INTERNATIONAL ARBITRATION AND THE REPUBLIC OF COLOMBIA: COMMERCIAL, COMPARATIVE AND CONSTITUTIONAL CONCERNS FROM A U.S. PERSPECTIVE

S.I. STRONG*

INTRODUCTION

For decades, Latin American nations have worked to stabilize their economies and liberalize their trade regimes.[1] By all accounts, these efforts have been highly successful, allowing Latin America to weather the recent economic downturn far better than any of the world's developed economies.[2] Indeed, as the United Nations recognized in March 2011:

> The region's economic reforms of past decades, its fiscal and macroeconomic prudence and its sound financial supervision, . . . have allowed it . . . to enter the new decade with a promising outlook for growth . . . . For the first time in its history, the region achieved during the past decade a combination of high growth, macroeconomic stability, poverty reduction and improvement in income distribution. On the strength of the foregoing and of its privileged endowment in natural resources, energy, water and biodiversity, the Latin American . . . region will be called upon to assume an increasingly larger role in the global economy.[3]

---

* Ph.D. (law), University of Cambridge (U.K.); D.Phil., University of Oxford (U.K.); J.D., Duke University; M.P.W., University of Southern California; B.A., University of California, Davis. The author, who is admitted to practice as an attorney in New York and Illinois and as a solicitor in England and Wales, is Associate Professor of Law at the University of Missouri and Senior Fellow at the Center for the Study of Dispute Resolution and has acted as Visiting Lecturer on international commercial arbitration and transnational litigation at the Universidad de Medellín in Colombia. This Article was drafted in part during a Visiting Fellowship at the Lauterpacht Centre for International Law at the University of Cambridge, and the author gratefully acknowledges the kind assistance of the staff and fellows during that time. Thanks are also due to Dimaro Alexis Agudelo and Fernando Mantilla-Serrano for their kind assistance and comments on an earlier draft of this Article. All errors of course remain the author's own.

1. *See generally* U.N. ECON. COMM'N FOR LATIN AMERICA & THE CARIBBEAN, THE UNITED STATES AND LATIN AMERICA AND THE CARIBBEAN - HIGHLIGHTS OF ECONOMY AND TRADE, U.N. Doc. LC/G.2489 (2011), *available at* http://www.eclac.org/cgi-bin/getProd.asp?xml=/publicaciones/xml/4/42854/P42854.xml&xsl=/comercio/tpl/p9f.xsl&base=/tpl/top-bottom.xsl.

2. *See id.* at 3.

3. *Id.*

Commercial potential of this magnitude has not gone unnoticed. Countries from all over the world are turning their eyes toward Latin America, and the United States is no exception. In fact, Latin America is currently the United States' fastest-growing export market, with three times as many goods and services heading to this region as to China.[4]

Although many Latin nations boast significant economic accomplishments, one country—the Republic of Colombia—is particularly impressive. For years, Colombia has been a model of political and economic stability in the Latin American region.[5] Although the country's commercial reputation has at times been overshadowed by other issues,[6] that did not stop the World Bank from ranking Colombia in 2011 as the best country in Latin America and the Caribbean for protecting investors and the third-best in the region for ease of doing business.[7]

American investors and companies are already benefitting from the Colombian success story, engaging in enough cross-border business to make Colombia the United States' twenty-sixth most active trading partner.[8] The amount of commercial activity between Colombia and the United States is expected to rise by an additional $1.1 billion as a result of a free trade agreement[9] that was recently ratified by the U.S. Congress.[10]

---

4. Francisco Sánchez, *Enhancing Trade in Latin America: Opening Opportunities*, U.S. DEP'T OF COM.: THE COM. BLOG (June 13, 2011, 4:00 PM), http://www.commerce.gov/blog/2011/06/13/enhancing-trade-latin-america-opening-opportunities.

5. Fernando Mantilla-Serrano, *Colombia*, *in* INTERNATIONAL ARBITRATION IN LATIN AMERICA 111, 111 (Nigel Blackaby et al. eds., 2002).

6. Concerns have been raised about Colombia's human rights record and drug-related violence. *See* Steve Rennie, *Prime Minister Has High Hopes for Trade Deals on Latin American Swing*, WINNIPEG FREE PRESS (Aug. 5, 2011, 5:07 PM), http://www.winnipegfreepress.com/business/breakingnews/126846298.html. However, recent reports suggest that Colombia has made significant strides to improve its domestic situation. *See* Peter Wilkinson, *Uribe: Why Colombia Is Winning War on Drugs*, CNN INT'L (Aug. 15, 2011, 8:49 PM), http://edition.cnn.com/2011/WORLD/americas/08/15/colombia.uribe.cocaine/index.html?hpt=hp_c2 (quoting former Colombian President Uribe as stating exports of cocaine have decreased from nearly 1,000 tons per year to 180 tons).

7. *Economy Rankings*, WORLD BANK, *available at* http://www.doingbusiness.org/rankings.

8. *See* U.S. Trade Balance, by Partner Country 2010, U.S. INT'L TRADE COMM'N, *available at* http://dataweb.usitc.gov/scripts/cy_m3_run.asp (focusing on trade turnover).

9. *See* Free Trade Agreement, U.S.-Colom., *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text [hereinafter U.S.-Colombia Free Trade Agreement]; *see also* U.S. EMBASSY - BOGOTÁ, COLOMBIA ET AL., AN OVERVIEW OF ARBITRATION IN COLOMBIA FOR U.S. COMPANIES 8 (2011), *available at* http://export.gov/colombia/static/Report%20-%20Arbitration%20in%20Colombia%20-%20final%206-1-11_Latest_eg_co_033097.pdf (providing that special protections for commercial agents will be eliminated within six months after the U.S.-Colombia Free Trade Agreement is entered into force); *see also* Sánchez, *supra* note 4 (describing the free trade agreement with Colombia as part of an effort by the United States to increase economic integration throughout Latin America).

As impressive as Colombia may be in some regards, problems do exist. For example, one of the biggest concerns commercial actors have about cross-border transactions involves the ability to enforce contractual obligations in a timely and effective manner.[11] Unfortunately, this is one area where Colombia does not rank highly at all.[12] However, the difficulty in Colombia is not that the courts are corrupt. Instead, it is the length of time that it takes for a dispute to make its way through the judicial system.[13] Although the situation is improving, in 2011 the World Bank reported that Colombia had the sixth slowest judicial system in the world, with the average contract dispute taking 1,346 days to resolve.[14]

Corporate actors do not welcome the prospect of lengthy litigation. If the likely cost of remedying a contractual breach outweighs the potential profits to be made from the transaction, the transaction will not be completed. However, litigation is not the only means of resolving commercial disputes.[15] Arbitration has long been seen as an appropriate alternative to judicial relief, particularly when national courts are unable to

---

10. *See* Statement by U.S. Trade Representative Rod Kirk on Presidential Signature of Trade Legislation, Office of the United States Trade Representative, *available at* http://www.ustr.gov/about-us/press-office/press-releases/2011/october/statement-us-trade-representative-ron-kirk-preside (noting President Obama signed legislation implementing the U.S.-Colombia Free Trade Agreement in October 2011).

11. For this reason, the World Bank includes a section on the enforcement of contracts in its annual rankings of the commercial potential of various countries. *See* WORLD BANK, *supra* note 7.

12. *See id.* (ranking Colombia twenty-fifth out of thirty-two nations in Latin America).

13. Colombia's judicial system is slightly more complicated than that of the United States. The highest court for civil claims is the Supreme Court of Justice (*Corte Suprema de Justicia*), which hears appeals from a variety of lower circuit and municipal courts. *See* Gustavo Tamayo Arango & Bernardo Salazar Parra*, Colombia*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO LITIGATION & DISPUTE RESOLUTION 2010 51, 51 (2010). In the arbitral context, the Supreme Court of Justice has exclusive jurisdiction to recognize and enforce foreign arbitral awards. *See* Eduardo Zuleta, *Republic of Colombia*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 3 (Jan Paulsson ed.) (Supp. 62 2010) [hereinafter Zuleta, 2010], *available at* http://www.kluwerarbitration.com. The Council of State (*Consejo de Estado*) is the highest court for administrative law matters and has jurisdiction to hear actions to annul awards involving state parties. *See id.* (noting Superior Tribunals of the various judicial districts can annul awards rendered in their territory when state parties are not involved). The Constitutional Court (*Corte Constitutional*) reviews the constitutional validity of laws enacted by the legislative branch and decrees issued by the executive branch, including those involving arbitration. *See id.*

14. *See* WORLD BANK & INT'L FIN. CORP., DOING BUSINESS 2011: MAKING A DIFFERENCE FOR ENTREPRENEURS 73-75 (2011), *available at* http://www.doingbusiness.org/reports/global-reports/doing-business-2011.

15. Although some matters must be resolved in court as a matter of national law, the global trend is to allow an increasing number of disputes to be addressed through arbitration. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 837-41 (2009) [hereinafter BORN (ICA)]; FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION paras. 330 to 598-1(Emmanuel Gaillard & John Savage eds., 1999); JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION paras. 9-2 to 9-4 (2003).

provide principled, predictable or timely resolution of legal controversies.[16] Therefore, it is unsurprising that arbitration is being used in Colombia with increasing frequency to resolve both domestic and international disputes.[17] Indeed, Colombia has been ranked very highly in terms of the strength of its laws regarding commercial arbitration.[18]

U.S. parties may see Colombian acceptance of arbitration as a positive indication of the country's suitability for international trade, and that is true in many ways. However, arbitration is not a one-size-fits-all proposition, not even in the international realm, where multilateral agreements such as the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (more commonly known as the New York Convention)[19] and the Inter-American Convention on International Commercial Arbitration of 1975 (more commonly known as the Panama Convention)[20] have helped increase the predictability of cross-border commercial arbitration by harmonizing certain procedures relating to the enforcement of foreign arbitral awards.[21] Instead, international arbitration is still very much affected by the legal environment in individual states.[22] A great deal of variation can arise even within a region (such as Latin America) that is customarily considered relatively homogenous in its

16. *See* BORN (ICA), *supra* note 15, at 85-86; LEW ET AL., *supra* note 15, paras. 1-18 to 1-29.

17. *See* U.S. EMBASSY, *supra* note 9, at 3; *see also* Arango & Parra, *supra* note 13, at 56 (describing the increasing use of arbitration in Colombia to resolve contract disputes).

18. *See generally The Inaugural Survey of Latin American Arbitral Institutions*, INST. FOR TRANSNAT'L ARB. 7 (2011), http://www.cailaw.org/ita/itasurvey.pdf (noting that the country does not perform as well in terms of ease of process or extent of judicial assistance).

19. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518 [hereinafter New York Convention].

20. Inter-American Convention on International Commercial Arbitration of 1975, Pub. L. No. 101-369, 104 Stat. 448 (1990) [hereinafter Panama Convention].

