, and (ii) the filing of a *tutela*. The parties were aware that their decision entailed that the enforcement of the award in Colombia, in the future, will require an additional and lengthy process, the so-called *exequatur*, before the Colombian Supreme Court of Justice.).

Conclusion

This article discusses the new Colombian statute on international arbitration regarding its scope of application, the formalities of the arbitration agreement, the governing law of the dispute, some issues on multi-party arbitration, the grounds for challenging the appointment of arbitrators, the provisional and conservatory measures, the application for setting aside an award, and the enforcement of a foreign award. This article also highlights the two main challenges that the new Colombian statute will face: first, a bias among scholars and courts against arbitration as a method to settle disputes, and, second, the recourse of the *tutela*.

If the new legal rules coupled with economic globalization gradually minimize this bias against arbitration and the *tutela* is not applied as an additional *de facto* instance for arbitral proceedings, the Colombian legal system might gradually become pro-arbitration. However, if the new legal rules, in spite of being in accordance with the most recent trends in international arbitration, are not applied or construed as required to surpass these hurdles, the parties to international contracts having connections with Colombia will conclude that arbitrations taking place in the nation will be too expensive and unpredictable. Accordingly, they will prefer to settle their disputes by arbitration in other venues or, worse yet, decide to invest in other countries.