21. *See* BORN (ICA), *supra* note 15, at 95-97; *see generally* Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

22. *See* BORN (ICA), *supra* note 15, at 99-100. Although the international legal community has attempted to minimize differences in national laws on arbitration through promulgation of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Arbitration Law), many states, including both the United States and Colombia, have retained their own unique legislation on arbitration. *See generally* U.N. Comm. on Int'l Trade Law, Rep. on its 18th Sess., June 3-21, 1985, Annex I, U.N. Doc. A/40/17; GAOR, 40th Sess., Supp. No. 17(June 21, 1985), revised by Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, 39th Sess., June 17-July7, 2006 Annex I, U.N. Doc. A/61/17; GAOR, 61st Sess., Supp. No. 17(July 7, 2006) [hereinafter Model Arbitration Law]; *see also* Status of UNCITRAL Model Arbitration Law, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (noting that sixty-five countries and seven U.S. states have adopted the original or revised Model Arbitration Law in whole or in part).

approach to legal issues.[23] Furthermore, there is never any guarantee that laws are as effective in practice as they are on paper.[24]

Multinational actors therefore cannot simply assume that states that espouse a pro-arbitration policy will necessarily enact laws that resemble those used elsewhere, including the actor's home legal system.[25] Instead, parties contemplating a cross-border commercial relationship must conduct extensive research into their counterpart's home legal system and consider a wide variety of issues prior to entering into an arbitration agreement.[26] For example, information must be obtained regarding the types of disputes that may be considered arbitrable in a particular state; the kind of procedures that may be used during the arbitration; whether and to what extent national courts involve themselves in the arbitral proceedings while the arbitration is pending; and the procedures and standards to be used to vacate or enforce an award arising out of an international arbitration.

The problem for many U.S. parties is that very little is known in the United States about arbitration in Colombia or involving Colombian parties.[27] This is not to say that no information is available on Colombian arbitration law. However, much of the material is extremely short, providing little more than intermittent highlights of recent developments without giving sufficient context for those who are unfamiliar with the legal system as a whole.[28] Only a few in-depth analyses of Colombian

---

23. *See* U.S. EMBASSY, *supra* note 9, at 3.

24. *See id.* at 8.

25. *See id.*

26. *See generally* GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: PLANNING, DRAFTING AND ENFORCING (2010) (describing the issues which should be considered while planning, drafting and enforcing international dispute resolution agreements) [hereinafter BORN (Drafting and Enforcing)].

27. Much of the information on Colombian law that does make its way to the U.S. arbitral community does so in an abbreviated or a contextual fashion, thus creating confusion about the efficacy of the Colombian arbitral regime. *See infra* note 371 (regarding the somewhat infamous *TermoRio* case). Furthermore, changes in the law that would cure certain unfortunate precedents often go unreported. *See id.* (regarding reforms that eliminated the possibility that *TermoRio* will be repeated in the future).

28. *See* BRIGARD & URRUTIA ABOGADOS, GUIDE TO DOING BUSINESS IN COLOMBIA 17-19 (2006) (including two pages on dispute resolution); Scott Appleton, *Latin American Arbitration: The Story Behind the Headlines*, 64 INT'L B. NEWS 27, 27-29 (Apr. 2010) (including two pages on Colombia); Arango & Parra, *supra* note 13, at 51 (including one chapter on Colombia); Hunter Carter, *Foreign Arbitration in Colombia and Enforcement Issues,* COLOM. L. & BUS. POST (Apr. 24, 2009), *available at* http://colombialawbiz.com/2009/04/24/foreign-arbitration-in-colombia-and-enforcement-issues/ (constituting an informal blog on recent developments); Hunter Carter, *Improving Recognition and Enforcement of International Arbitral Awards - Analysis and Translation of Proposed Arbitration Law*, COLOM. L. & BUS. POST (June 5, 2011), *available at* http://colombialawbiz.com/2011/06/05/improving-recognition-and-enforcement-of-international-arbitral-awards-analysis-and-translation-of-proposed-arbitration-law/ (constituting an informal blog on recent developments) [hereinafter Carter,

arbitration law exist in English,[29] compared to more extensive commentary focusing on other Latin American jurisdictions, such as Argentina, Brazil, Chile, Mexico and Peru.[30] Many of the scholarly articles on Latin American arbitration law that do mention Colombia typically do so only in passing.[31]

This Article fills that gap in the literature by describing the Colombian approach to international commercial arbitration in detail. The discussion not only includes references to both statutory and case law, it also includes comparisons to U.S. law so as to help U.S. parties put the analysis into context. Although the focus of this Article is on international disputes,

---

Improving Recognition]; Mauricio Gomm-Santos, *What's New in Latin American ADR?*, 65 DISP. RES. J. 13 (May-Oct. 2010) (including a one-page update on recent developments); Nicolas Gamboa Morales, *Colombia's Adoption of the Model Law: Almost There?*,15. No. 1 IBA ARB. NEWS 167 (Mar. 2010) (including a short analysis of whether Colombia should adopt the Model Arbitration Law); Carolita L. Oliveros, *International Distribution Issues: Contract Materials*, WL SH064 ALI-ABA 675 (Mar. 20-22, 2003) (constituting a short practitioner analysis of arbitration law with a passing reference to Colombia); Alejandro Ponieman, *How Important is ADR to Latin America?*, 58 DISP. RES. J. 65, 65 (Feb.-Apr. 2003) (including one page which mentions Colombia); Jorge Posada-Villaveces, *Arbitration Versus Litigation in Colombia*, INT'L L. PRAC. 12 (Spring 2002) (constituting a short practitioner analysis); Daniel Posse Velasquez & Carolina Posada*, Colombia*, *in* Latin Lawyer Reference 2008, *available at* http://www.phrlegal.com (constituting a short practitioner analysis); Mairee Uran-Bidegain, *Colombian Constitutional Court Rulings on the Applicability of International Arbitration to State Contracts*, LATIN AM. LAW (Sept. 2007), *available at* http://www.latinarbitrationlaw.com/colombian-constitutional-court-rulings-on-the-applicability-of-international-arbitration-to-state-contracts/ (reflecting a short update on recent developments); Erika P. Schultz, *Latin American Commercial Arbitration: The Colombian Approach,* 9 WORLD ARB. & MED. REP. 295 (1998) (constituting a short practitioner analysis); Eduardo Zuleta, *Colombia*, *in* LATIN LAWYER REFERENCE, *available at* http://www.latinlawyer.com/reference/topics/45/jurisdictions/8/colombia (reflecting a short practical analysis) [hereinafter Zuleta, *Colombia*].

29. *See* CAVELIER ABOGADOS, DOING BUSINESS IN COLOMBIA ch. 27 (forthcoming 2011) (focusing on alternative dispute resolution); *see generally* Mantilla-Serrano, *supra* note 5; Zuleta, 2010, *supra* note 13.

30. *See, e.g.*, ARBITRATION LAW AND PRACTICE IN LATIN AMERICA (Alejandro M. Garro ed., 2001) (focusing on all of Latin America); JAN KLEINHEISTERKAMP, INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA 469-607 (2005) (focusing on Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay); CHRISTIAN LEATHLEY, INTERNATIONAL DISPUTE RESOLUTION IN LATIN AMERICA: AN INSTITUTIONAL OVERVIEW (2007); Jonathan C. Hamilton, *Three Decades of Latin American Commercial Arbitration*, 30 U. PA. J. INT'L L. 1099, 1112-17 (2009); Paul E. Mason & Roque J. Caivano, *International Commercial Arbitration Practice in Latin America*, *in* INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE: 21ST CENTURY PERSPECTIVES 8-1 (Horacio A. Grigera Naón & Paul E. Mason eds., 2010).

31. *See* Alexia Brunet & Juan Agustin Lentini, *Arbitration of Oil, Gas, and Energy Disputes in Latin America,* 27 NW. J. INT'L L. & BUS. 591, 616-17 (2007); Adam B. Leichtling & Laura M. Paredes, *Fundamental Concepts in Reinsurance in Latin American Countries*, 37 U. MIAMI INTER-AM. L. REV. 1, 42-45 (2005); John F. Molloy, *Symposium - Products Liability in Latin America: Part II: Conference Report*, 8 ARIZ. J. INT'L & COMP. L. 47, 73, 76 (2003); Eduardo Palmer & Eliana Lopez, *The Use of Multi-Tiered Dispute Resolution Clauses in Latin America: Questions of Enforceability*, 14 AM. REV. INT'L ARB. 285, 293 (2003).

some attention is nevertheless paid to the law governing domestic arbitration in Colombia, since certain domestic provisions of law apply to international arbitration with equal weight.[32] The goal is to provide U.S. parties with the information they need to (1) evaluate the risks and benefits associated with entering into an arbitration agreement with a Colombian party and (2) establish the kinds of procedures needed to provide optimal protection of the arbitral process and any resulting award, regardless of whether the arbitration is seated in Colombia or elsewhere.

The discussion proceeds as follows. Section I considers the various international laws that affect international commercial arbitration in Colombia and with Colombian parties. This analysis is somewhat different from others of this type because of the predominant role played by the Panama Convention in disputes involving U.S. and Colombian parties.[33] Very little has been written about the Panama Convention compared to the New York Convention, and although the two treaties are similar in many ways, certain significant differences exist.[34]

Section II focuses on Colombian law, particularly Law No. 315/96[35] and Decree 1818/98,[36] which are the two primary statutes on arbitration.[37] Colombian case law will also be discussed in this section, although judicial opinions play something of a different role in civil law jurisdictions than in common law countries and are often written in a manner that common law-trained lawyers find difficult.[38] Among the issues considered in this section

---

32. *See infra* notes 93-100 and accompanying text. Some aspects of domestic arbitration law and practice must nevertheless be omitted for reasons of space, although further reading is available. *See e.g.,* Zuleta, 2010, *supra* note 13, at 1-69.

33. *See* Panama Convention, *supra* note 20; *see infra* notes 46-78 and accompanying text.

34. *See* New York Convention, *supra* note 19; Panama Convention, *supra* note 20; *see infra* notes 48-80 and accompanying text.

35. *See* L. 315/96, septiembre 12, 1996, DIARIO OFICIAL [D.O.] (Colom.), *available in Spanish at* Juriscol, http://juriscol.banrep.gov.co (search for 315 under "Leyes") [hereinafter Law No. 315/96]. An unofficial English translation may be found in Zuleta, 2010, *supra* note 13, as well as in INTERNATIONAL ARBITRATION IN LATIN AMERICA, *supra* note 5, Annex 4D - Colombia, at 509-10.

36. *See* D. 1818/98, septiembre 7, 1998, D.O. (Colom.), *available in Spanish at* Juriscol, http://juriscol.banrep.gov.co (search for 1818 under "Decretos") [hereinafter Decree 1818/98]. An unofficial English translation of Articles 115 to 198 may be found in *Republic of Colombia*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 1-20 (Jan Paulsson ed.) (Supp. 54 2009), *available at* http://www.kluwerarbitration.com.

37. However, these two provisions do not constitute the entirety of Colombian law on arbitration, and references to other statutory provisions are also made throughout this Article. *See infra* notes 82-92 and accompanying text (noting the intricacy of Colombia's arbitration law). Although Law No. 315/96 may appear on its face to be the exclusive statutory reference to international commercial arbitration, Decree 1818/98 also plays a role in international proceedings. *See infra* notes 92-99 and accompanying text.

38. As a general rule, opinions written by civil law judges are much shorter and more conclusory than those written by common law judges, providing very few of the underlying facts and very little in

is a somewhat unique procedure known as the *acción de tutela*, which allows a constitutional challenge to be mounted to an arbitral award or proceeding.[39] Comparisons to U.S. law are made throughout this section, providing a framework for analyzing the Colombian arbitral regime.

The final section looks to the future of arbitration law in Colombia by discussing recent and pending efforts to reform the Colombian statutory scheme. This section also concludes the Article by drawing together the various strands of discussion and providing some final observations.

The analysis begins with an introduction of the international legal environment in which Colombia operates. That discussion is found in the next section.

I. INTERNATIONAL LAW AFFECTING COMMERCIAL ARBITRATION IN COLOMBIA AND WITH COLOMBIAN PARTIES

Colombia has signed several international treaties involving arbitration, including the New York Convention,[40] the Panama Convention,[41] the Convention on the Settlement of Investment Disputes

---

the way of judicial reasoning. This, of course, leaves courts and parties with little guidance on how similar disputes will be decided in the future, for although later courts will know the outcome of an earlier dispute, they may not necessarily be able to glean the reasoning behind the decision. However, this is not inherently problematic for civil law lawyers or judges because of (1) the predominance given to statutory law in the civil law tradition and (2) the emphasis placed by civil law jurisprudence on general, relatively abstract principles of law rather than case-by-case analysis in response to individual disputes. Nevertheless, civil law judges do strive to achieve results that are consistent with existing precedents, often through the assistance of treatises written by learned scholars, which provide extensive and highly persuasive analysis regarding legal reasoning on certain issues. *See* S.I. STRONG, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. FEDERAL JUDGES (forthcoming 2012) [hereinafter STRONG, GUIDE]; KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 256-75 (Tony Weir trans., Oxford Univ. Press 3d ed. 1998) (1977); Jacques H. Herbots, *Interpretation of Contracts*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 325, 325-47 (Jan M. Smits ed., 2006). A good English-language example of a civil law judicial opinion is Empresa Colombiana de Vías Férreas (Ferrovías) v. Drummond Ltd., Consejo de Estado [C.E.] [Administrative Court], Sala de lo Contencioso Administrativo, Seccion Tercera, octubre 24, 2003, No. 25.25, *aff'd* C.E., abril 22, 2004, No. 24.261, *in* 29 Y.B. COMM. ARB. 643 (Albert Jan van den Berg ed., 2004). A collection of important judicial decisions concerning arbitration is available in Spanish on the website of the Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá. *See Jurisprudencia*, CENTRO DE ARBITRAJE Y CONCILIACIÓN DE LA CÁMARA DE COMERCIO DE BOGOTÁ, http://www.cacccb.org.co/contenido/contenido.aspx?catID=3&conID=62 (last visited Oct. 1, 2011).

39. *See* Zuleta, *Colombia*, *supra* note 28, para. 37; *see also Colombia*, *in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD art. 86 (2005) (setting forth constitutional basis for an *acción de tutela*) [hereinafter Colombia Constitution].

40. *See* New York Convention, *supra* note 19. Colombia's initial adherence to the New York Convention was declared unconstitutional in 1988, but the country re-ratified the treaty in 1990. *See* INT'L CHAMBER OF COMMERCE, GUIDE TO NATIONAL RULES OF PROCEDURE FOR RECOGNITION AND ENFORCEMENT OF NEW YORK CONVENTION AWARDS 88 (2009).

41. *See* Panama Convention, *supra* note 20.

Between States and Nationals of Other States (ICSID Convention),[42] and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, more commonly known as the Montevideo Convention, which facilitates the enforcement of arbitration with several of the members of the Organization of American States.[43] Although the United States has not adhered to the Montevideo Convention,[44] it has signed and ratified the other three treaties.[45] The two countries have also concluded a free trade agreement that would provide for arbitration of disputes, although those provisions do not relate to the type of private commercial (as opposed to investment) disputes at issue in this Article.[46] Since treaty-based investment arbitration differs from international commercial arbitration in several significant ways, this Article will not discuss arbitration under either the ICSID Convention or the U.S.-Colombia free trade agreement.[47] The analysis will instead focus on the New York and Panama Conventions, the two commercial treaties that have been ratified by both the United States and Colombia.[48]

The New York and Panama Conventions constitute significant advancements in international commercial arbitration, greatly facilitating the cross-border enforcement of arbitral awards and arbitration

---

42. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

43. *See* Organization of American States, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 14, 1979, O.A.S.T.S. No. 51, 1439 U.N.T.S. 87 [hereinafter Montevideo Convention]; *see also* Zuleta, *Colombia*, *supra* note 28, para. 3 (regarding Colombia's adherence to various conventions).

44. *See* Montevideo Convention, *supra* note 43.

45. *See* ICSID Convention, *supra* note 42; 9 U.S.C. §§ 201, 301 (2006).

46. *See* U.S.-Colombia Free Trade Agreement, *supra* note 9; *see also supra* note 9 and accompanying text. For more information on dispute resolution provisions in ICSID and free trade agreements, *see generally* Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, *in* INTERNATIONAL ARBITRATION IN LATIN AMERICA 313 (Nigel Blackaby et al. eds., 2002); David A. Gantz, *Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement*, 30 B.C. INT'L & COMP. L. REV. 331 (2007) (discussing CAFTA-DR and NAFTA dispute resolution); Katia Fach Gómez, *Latin America and ICSID: David Versus Goliath?*, 17 L. & BUS. REV. AM. 195 (2011); *see also* U.S. EMBASSY, *supra* note 9, at 4 (discussing Colombia's adherence to various free trade agreements (FTAs) and bilateral investment treaties (BITs) and the effect Colombian arbitration law has on investment arbitration); Nigel Blackaby, *Arbitration Under Bilateral Investment Treaties in Latin America*, *in* INTERNATIONAL ARBITRATION IN LATIN AMERICA 379 (Nigel Blackaby et al. eds., 2002); Zuleta, 2010, *supra* note 13, at 71-73 (listing FTAs and BITs involving Colombia).

47. *See* ICSID Convention, *supra* note 42; U.S.-Colombia Free Trade Agreement, *supra* note 9; LEW ET AL., *supra* note 15, paras. 28-8 to 28-13.

48. *See* New York Convention, *supra* note 19; Panama Convention, *supra* note 20.

agreements.[49] The New York Convention is the more well-known of the two treaties and, with 146 state parties, the more broadly applicable.[50] This treaty has been credited with revolutionizing global commerce by facilitating the enforcement of foreign arbitral awards and thereby creating a neutral, reputable and effective means of resolving cross-border legal disputes.[51]

The New York Convention predates the Panama Convention by nearly twenty years and in many ways acted as a model for the later agreement.[52] The drafters intended the two treaties to be interpreted and applied harmoniously,[53] and when the United States adopted the Panama Convention, Congress expressly stated that it expected that U.S. courts would achieve uniform results under the two instruments.[54]

Because the two treaties are perceived as being so similar and because the New York Convention includes a geographically wider field of application than the Panama Convention, most scholarly and judicial commentary in the United States tends to focus on the New York Convention.[55] However, the U.S. Federal Arbitration Act (FAA) includes a rule of priority addressing situations where both treaties could apply, stating that it is the Panama Convention, rather than the New York Convention, that governs if a majority of the parties to the arbitration agreement are from countries that have ratified or acceded to the Panama Convention and are also members of the Organization of American States.[56] Commentators have indicated that a similar rule of priority should

---

49. *See* New York Convention, *supra* note 19; Panama Convention, *supra* note 20; BORN (Drafting and Enforcing), *supra* note 26, at 123-130.

50. *See Status-1958 Convention on the Recognition and Enforcement of Foreign Arbitration Awards*, U.N. COMM'N ON INT'L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Oct. 2, 2011) (listing 146 state parties).

51. *See* BORN (Drafting and Enforcing), *supra* note 26, at 123-24.

52. *See* New York Convention, *supra* note 19; Panama Convention, *supra* note 20; John P. Bowman, *The Panama Convention and Its Implementation Under the Federal Arbitration Act*, 11 AM. REV. INT'L ARB. 1, 19-20 (2000).

53. *See* BORN (Drafting and Enforcing), *supra* note 26, at 124-25; Bowman, *supra* note 52, at 19-20.

54. *See* H. R. REP. NO. 101-501, at 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 675, 678, 1990 WL 132745; DRC, Inc. v. Republic of Honduras, 774 F.Supp.2d 66, 71 (D.D.C. 2011).

55. *See, e.g.,* Employers Ins. of Wasau v. Banco Seguros Del Estado, 34 F.Supp.2d 1115, 1120 (E.D. Wis. 1999) ("There is little case law interpreting the Inter-American Convention."), *aff'd,* 199 F.3d 937 (7th Cir. 1999); Bowman, *supra* note 52, at 1-2; Helena Tavares Erickson et al., *Looking Back, and Ahead: The Panama Convention after 30 Years,* 23 ALT. HIGH COST LITIG. 184, 184 (2004).

56. *See* New York Convention, *supra* note 19; Panama Convention, *supra* note 20; 9 U.S.C. § 305 (2006).

apply in other jurisdictions.[57] Nevertheless, suggestions have been made that "it would be a mistake to conclude that [the Panama] Convention operates with equal effectiveness in the United States and Latin America."[58] Therefore, U.S. parties should remain cautious when considering how international laws on arbitration are interpreted and applied in Colombia, although the presumption should be that the Panama Convention controls in bilateral disputes involving a U.S. and Colombian party.[59]

In some ways, it may seem that debates about applicability of the Panama Convention versus the New York Convention are irrelevant, since the two conventions are similar in many important regards.[60] For example, the two conventions reflect virtually identical language with respect to the standards associated with the enforcement of arbitral awards.[61]

However, the two conventions reflect some key differences.[62] The most important for purposes of this discussion involves Article 3 of the Panama Convention, which imposes a specific set of procedural rules in

---

57. *See* KLEINHEISTERKAMP, *supra* note 30, at 27 ("If the arbitration is a genuine Inter-American one, the Panama-Convention will prevail as *lex specialis* over the [New York]-Convention"); Bowman, *supra* note 52, at 45-47; Hamilton, *supra* note 30, at 1109. However, it is not clear whether Colombia would adopt the same rule of priority. For example, one case that appeared to be a likely candidate for the application of the Panama Convention considered the dispute under the New York Convention instead. *See* Sunward Overseas, S.A. v. Servicios Marítimos Ltd., 20 Y.B. COMM. ARB. 651 (Corte Suprema de Justicia 1992). That case involved a Colombian party and a party whose nationality was unstated, although public records suggest that the unknown party was registered in the Republic of Panama, a signatory of the Panama Convention. *See* Panama Convention, *supra* note 20; *Public Register*, REP. OF PAN., https://www.registro-publico.gob.pa/scripts/nwwisapi.dll/conweb/MESAMENU?TODO=SHOW&ID=143868 (relating to Sunward Overseas, S.A.). Some discrepancies in the application of the two treaties may arise because the New York Convention looks to the place of the arbitration when deciding issues of applicability, whereas the Panama Convention arguably looks to the nationality of the parties. *See* New York Convention, *supra* note 19, art. I(1); Panama Convention, *supra* note 20, art. 1; Bowman, *supra* note 52, at 45-47 (stating this is an issue of some debate).

58. *See* Bowman, *supra* note 52, at 19.

59. *See* 9 U.S.C. § 305; Banco de Seguros del Estado v. Mutual Marine Offices, Inc., 230 F. Supp. 2d 362, 367 n.4 (S.D.N.Y. 2002), *aff'd* 344 F.3d 255 (2d Cir. 2003); Progressive Casualty Ins. v. C.A. Reaseguradora Nacional de Venezuela, 802 F. Supp. 1069, 1074 (S.D.N.Y. 1992), *rev'd on other grounds,* 991 F.2d 42 (2d Cir. 1993). *But see supra* note 57.

60. *See* New York Convention, *supra* note 19; Panama Convention, *supra* note 20; BORN (Drafting and Enforcing), *supra* note 26, at 125.

61. *See* New York Convention, *supra* note 19, art. V; Panama Convention, *supra* note 20, art. 5; BORN (Drafting and Enforcing), *supra* note 26, at 125.

62. *See* BORN (Drafting and Enforcing), *supra* note 26, at 125; Bowman, *supra* note 52, at 20-115. For example, the Panama Convention does not include language requiring national courts to refer disputes to arbitration in cases where a valid arbitration agreement exists. *See* BORN (Drafting and Enforcing), *supra* note 26, at 125. A comprehensive comparison of the Panama and New York Conventions is beyond the scope of this Article. However, further reading is available. *See* Bowman, *supra* note 52, *passim;* Erickson et al., *supra* note 55, *passim*.

cases where the parties have failed to agree on the procedures to be used in the arbitration.[63] This provision is very important, since it bars the application of certain default rules in Colombian arbitration law.[64]

Article 3 states that "the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission" (IACAC Arbitration Rules) in any case where the parties have not made an express agreement regarding the governing procedural rules.[65] Because the Panama Convention applies in any bilateral arbitration between a U.S. and Colombian party, the IACAC Arbitration Rules will necessarily apply in bilateral arbitrations between U.S. and Colombian nationals where the parties have not agreed otherwise.[66]

However, Colombian arbitration is very often multiparty in nature, with forty percent of the cases handled by the Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá (Arbitration and Conciliation Center of the Botogá Chamber of Commerce), the leading arbitration institution in Colombia, involving more than two parties.[67] Many of these disputes may be entirely domestic, since Colombian law contains an unusually liberal provision requiring the joinder of any third parties, even non-signatories, who could be directly affected by an arbitration award.[68] Although this rule will not apply in international arbitrations,[69] multiparty disputes nevertheless can and do apply in the context of international arbitration.[70] Therefore, the question is whether the

---

63. *See* Panama Convention, *supra* note 20, art. 3; Bowman, *supra* note 52, at 24-35; Erickson et al., *supra* note 55, at 185; Hamilton, *supra* note 30, at 1117.

64. *See infra* notes 217-18 and accompanying text. Article 2 of the Panama Convention is also useful in this regard, in that it lays down certain rules regarding the appointment of arbitrators. *See* Panama Convention, *supra* note 20, art. 2.

65. *See* Panama Convention, *supra* note 20, art. 3; Inter-American Commercial Arbitration Commission Rules of Procedure, 22 C.F.R. pt. 194 app. A (1975) (amended April 1, 2002) [hereinafter IACAC Arbitration Rules].

66. *See* Panama Convention, *supra* note 20; 9 U.S.C. § 301 (2006).

67. *See* INST. FOR TRANSNAT'L ARB., *supra* note 18, at 14.

68. *See* Mantilla-Serrano, *supra* note 5, at 125 (noting that the circumstances are limited to situations where the award would have *res judicata* effect over the third party); *see also* Zuleta, 2010, *supra* note 13, at 11-12 (noting arbitral consolidation in domestic arbitration follows the same rules as judicial consolidation under Article 157 of the Code of Civil Procedure). This may explain why there appear to be no reported cases involving non-signatories in the international context. *See* Zuleta, *Colombia*, *supra* note 28, para. 12; *see also* U.S. EMBASSY, *supra* note 9, at 21 (claiming that "Colombia is restrictive in extending the scope of the arbitration agreement to non-signatory parties").

69. *See* Zuleta, 2010, *supra* note 13, at 12.

70. *See* LEW ET AL., *supra* note 15, para. 16-1 (noting that the percentage of multiparty arbitrations administered by the ICC rose from 20% to 30% during the period 1995 to 2001); Martin Platte, *When Should an Arbitrator Join Cases?*, 18 ARB. INT'L 67, 67 (2002) (noting that more than fifty percent of LCIA arbitrations reportedly involve more than two parties). Most multilateral disputes

Panama Convention, and thus the IACAC Arbitration Rules, will also apply in multiparty arbitrations.[71]

On one level, few problems arise, since both the Panama and New York Conventions apply to bilateral and multilateral arbitrations with equal force.[72] Furthermore, it is clear that the IACAC Arbitration Rules could and should apply in any multiparty dispute where all of the participants come from states that have signed Panama Convention.[73] Currently fifteen countries have ratified the Panama Convention in addition to the United States and Colombia, with two more having signed the Convention but not yet ratified it.[74]

However, it is not clear whether the IACAC Arbitration Rules would or could apply by default to any multiparty arbitration involving a party who was not resident in a nation that had signed the Panama Convention.[75] Although a court or arbitral tribunal might be inclined to construct a theory of implicit consent so as to impose the IACAC Arbitration Rules on a party from a non-signatory state without that party's explicit consent, this Article

---

involve three to five parties. *See* S.I. Strong, *Does Class Arbitration 'Change the Nature' of Arbitration?* Stolt-Nielsen, AT&T *and a Return to First Principles*, 17 HARV. NEGOT. L. REV. (forthcoming 2012). However, both the United States and Colombia appear amenable to the concept of class arbitration. *See, e.g.,* AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740 (2011); Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010); Eduardo Zuleta Jaramillo, *Valencia v. Bancolombia*, *Arbitral Tribunal from the Bogotá Chamber of Commerce*, KLUWERARBITRATION (Apr. 24, 2003), http://www.kluwerarbitration.com (noting the arbitrator was to consider whether the plaintiff met the standards necessary for a class action, although "the question of whether arbitral agreements can serve as an instrument for filing class actions or other constitutional actions remains unanswered within the Colombian legal system"); *see* Zuleta, *Colombia*, *supra* note 28, para. 14; *see also* S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017, 1031-32 (2009).

71. *See* IACAC Arbitration Rules, *supra* note 65. While the IACAC Arbitration Rules do not mention multiparty arbitration, that is not a bar to the use of those Rules in such proceedings, since multiparty arbitrations have proceeded in the past under rules that were similarly silent. *See* LEW ET AL., *supra* note 15, paras. 16-30 to 16-32.

72. *See generally* New York Convention, *supra* note 19; Panama Convention, *supra* note 20; BORN (ICA), *supra* note 15, at 2073-76.

73. *See* Panama Convention, *supra* note 20; Bowman, *supra* note 52, at 45-47.

74. The seventeen states that have ratified the Panama Convention include Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, the United States, Uruguay and Venezuela. *See* Panama Convention, *supra* note 20; *see also* Organization of American States, Foreign Trade Information System, *available at* http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp [hereinafter SICE]. The two countries that have signed the Convention but not yet ratified it are the Dominican Republic and Nicaragua. *See* SICE, *supra.*

75. *See* Panama Convention, *supra* note 20; Bowman, *supra* note 52, at 45-47. This issue could arise in cases involving both conventional multiparty arbitration and class arbitration.

will not engage in speculation on this point.[76] Instead, this discussion takes the view that most commercial parties would agree to the adoption of the IACAC Arbitration Rules so as to avoid the uncertainty that would otherwise ensue.[77] This approach is permitted under the IACAC Arbitration Rules, which can be explicitly adopted by parties either before or after the dispute has arisen.[78] If the parties do not agree to application of the IACAC Arbitration Rules, then procedural issues would be governed by the law of the arbitral seat.[79] However, the analysis in this Article proceeds as if the IACAC Arbitration Rules apply to international disputes in the absence of party agreement, since bilateral arbitrations will likely be the norm.[80]

Having set forth the international law affecting arbitration between a U.S. and Colombian party, it is now time to consider Colombia's national laws on arbitration. The following discussion considers both statutory provisions and judicial opinions, and compares the Colombian approach to the U.S. approach.[81]

II. COLOMBIAN ARBITRATION LAW

A. Introduction

Like many countries, Colombia differentiates between its treatment of international and domestic arbitration. International arbitration is primarily addressed in Law No. 315/96,[82] while domestic arbitration is primarily

---

76. *See* Panama Convention, *supra* note 20; IACAC Arbitration Rules, *supra* note 65; Bowman, *supra* note 52, at 45-47.

77. *See generally* Banco de Seguros del Estado v. Mut. Marine Offices, Inc., 230 F. Supp. 2d 362, 367 n.4 (S.D.N.Y. 2002) (applying the Panama Convention when there was no information on the nationalities of the parties but parties agreed that the Convention would govern), *aff'd*, 344 F.3d 255 (2d Cir. 2003).

78. *See* IACAC Arbitration Rules, *supra* note 65, art. 1(1); *see also infra* note 232 and accompanying text (noting validity of both pre- and post-dispute agreements in Colombian and U.S. arbitration law).

79. *See* IACAC Arbitration Rules, *supra* note 65; LEW ET AL., *supra* note 15, paras. 21-2 to 21-18.

80. *See* IACAC Arbitration Rules, *supra* note 65.

81. This Article will focus on arbitrations arising under the FAA, although it is possible for an international arbitration to proceed under state law as well. *See* 9 U.S.C. §§ 1-307 (2006); BORN (ICA), *supra* note 15, at 140-44. Issues of preemption are beyond the scope of this Article, as are detailed examinations of the content and applicability of statutes regarding international commercial arbitration enacted by individual U.S. states. *See id.* at 143.

82. *See* Law No. 315/96, *supra* note 35. This law replaced two earlier edicts. *See* D. 2279/89, octubre 7, 1989, D.O. (Colom.), *available at* http://juriscol.banrep.gov.co (search for 2279 under "Decretos") [hereinafter Decree 2279/89]; L. 23/91, marzo 21, 1991, D.O. (Colom.), *available at* http://juriscol.banrep.gov.co (search for 23 under "Leyes") [hereinafter Law No. 23/91]. This law also abrogated and replaced Articles 663-77 and 693-95 of the Code of Civil Procedure and Articles 2011-25 of the Commercial Code. *See* Código de Comercio, Título III del Arbitramento, arts. 2011-25

covered by Decree 1818/98.[83] Decree 1818/98 is an omnibus provision encompassing most aspects of the law regarding arbitration and conciliation in Colombia and includes the substantive provisions of Decree 2279/89, which had previously been the most comprehensive enactment on domestic arbitration in Colombia.[84] However, Decree 1818/98 contained a number of errors when it was enacted, omitting some provisions that are currently in force and including some new items that are unique to this statute.[85]

A variety of other statutes also address arbitration, meaning that researchers must do more than simply consider Law No. 315/96 and Decree 1818/98 in isolation.[86] Perhaps the most important of these other provisions is Law No. 80/93, which was amended by Law No. 1150/07 and

---

(Colom.) (repealed 1989), *available at* http://www.secretariasenado.gov.co/senado/basedoc/codigo/codigo_comercio.html#1 (select article number in drop-down box marked "Artículo") [hereinafter Commercial Code]; Código de Procedimiento Civil, arts. 663-77, 693-96 (Colom.) (Articles 663-77 repealed 1989, Articles 693-95 concerning *exequatur*), *available at* http://www. secretariasenado. gov.co/senado/basedoc/codigo/ codigo_procedimiento_civil.html#1 (select article number in drop-down box marked "Articulo") [hereinafter Code of Civil Procedure]. Decree 2279/89 can be found in English in *Republic of Colombia*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 1-10 (Jan Paulsson ed.) (Supp. 18 1994), *available at* http://www.kluwerarbitration.com. Articles 693-94 of the Code of Civil Procedure can be found in English at *Sunward Overseas S.A. v. Servicios Marítimos Ltd.*, 20 Nov. 1992, XX Y.B. COMM. ARB. 651 (1992).

83. *See* Decree 1818/98, *supra* note 36.

84. *See id.*; Decree 2279/89, *supra* note 82; Mantilla-Serrano, *supra* note 5, at 113. Decree 1818/98 also combined Law No. 315/96 with the ICSID Convention, giving the impression that the two instruments were part of the same statute. *See* ICSID Convention, *supra* note 42; Decree 1818/98, *supra* note 36, arts. 196-98; Law No. 315/96, *supra* note 35; Zuleta, 2010, *supra* note 13, at 2.

85. *See* Zuleta, 2010, *supra* note 13, at 1-2.

86. *See* Zuleta, 2010, *supra* note 13, at 1-2; *see also* Arango & Parra, *supra* note 13, at 56 (noting primary laws relating to dispute resolution). For example, Decree 2651/91 discusses certain aspects of domestic arbitration, as does Law No. 446/98. *See* D. 2651/91, noviembre 25, 1991, D.O. (Colom.), *available at* http://juriscol.banrep.gov.co (search for 2651 under "Decretos") [hereinafter Decree 2651/91]; L. 446/98, julio 7, 1998, D.O. (Colom.), *available at* http://juriscol.banrep.gov.co (search for 446 under "Leyes"), *implemented by* Decree 1818/98, *translated in part in* 36 Legal Bulletin (Aug. 31, 1998 and Sept./Oct. 1998) [hereinafter Law No. 446/98]. Law No. 640/01 discusses conciliation and amends Law No. 446/98 and Law No. 23/91. *See* L. 640/01, enero 5, 2001, D.O. (Colom.), *available at* http://juriscol.banrep.gov.co (search for 640 under "Leyes") (additional provisions reprinted at L. 640/01, enero 24, 2007, D.O. (Colom.)) [hereinafter Law No. 640/01]; *see also* Law No. 446/98, *supra*; Law No. 23/91, *supra* note 82. An unofficial English translation of Law No. 640/01 can be found in Zuleta, 2010, *supra* note 13. Law No. 270/96, which describes the judicial nature of arbitral authority, was amended by Law No. 1285/09. *See* L. 1285/09, enero 22, 2009, D.O. (Colom.), *available at* http://juriscol.banrep.gov.co (search for 1285 under "Leyes") [hereinafter Law No. 1285/09]; L. 270/96, marzo 7, 1996, D.O. (Colom.), *available at* http://juriscol.banrep.gov.co (search for 270 under "Leyes") [hereinafter Law No. 270/96]; U.S. EMBASSY, *supra* note 9, at 4. An unofficial English translation of Article 13 of Law No. 270/96, as amended by Law No. 1285/09, can be found in Zuleta, 2010, *supra* note 13.

which governs arbitrations involving the state.[87] Various provisions of the Colombian Constitution[88] and Code of Civil Procedure[89] are also relevant to actions involving arbitration.[90] Nevertheless, this Article will focus primarily on Law No. 315/96 and Decree 1818/98, since they are the most recent and comprehensive enactments on arbitration in Colombia, with only occasional references to other provisions.[91]

Although Law No. 315/96 suggests that it is the exclusive statutory authority on international arbitration, there are four reasons why U.S. parties must nevertheless take Decree 1818/98 into account.[92] First, Law No. 315/96 is very sparse, and courts and arbitrators may need to rely on Decree 1818/98 to fill any statutory gaps that may arise.[93] In this, Colombia is similar to the United States, which also uses domestic arbitration law (Chapter 1 of the FAA) in cases where the international arbitration statutory regime (Chapters 2 and 3 of the FAA) fails to provide adequate guidance.[94]

Second, domestic arbitration law typically governs certain proceedings that arise after the conclusion of an arbitration, such as motions to annul or confirm an arbitral award. Colombia's adoption of this approach has recently been confirmed by the Superior Tribunal of Bogotá,

---

87. *See* L. 1150/07, julio 16, 2007, D.O. (Colom.), *available at* http://juriscol.banrep.gov.co (search for 1150 under "Leyes") [hereinafter Law No. 1150/07]; L. 80/93, octubre 28, 1993, D.O. (Colom.), *available at* http://juriscol.banrep.gov.co (search for 80 under "Leyes") [hereinafter Law No. 80/93]; Zuleta, *Colombia*, *supra* note 28, para. 10. An unofficial English translation of excerpts of Law No. 80/93, as amended by Law No. 1150/07, can be found in Zuleta, 2010, *supra* note 13. Article 70 of Law No. 80/93 authorizes arbitration agreements between the state and foreign parties. *See* Law No. 80/93, *supra*, art. 70; Zuleta, *Colombia*, *supra* note 28, para. 1.

88. Arbitration in Colombia is based on Article 116 of the Constitution, which reads, in part: "Individuals may be entrusted temporarily with the function of administering justice as jurors in criminal proceedings, as mediators or as arbitrators authorized by the parties to issue verdicts in law or in equity in [sic] the terms defined by the law." Colombia Constitution, *supra* note 39, art. 116; *see also id.* arts. 13 (involving equal treatment), 28 (involving personal autonomy), 29 (involving due process), 86 (involving *acciones de tutela*).

89. *See* Code of Civil Procedure, *supra* note 82, arts. 693-95 (concerning *exequatur* proceedings).

90. *See* Zuleta, 2010, *supra* note 13, at 2.

91. *See* Decree 1818/98, *supra* note 36; Law No. 315/96, *supra* note 35.

92. *See* Law No. 315/96, *supra* note 35, art. 2 (stating, in part, that "[i]nternational arbitration shall be governed in all its aspects in accordance with the provisions of this law."); *see also* Decree 1818/98, *supra* note 36.

93. *See* Decree 1818/98, *supra* note 36; Law No. 315/96, *supra* note 35, art. 2; Mantilla-Serrano, *supra* note 5, at 123; Zuleta, 2010, *supra* note 13, at 3, 38.

94. *See* 9 U.S.C. §§ 208, 307 (2006); Law No. 315/96, *supra* note 35; Zuleta, 2010, *supra* note 13, at 3, 38. Chapter 2 of the FAA governs arbitrations falling under the New York Convention, while Chapter 3 addresses arbitrations falling under the Panama Convention. *See* 9 U.S.C. §§ 201, 301. However, certain sections of Chapter 2 also apply to arbitrations proceeding under Chapter 3. *See* 9 U.S.C. § 302 (incorporating Sections 202, 203, 204, 205, and 207 of the FAA by reference).

which stated that an arbitral award rendered by an international arbitral tribunal may nevertheless be subject to annulment proceedings under Decree 1818/98.[95] This is similar to the approach taken in the United States, where motions to vacate an arbitral award are brought under Chapter 1 of the FAA.[96]

Third, domestic laws and practice often influence the way courts and arbitrators exercise their discretion and interpret rules regarding international arbitration. Parties may also find their expectations regarding "proper" arbitral procedures affected by domestic norms. U.S. parties therefore need to know about Colombian domestic procedures in order to understand the legal culture in which Colombian judges, arbitrators and parties habitually operate.[97]

Fourth and finally, it is possible for some disputes to be later characterized as domestic even though the parties originally believed the arbitration to constitute an international proceeding.[98] Even if this only rarely happens, adoption of certain domestic practices may help safeguard an international award. Therefore, brief consideration of Decree 1818/98 is useful, although the discussion will be limited to those issues that are most relevant to U.S. parties considering arbitration in Colombia or with Colombian nationals.[99]

---

95. *See* Gomm-Santos, *supra* note 28, at 15 (discussing *SAP Andina y del Caribe C.A. Colombia,* Mar. 10, 2010, which involved the International Centre of Dispute Resolution (ICDR) Arbitration Rules and which was decided in light of Article 161 of Decree 1818/98); *see also* Zuleta, 2010, *supra* note 13, at 55-57.

96. *See* 9 U.S.C. §§ 10, 208, 307. Although U.S. courts agree that the procedure for vacating an arbitral award is described in Section 10, circuits are split on the substantive standards to be used in such an action. For example, the Eleventh Circuit has ruled that parties may only rely on the grounds relating to non-enforcement of a foreign arbitral award under Article V of the New York Convention, even in actions to vacate an award arising out of an arbitration seated in the United States. *See* Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH, 141 F.3d 1434, 1140-41, 1445 (11th Cir. 1998). The Second Circuit appears to take the view that the New York Convention does not impose any limits on the grounds upon which vacatur is allowed. *See* Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 22-23 (2d Cir. 1997). *But see* Westerbeke Corp. v. Daihatsu Motor Co., Ltd., 304 F.3d 200, 221-22 (2d Cir. 2002) (calling *Toys "R" Us* into question regarding its reliance on Section 10 of the FAA). Motions to confirm an arbitral award arising under the New York or Panama Convention are brought under Chapters 2 and 3 of the FAA. *See* 9 U.S.C. §§ 207, 302.

97. For example, domestic arbitration in Colombia is a relatively formal undertaking that relies heavily on analogies to judicial actions. *See* Mantilla-Serrano, *supra* note 5, at 114.

98. This is what happened in the *TermoRio* case. *See* Eduardo Zuleta Jaramillo, *Decision C-713/2008, Corte Constitucional [Constitutional Court]*, KLUWERARBITRATION (July 15, 2008), http://www.kluwerarbitration.com (discussing *TermoRio*); *see infra* note 371 (discussing *TermoRio* and noting the situation is unlikely to arise again).

99. For a more comprehensive discussion of domestic arbitration law and practice in Colombia, see Zuleta, 2010, *supra* note 13, at 1-69.

B. International Commercial Arbitration Under Colombian Law—Law No. 315/96

1. Definitions and Applicability

The analysis begins with Law No. 315/96, which governs matters involving international commercial arbitration in Colombia.[100] The law is quite short, only including five articles.[101] Although some commentators have claimed that the Colombian law is in some ways similar to the UNCITRAL Model Arbitration Law, that appears to be something of an overstatement, given the comparative lengths of the two enactments.[102] However, Law. No. 315/96 does resemble the Model Arbitration Law with respect to its definition of an international arbitration.[103]

That definition is found in Article 1 of Law No. 315/96 and includes three elements.[104] First, the parties must have entered into an arbitration agreement, although they do not need to declare explicitly when doing so that the procedure is "international" per se.[105] For a while, this issue was open to debate, but commentators have taken the view that a close reading of the statute and its legislative history suggested that the drafters simply meant "that there be a valid arbitration agreement," with the determination of internationality relying solely on the criteria set forth in Article 1.[106] Although the courts have yet to confirm this approach, it was affirmed in an arbitral award rendered in 2004 under the auspices of the International Court of Arbitration for the International Chamber of Commerce (ICC).[107]

---

100. *See* Law No. 315/96, *supra* note 35, arts. 1-5.

101. *See id.*

102. *Id.; see* Model Arbitration Law, *supra* note 22, arts. 1-36; Mantilla-Serrano, *supra* note 5, at 130-31. Some commentators believe that Colombia may be close to adopting the Model Arbitration Law, but that has not yet occurred. *See* Morales, *supra* note 28, at 167.

103. Law No. 315/96, *supra* note 35, art. 1; *see* Model Arbitration Law, *supra* note 22, art. 1(3); Zuleta, 2010, *supra* note 13, at 2.

104. *See* Law No. 315/96, *supra* note 35, art. 1.

105. *See id.*; Mantilla-Serrano, *supra* note 5, at 131 (referring to the phrase "when the parties have so agreed"). Arbitration agreements in international disputes need not take any particular form. *See* Zuleta, 2010, *supra* note 13, at 10.

106. *See* Law No. 315/96, *supra* note 35, art. 1; Mantilla-Serrano, *supra* note 5, at 131.

107. *See* Eduardo Zuleta Jaramillo, *Consorcio del Caribe (consortium formed by Ingeneria y Equipos del Caribe Ltda and DEEB Asociados Ltda) v. Boskalis BV, ICC Case No. 117/KGA*, KLUWERARBITRATION (Jan. 24, 2004), http://www.kluwerarbitration.com (relying on the language of Law No. 315/96 and noting that a contrary interpretation would violate the New York and Panama Conventions, which only require that the arbitration agreement be in writing).

Second, Article 1 sets forth the indicia of an "international" arbitration.[108] A proceeding will fall under Law No. 315/96 if any one of the following five elements exists:

> 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 on in the arbitration agreement.
> 4. The matter that is the object of the arbitration agreement clearly involves the interests 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.[109]

Third, Article 1 of Law No. 315/96 expressly indicates that it can be used as a defensive mechanism.[110] Thus, a party who is named as a defendant in a judicial proceeding may raise the existence of the arbitration agreement as an objection to the jurisdiction of the court.[111]

In many ways, the Colombian definition of an international arbitration is much simpler than that used in the United States. For example, Chapter 1 of the FAA indicates that it applies both to domestic arbitrations and to arbitrations involving interstate and foreign commerce, so long as those arbitrations arise out of written agreements involving maritime or commercial transactions.[112] However, Chapter 2, which was enacted some forty-five years later to give domestic effect to the New York Convention, curtails Chapter 1's broad applicability with certain limiting language that

---

108. Law No. 315/96, *supra* note 35, art. 1.

109. *Id.*; *see also* Posada-Villaveces, *supra* note 28, at 12. The reference to "the interests of international commerce" or "international trade" mirrors provisions founds in the French law of arbitration. *See* FOUCHARD, GAILLARD, GOLDMAN, *supra* note 14, paras. 107-26 (discussing the definition of international arbitration in Article 1492 of the pre-2011 French Code of Civil Procedure); *see also* Code de procédure civile [C.P.C.] bk. IV art. 1504 (Fr.), *translated in* Yves Derains & Laurence Kiffer, *France*, *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION Annex I (Jan Paulsson ed.) (Supp. 64 2011) ("An arbitration is international when international trade interests are at stake.").

110. *See* Law No. 315/96, *supra* note 35, art. 1; *see also* Posada-Villaveces, *supra* note 28, at 12; Zuleta, *Colombia*, *supra* note 28, para. 29.

111. *See* Law No. 315/96, *supra* note 35, art. 1.

112. *See* 9 U.S.C. §§ 1-2 (2006) (noting also some exclusions).

appears in Section 202.[113] This section states that "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in Section 2 of this title, falls under the Convention."[114] Although Chapter 2 originally referred only to arbitrations arising under the New York Convention, certain portions of Chapter 2, including Section 202, now apply to arbitrations falling under the Panama Convention as well, so that the reference to "the Convention" in Section 202 can apply to either the New York or Panama Convention .[115]

At first, this language would appear to bring all disputes listed in Section 2 under the control of Chapters 2 or 3, leaving nothing to the exclusive jurisdiction of Chapter 1.[116] However, Section 202 then returns a subset of disputes to the exclusive jurisdiction of Chapter 1, stating that:

> [a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention. . . .[117]

However, Section 202 includes one more provision that brings some disputes that arise out of a relationship entirely between citizens of the United States back within the scope of Chapters 2 or 3.[118] This occurs when:

> . . . that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.[119]

The end result is that the international chapters of the FAA apply to:

- agreements or awards arising between a U.S. and foreign party;

113. *See* 9 U.S.C. § 201.

114. 9 U.S.C. § 202.

115. *See* 9 U.S.C. §§ 201-02, 302. Chapter 3 of the FAA was enacted in 1990 to give domestic application to the Panama Convention. *See* 9 U.S.C. § 301.

116. *See* 9 U.S.C. §§ 2, 202.

117. 9 U.S.C. § 202.

118. *See* 9 U.S.C. § 202.

119. 9 U.S.C. § 202.

- agreements or awards arising entirely between foreign parties; and
- agreements or awards arising entirely between U.S. citizens, but only if there is some sort of international nexus (i.e., "property located abroad, . . . performance or enforcement abroad, or . . . some other reasonable relation with one or more foreign states").[120]

Any agreement or award that falls under Chapter 2 or 3 is subject not only to the statutory requirements set forth in that chapter, but also to the requirements of the relevant convention.[121]

Although the United States and Colombia approach the definition of an international arbitration in very different manners, the results are in many ways similar. For example, both countries consider an arbitration to be international when the dispute involves parties from the home state and a foreign state, although some question may arise in Colombia if the dispute involves multiple parties, two of whom are from the same country.[122] Similarly, foreign performance will be enough to bring a dispute within the scope of both Law No. 315/96 and Section 202, although Colombia requires a "substantial part of the obligations" to be performed outside the place where the parties are domiciled and the United States does not indicate what proportion of the performance must be foreign.[123] Foreign-seated arbitrations are also considered international under both statutes, although questions have been raised in the United States as to whether a foreign seat is enough to bring an arbitration between two U.S. citizens within the scope of the New York or Panama Conventions.[124]

---

120. 9 U.S.C. § 202.

121. *See* 9 U.S.C. §§ 201, 301.

122. *See* 9 U.S.C. § 202; Law No. 315/96, *supra* note 35, art. 1(1). This would be similar to the kinds of problems associated with diversity jurisdiction in U.S. federal courts, although there is no indication that Colombia would analyze the issue in a similar manner. *See* 28 U.S.C. § 1332(a) (2006).

123. *See* 9 U.S.C. § 202; Law No. 315/96, *supra* note 35, art. 1(2).

124. *See* 9 U.S.C. § 202; Law No. 315/96, *supra* note 35, art. 1(3). Although these are clearly "foreign" arbitrations under the New York Convention, based on geographic considerations, U.S. courts have occasionally held that Chapter 2 of the FAA does not apply to these types of disputes. *See* Wilson v. Lignotock U.S.A. Inc., 709 F. Supp. 797, 799 (E.D. Mich. 1989). However, this question has seldom been addressed and therefore remains relatively open. Thus, it may be that seating an arbitration outside the United States creates a reasonable relationship with a foreign state sufficient to bring the arbitration within the scope of Section 202 of the FAA, "at least where this was not an effort to circumvent local regulatory protections." BORN (ICA), *supra* note 15, at 293-94 (citing analogies to Section 1-105 of the Uniform Commercial Code). The issue does not appear to have been raised in the U.S. with respect to the Panama Convention. *See* Panama Convention, *supra* note 20.

However, some substantive differences may exist. For example, Law No. 315/96 indicates that an arbitration is international under Colombian law if "[t]he matter that is the object of the arbitration agreement clearly involves the interests of more than one State and the parties thus expressly agreed" or "[t]he dispute referred to arbitration directly and unequivocally affects the interests of international commerce."[125] While these types of disputes may be the same as those that fall under the FAA's "reasonable relation" provision, the language of Law No. 315/96 appears to focus on state interests rather than the parties' private connections with the foreign state.[126] This may limit or expand the Colombian definition of "international arbitration," depending on the circumstances.

Law No. 315/96 reflects a second difference from the FAA. As a rule, U.S. jurisprudence does not use the term "international" arbitration, instead referring to "Convention" proceedings, where "Convention" can refer to either the New York or Panama Convention.[127] U.S. cases also refer to "foreign" arbitrations or awards, on the one hand, and "non-domestic" arbitrations or awards, on the other.[128] This distinction arises because the New York Convention can apply not only to awards arising out of arbitrations seated at a place other than that of enforcement (i.e., foreign awards) but also to awards "not considered as domestic awards in the State where their recognition and enforcement are sought."[129] As a matter of national law, the United States has decided to grant Convention treatment to some awards that arise out of arbitrations seated in the United States.[130] The phrasing of Section 202 of the FAA suggests that the concept of non-domesticity will be applied not only to awards and arbitrations arising under the New York Convention, but also to those arising under the Panama Convention, even though the Panama Convention does not include language regarding non-domestic awards in the same way that the New York Convention does.[131]

---

125. *See* Law No. 315/96, *supra* note 35, art. 1(4)-(5).

126. *See* 9 U.S.C. § 202; Law No. 315/96, *supra* note 35, art. 1(4)-(5).

127. *See* 9 U.S.C. §§ 201-307.

128. *See* S.I. Strong, *What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48 STAN. J. INT'L L. (forthcoming 2012) [hereinafter Strong, *Writing*].

129. New York Convention, *supra* note 19, art. I(1).

130. *See* 9 U.S.C. §§ 202, 302 (2006).

131. New York Convention, *supra* note 19, art. I(1); *see also* Panama Convention, *supra* note 20; 9 U.S.C. §§ 202, 302; Bowman, *supra* note 52, at 134-40.

Notably, states do not have to extend New York Convention treatment to awards rendered within their territory.[132] Instead, numerous countries, including Colombia, only apply the New York Convention to awards and agreements associated with foreign-seated arbitrations.[133] While it is unclear whether and to what extent these issues will affect arbitrations proceeding under the Panama Convention, commentators have suggested that courts should construe the two conventions similarly, despite the Panama Convention's focus on "international" arbitrations rather than "foreign" or "non-domestic" arbitrations.[134]

2. Relationship to Other Provisions of Law

The next item to consider is the relationship of Law No. 315/96 to other statutory enactments. Article 2 indicates that Law No. 315/96, along with any relevant treaties, conventions and other international agreements, is the sole provision governing international arbitration under Colombian law.[135] In this, Colombia has taken an approach similar to that of the United States, in that international conventions are not simply given direct domestic application but are instead embedded within national statutes that illuminate and expand upon the treaty itself.[136] However, despite the apparent exclusivity of Article 2, Decree 1818/98 is allowed to fill certain gaps in the Colombian arbitral regime even though Law No. 315/96 does not include any language similar to that found in Chapters 2 and 3 of the FAA specifically providing for residual application of domestic law.[137]

Article 2 also states that Law No. 315/96 "prevail[s] over the provisions laid down in respect of the specific matters in the Code of Civil Procedure."[138] This language is particularly useful because it underscores the difference between international and domestic arbitration, since the latter can be heavily influenced by judicial procedures and rules.[139] The

132. *See* New York Convention, *supra* note 19, art. 1; BORN (ICA), *supra* note 15, at 2365-67, 2377-81.

133. *See* INT'L CHAMBER OF COMMERCE, *supra* note 40, para. 4.

134. *See* BORN (ICA), *supra* note 15, at 2384-85.

135. *See* Law No. 315/96, *supra* note 35, art. 2.

136. *See id.*; 9 U.S.C. §§ 201, 301. Although most states take this approach, some simply give the New York Convention direct application domestically. *See* BORN (ICA), *supra* note 15, at 99-100.

137. *See* 9 U.S.C. §§ 208, 307; Law No. 315/96, *supra* note 35; Decree 1818/98, *supra* note 36; Mantilla-Serrano, *supra* note 5, at 123; Zuleta, 2010, *supra* note 13, at 3, 38.

138. Law No. 315/96, *supra* note 35, art. 2.

139. *See* Mantilla-Serrano, *supra* note 5, at 114, 132.

FAA has no similar language, although case law has established the same principle in the United States.[140]

3. Party Autonomy

Article 2 is not limited to discussing the relationship between Law No. 315/96 and other provisions of national and international law.[141] This article also contains important language regarding the extent of party autonomy in international arbitration and was indeed the first instance of broad legislative acceptance of party autonomy in Colombian arbitration law.[142]

The language regarding autonomy in Article 2 addresses both procedural and substantive issues.[143] For example, parties are explicitly permitted to determine the applicable substantive law that will govern the merits of the dispute.[144] This is a departure from domestic arbitration, which requires the use of Colombian substantive law in certain circumstances.[145]

Furthermore, parties to an international dispute are permitted to determine the procedures that will apply to the arbitration.[146] The agreement regarding the governing procedure may be outlined explicitly in the arbitration agreement itself or may be determined implicitly, as through the adoption of institutional rules.[147] Article 2 even goes so far as to include a list of elements that may be subject to the agreement of the parties, including notification procedures, constitution of the tribunal (including appointment mechanisms and the nationality of the tribunal members), language of the arbitration and the seat of the arbitration.[148] Law No. 315/96 specifically states that the arbitration may be seated in Colombia or elsewhere.[149]

---

140. *See* BORN (ICA), *supra* note 15, at 1334-36 (noting rules of civil procedure are not applicable in arbitration absent very clear party agreement).

141. *See* Law No. 315/96, *supra* note 35, art. 2.

142. *See id.*; Mantilla-Serrano, *supra* note 5, at 132.

143. *See* Law No. 315/96, *supra* note 35, art. 2.

144. *See id.* Nevertheless, one commentator has suggested putting the choice of substantive law provision in the arbitration agreement itself, rather than in a separate clause, for the avoidance of confusion. *See* Mantilla-Serrano, *supra* note 5, at 132.

145. *See infra* note 191.

146. *See* Law No. 315/96, *supra* note 35, art. 2.

147. *See id.* International arbitrations may not only proceed under the institutional rules of non-Colombian organizations, but may also be administered by them. *See* Zuleta, *Colombia*, *supra* note 28, para. 15.

148. *See* Law No. 315/96, *supra* note 35, art. 2.

149. *See id.*

The scope of party autonomy in Colombia appears on its face to be as broad as that permitted under U.S. law.[150] However, U.S. parties need to be careful about reading Law No. 315/96 in isolation.[151] For example, even though Article 1 states that an arbitration is considered international if the "parties have their domicile in different States at the time of the conclusion of the arbitration agreement" and Article 2 provides a broad grant of autonomy for parties to an international arbitration, some questions may arise as a result of Article 13 of Law No. 270/96, as modified by Article 6 of Law No. 1285/09, which states that arbitrations between private parties and Colombian state entities must adhere to what is known as "legal" arbitration under Colombian law.[152] While this could be interpreted as suggesting that foreign parties who enter into arbitration agreements with state entities will not be allowed to choose the procedures that govern the arbitration to the same extent as they do in purely private transactions,[153] the better reading of the various statutes appears to be that this limitation on the type of arbitration that may be used in a dispute involving a state party does not apply to contracts involving foreign parties.[154]

Issues relating to the extent of party autonomy in contracts between foreign parties and state entities demonstrate the difficulty of statutory interpretation in Colombia arbitration law. Not only is it important to have access to all of the relevant laws in their most up-to-date forms, it is necessary to consider the interplay between interpretive principles such as

150. *See* UHC Mgmt Co. v. Computer Sci. Corp., 148 F.3d 992, 995-96 (8th Cir. 1998) (quoting Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)); BORN (ICA), *supra* note 15, at 1752-53 (noting the FAA is silent on this issue, but that broad autonomy has been firmly established by case law).

151. *See* Law No. 315/96, *supra* note 35.

152. *See* Law No. 1285/09, *supra* note 86, art. 6 (stating, in part, that "[w]ith respect to arbitrations where the Government or one of its entities is not a party, private persons may agree to the procedural rules to be applied, either directly or by making reference to those of an Arbitration Centre respecting, in any event, Constitutional due process principles"); Law No. 270/96, *supra* note 86, art. 13; Law No. 315/96, *supra* note 35, arts. 1-2; U.S. EMBASSY, *supra* note 9, at 5; *infra* notes 217-18 and accompanying text (describing "legal" arbitration). Law No. 1285/09 was preceded by a decision of the Colombian Constitutional Court stating that the requirement of legal arbitration was justified in domestic disputes on the grounds that the public interests at stake required that the legislature, rather than the parties, be the one to regulate arbitration involving the state or state parties. *See* Law No. 1285/09, *supra* note 86; Decision C-713/2008, *supra* note 98; *see also* U.S. EMBASSY, *supra* note 9, at 5.

153. *See* U.S. EMBASSY, *supra* note 9, at 5.

154. *See* Mantilla-Serrano, *supra* note 5, at 132 (citing Article 4 of Law No. 315/96); Zuleta, 2010, *supra* note 13, at 11; *see also* Law No. 315/96, *supra* note 35, arts. 4-5; Law No. 80/93, *supra* note 87, art. 70 (amended by Law No. 1150/07); *see infra* notes 181-207 and accompanying text.

lex specialis and *lex posterior,* particularly as those concepts are used in civil law statutory analysis.[155]

4. Confirmation of Awards

One of the major innovations of the New York Convention, also reflected in the Panama Convention, is the abolition of double *exequatur,* which required parties to confirm an award at the place where it was rendered before taking it to another location for enforcement.[156] However, *exequatur* proceedings are not prohibited by either of the two Conventions when such procedures are a required part of a state's domestic enforcement mechanism.[157]

Exequatur constitutes a judicial recognition that an arbitral award is proper, and some states, including Colombia, require parties to obtain *exequatur* before an award may be enforced in a second, separate proceeding.[158] The process is quite time-consuming, often taking from one to three years.[159] Once the *exequatur* proceedings have been successfully completed, the prevailing party can ask the court to enforce the award through an execution proceeding (*proceso ejecutivo*).[160]

Parties to international arbitrations are not exempt from requirements regarding *exequatur*. Two separate analyses are necessary, one regarding

---

155. *See* Diane A. Desierto, *Necessity and "Supplementary Means of Interpretation" for Non-precluded Measures in Bilateral Investment Treaties*, 31 U. PA. J. INT'L L. 827, 894 n.210 (2010); David C. Donald, *Approaching Comparative Company Law*, 14 FORDHAM J. CORP. & FIN. L. 83, 90 (2008); John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 PENN ST. L. REV. 119, 142-43, 162 (2009).

156. *See* BORN (ICA), *supra* note 15, at 2338 (noting neither the New York nor the Panama Convention requires double *exequatur*).

157. Most parties comply with arbitral awards voluntarily. *See* NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION para. 11.02 (2009); U.S. EMBASSY, *supra* note 9, at 12. Nevertheless, there may be times when parties either wish or need to undertake *exequatur* proceedings. *See* BORN (ICA), *supra* note 15, at 2329, 2338, 2343.

158. *See* INT'L CHAMBER OF COMMERCE, *supra* note 40, paras. 7, 11 (noting two-step process); Zuleta, 2010, *supra* note 13, at 47. "Enforcement" is the process in which a court brings its coercive powers to bear on a party who has not complied with the terms of the award.

159. *See* Posada-Villaveces, *supra* note 28, at 12. Other experts indicate that the enforcement of a foreign judgment takes from three to four years. *See* Zuleta, *Colombia*, *supra* note 28, para. 45. Actions to recognize and enforce foreign arbitral awards may only be brought in the Civil Chamber of the Supreme Court of Justice. *See* U.S. EMBASSY, *supra* note 9, at 7; INT'L CHAMBER OF COMMERCE, *supra* note 40, para. 7. Actions to annul an award are brought in lower courts known as *tribunales superiores de distrito judicial*. *See* U.S. EMBASSY, *supra* note 9, at 7; INT'L CHAMBER OF COMMERCE, *supra* note 40, para. 7.

160. *See* Mantilla-Serrano, *supra* note 5, at 133 (noting such actions should be brought in the competent court); Zuleta, 2010, *supra* note 13, at 43 (noting limited grounds for objection based on Article 509(2) of the Code of Civil Procedure).

awards rendered outside Colombia and one regarding awards rendered inside the country.

Awards that arise out of arbitrations seated outside Colombia are considered "foreign" under Article 3 of Law No. 315/96 and may therefore be enforced pursuant to the terms of the New York or Panama Convention.[161] At one time such awards were also required to comply with Colombian *exequatur* proceedings, as outlined in Articles 694 and 695 of the Colombian Code of Civil Procedure.[162]

However, difficulties with this approach arose as a result of the New York Convention, which permits states to use their own methods of recognition and enforcement of foreign awards only so long as "[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies."[163] At first, the Colombian Supreme Court of Justice addressed this issue by indicating that *exequatur* procedures could be combined with enforcement proceedings under the New York or Panama Convention, thus allowing all issues to be determined at a single time, in a single forum.[164] However, a July 2011 decision of the Supreme Court of Justice clearly indicates that Colombia courts now only need to apply the criteria found in the New York or Panama Convention.[165]

---

161. *See* New York Convention, *supra* note 19, arts. I, III; Panama Convention, *supra* note 20, art. 4; Law No. 315/96, *supra* note 35, art. 3.

162. *See* Law No. 315/96, *supra* note 35, art. 3; Code of Civil Procedure, *supra* note 82, arts. 693-95 (concerning *exequatur* proceedings); Zuleta, *Colombia*, *supra* note 28, paras. 44, 46 (describing procedure for obtaining *exequatur* in detail); *see also* BRIGARD & URRUTIA ABOGADOS, *supra* note 28, at 19. Colombia has also instituted an unusual rule that shifts the normal burden of proof under the Panama Convention, effectively requiring prevailing parties to demonstrate that the award is final. *See* Zuleta, 2010, *supra* note 13, at 47 (citing Merck & Co. Inc. v. Technoquímicas S.A., XXVI Y.B. COM. ARB. 260 (2001)).

163. New York Convention, *supra* note 19, art. III; *see also* Encyclopaedia Universalis SA v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 90, 92 (2d Cir. 2005) (noting parties cannot rely on rationales based on Section 10 of the FAA or developed through the common law in an action to enforce a foreign arbitral award); Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RATKA), 508 F.2d 969, 974 (2d Cir. 1974) (noting objections to enforcement are to be construed narrowly). The Panama Convention is silent on this issue. *See* Panama Convention, *supra* note 20.

164. *See* Sunward Overseas S.A. v. Servicios Maritimos Ltd., 20 Nov. 1992, XX Y.B. COMM. ARB. 651, 653 (1992) (noting Article III of the New York Convention allowed domestic procedures to be used in actions to enforce a foreign arbitral award); INT'L CHAMBER OF COMMERCE, *supra* note 40, para. 20; Mantilla-Serrano, *supra* note 5, at 133; Zuleta, *Colombia*, *supra* note 28, para. 47. *Sunward Overseas* is summarized in Zuleta, 2010, *supra* note 13, at 50.

165. *See* Corte Suprema de Justicia [C.S.J][Supreme Court], Sala de Casacion Civil, Julio 27, 2011, No. 11001-0203-000-2007-01956-00, at 3, 17, *available in Spanish at* http://190.24.134.121/webcsj/Documentos/Novedades/Archivo/Civil/1100102030002007-01956-00%20[27-07-211].pdf (considering an arbitral award rendered in New York and noting that Article III of the New York

The next question to consider is whether awards rendered in Colombia are subject to *exequatur* proceedings, even if the arbitration is considered "international" under Law No. 315/96.[166] Interestingly, there has been some debate on this point, with some commentators claiming that such awards should not be subject to *exequatur* proceedings.[167] However, most authorities appear to suggest that awards rendered in international arbitrations seated in Colombia are indeed subject to *exequatur* proceedings.[168] This approach is potentially problematic, in that an award rendered in an international arbitration could be subject not only to challenges made during the *exequatur* proceedings but also to separate actions to set aside or revise the award.[169] Additional guidance from the Supreme Court of Justice on this issue would be welcome and may perhaps be forthcoming given the Court's recent activity in this area.[170]

U.S. treatment of awards rendered in the United States is somewhat different than that of Colombia because the United States recognizes the concept of "non-domestic" awards.[171] Thus, awards that are made in the United States but that are nevertheless subject to the New York or Panama Convention can be confirmed under Section 207 of the FAA.[172] According to Section 207, a U.S. court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."[173] Recourse may not be had to Section 10 of the FAA, which addresses vacatur of an award rendered in the United States, or to any of the potential common law bases for vacating an award, such as manifest disregard of law.[174] Parties to an award that falls

---

Convention prohibits use of domestic enforcement procedures that are more onerous than those found in the Convention and refusing to apply Article 694 of the Code of Civil Procedure).

166. *See* New York Convention, *supra* note 19, art. III; Law No. 315/96, *supra* note 35, art. 1.

167. *See* Mantilla-Serrano, *supra* note 5, at 132-33 (claiming in 2002 that "[a] minority of the Colombian legal community considers that awards rendered in Colombia in an international arbitration, although being 'Colombian' awards, should be subject to *exequatur*").

168. *See* INT'L CHAMBER OF COMMERCE, *supra* note 40, para. 4; Posada-Villaveces, *supra* note 28, at 12; Zuleta, 2010, *supra* note 13, at 13.

169. *See* Mantilla-Serrano, *supra* note 5, at 133.

170. *See supra* note 165 and accompanying text.

171. *See* New York Convention, *supra* note 19, art. I(1); *see supra* notes 128-31 and accompanying text. This provision is made applicable to awards arising under the Panama Convention by virtue of Section 302 of the FAA. *See id.* § 302.

172. *See* 9 U.S.C. § 207 (2006).

173. *Id.*

174. *See* 9 U.S.C. §§ 10, 302, 307; Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 389 (2d Cir. 2003) (describing test for manifest disregard); *see also supra* note 96 and accompanying text (regarding vacatur and Section 10). The continuing availability of manifest disregard as a grounds for vacatur in the United States is less than clear, despite several recent U.S.

under the international chapters of the FAA have three years in which to bring a motion to confirm the award, which is considerably longer than the one-year period for confirming a domestic award.[175]

Questions sometimes arise about the enforceability of partial awards.[176] Colombian courts have expressed doubts about their ability to enforce partial awards.[177] However, the issue remains open, since the one court to address the issue did so only in dicta.[178] U.S. courts will enforce provisional or interim measures ordered by an arbitral tribunal to the extent that the measure in question constitutes a final disposition of the matter requested.[179]

5. Arbitrability and State Contracts

The arbitrability of state contracts is a somewhat complicated issue in Colombia. The primary statutory provision on this subject is Article 4 of Law No. 315/96, which amends Article 70 of Law No. 80/1993 concerning state contracts.[180]

The fact that Article 4 is meant to amend Law No. 80/1993 is instructive, since it means that the entire paragraph is to be read in the context of state contracts.[181] Article 4 states that all contracts with foreign parties (meaning state contracts with foreign parties) may be referred to international arbitration.[182] Furthermore, Article 4 indicates that several

---

Supreme Court pronouncements on the subject. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1768 n.3 (2010); Hall Street Assoc., LLC v. Mattel, Inc., 552 U.S. 576, 585 (2008).

175. *See* 9 U.S.C. §§ 9, 207, 302.

176. *See* LEW ET AL., *supra* note 15, paras. 9-2 to 9-4.

177. *See* Empresa Colombiana de Vías Férreas (Ferrovías) v. Drummond Ltd., No. 25.261, (Consejo de Estado, Apr. 27, 2004), *available at* http://www.kluwerarbitration.com [hereinafter Empresa Colombiana, Apr. 27, 2004]; *see also* Empresa Colombiana de Vías Férreas (Ferrovías) v. Drummond Ltd., No. 25.261, (Consejo de Estado, Apr. 22, 2004), *available at* http://www.kluwerarbitration.com [hereinafter Empresa Colombiana, Apr. 22, 2004]; Empresa Colombiana de Vías Férreas (Ferrovías) v. Drummond Ltd., No. 25.25, (Consejo de Estado, Oct. 24, 2003), *available at* http://www.kluwerarbitration.com [hereinafter Empresa Colombiana, Oct. 24, 2003]; Uran-Bidegain, *supra* note 28. Empresa Colombiana, Oct. 24, 2003, is also summarized at Zuleta, 2010, *supra* note 13, at 56-57.

178. *See* Empresa Colombiana, Apr. 27, 2004, *supra* note 177.

179. *See* Arrowhead Global Solutions, Inc. v. Datapath, Inc., 166 Fed. Appx. 39, 47 (4th Cir. 2006); Publicis Comm. v. True North Comm., Inc., 206 F.3d 725, 729 (7th Cir. 2000) (focusing on "a document's . . . substance and impact to determine whether the decision is final" for purposes of enforcement).

180. *See* Law No. 315/96, *supra* note 35, art. 4; Law No. 80/93, *supra* note 87, art. 70.

181. *See* Law No. 315/96, *supra* note 35, art. 4; Law No. 80/93, *supra* note 87, art. 70.

182. *See* Law No. 315/96, *supra* note 35, art. 4; Mantilla-Serrano, *supra* note 5, at 132. Although it would be possible to argue that state contracts with foreign parties would also fall under Article 1(1), which states that "[a]n arbitration is international when . . . [t]he parties have their domicile in different States at the time of the conclusion of the arbitration agreement," the specificity of Article 4 and the

other types of domestic state contracts—those "providing for long-term financing and payment thereof through the exploitation of the object that has been built or the operation of goods for carrying out a public service"—may also be made subject to the more liberal procedures associated with international arbitration.[183]

Article 4 is a significant concession on the part of Colombia, since the arbitrability of state contracts has been and remains a highly political subject in both the judicial and legislative spheres.[184] However, U.S. parties should be cautious about taking the breadth of Article 4 at face value because of certain unspoken assumptions about arbitrability.[185]

Arbitrability is a concept that that can confuse U.S. parties due to the way the term is defined in the United States. In most countries, arbitrability is a public law concern going to whether a country will permit a particular subject matter to be resolved through arbitration.[186] In the United States, however, the term refers primarily to "[t]he question whether the parties have submitted a particular dispute to arbitration."[187] As such, arbitrability in the United States is often viewed as a private matter that goes to the scope of the parties' agreement. Although it is important for parties to consider issues relating to the scope of their arbitration agreement, it is perhaps even more important that they understand national restrictions on arbitrability (in the international sense) so as to avoid having the arbitration agreement and any future awards ruled unenforceable.[188]

---

reference to Law No. 80/93 trumps this reading. *See* Law No. 315/96, *supra* note 35, art. 4; Law No. 80/93, *supra* note 87, art. 70

183. *See* Law No. 315/96, *supra* note 35, art. 4.

184. *See* U.S. EMBASSY, *supra* note 9, at 10, 15; Uran-Bidegain, *supra* note 28 (citing *Departamento del Valle del Cauca* and *Ferrovías* as supportive of the arbitrability of state contracts, but suggesting Decision C-961/2006 restricted the arbitrability of some contracts). Often the issue arises as a constitutional matter, with claims having been made that arbitrating certain matters deemed to be non-arbitrable violates the fundamental right to due process reflected in Article 28 of the Colombian Constitution. *See* Eduardo Zuleta Jaramillo, *22 March 2006 – Colombian Constitutional Court*, KLUWERARBITRATION, (Mar. 22, 2006), http://www.kluwerarbitration.com (describing the overturning of Decision T-481/2005 of May 2005 between Departamento del Valle, a public entity, and Concesiones de Infraestructuras S.A.) [hereinafter Decision 22 March 2006]; *see infra* note 369 (quoting Article 28). However, this argument was ultimately unsuccessful, at least in cases where "the issue of whether the awarded decided on matters not subject to arbitration is a reasonable debate." Decision 22 March 2006, *supra* (involving a unilateral liquidation of an agreement, something that had been considered a prerogative of the state and thus non-arbitrable until that point); *see also* Uran-Bidegain, *supra* note 28. Although Decision 22 March 2006 was decided in the domestic context, the analytical approach will surely apply in international disputes as well.

185. *See* Law No. 315/96, *supra* note 35, art. 4.

186. *See* LEW ET AL., *supra* note 15, paras. 9-2 to 9-4 (discussing objective arbitrability).

187. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (citations omitted).

188. *See* LEW ET AL., *supra* note 15, paras. 9-2 to 9-4.

Therefore, Article 4 should not be read as allowing all disputes with foreigners to be arbitrable, or even all disputes involving foreigners and state parties. Instead, U.S. parties must look elsewhere to determine whether the subject matter of the dispute is amenable to arbitration. Several known exceptions already exist, such as disputes with foreign parties arising under the Investment Stability Law (Law No. 963/05).[189] Similar limitations arise with respect to state contracts involving long-term financing.[190] Thus, Article 4 should be read as simply allowing state contracts with foreigners to be subject to a certain type of procedure (i.e., international arbitration) rather than the usual type of arbitral procedure used in state contracts (i.e., "legal" arbitration), subject to certain specific limitations.[191]

This raises the question of what the scope of arbitrability is in Colombia, both with regard to public and private contracts, since "[t]he restrictions on arbitrability under Colombian law are ratione materiae and not ratione personae."[192] Some guidance may be found in the Colombian Civil Code, which states that parties may only submit "freely disposable rights" to arbitration.[193] Some matters, "such as criminal, tax, family rights, and certain state contract decisions (*actos administrativos*)," are therefore considered non-arbitrable.[194] Although these provisions are typically considered to refer to domestic disputes, some of these issues would appear

189. For example, the Constitutional Court has stated that because disputes arising under the Investment Stability Law (Law No. 963/05) are a type of administrative contract that are intended to guarantee consistent application of Colombia law to investors, the only type of arbitration possible is domestic arbitration governed by Colombian law. *See* Uran-Bidegain, *supra* note 28 (discussing Decision C-961/2006, decided on Nov. 22, 2006); *see also* DG&A ABOGADOS, COLOMBIA: THE PLACE TO INVEST 17-18 (2009); A.F.M. Maniruzzaman, *National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective*, 8 J. WORLD INVEST. & TRADE 1, 6 (2007).

190. *See* Zuleta, 2010, *supra* note 13, at 11 (noting contracts with the Colombian Hydrocarbons Agency that involve exploration and exploitation of hydrocarbons may not be submitted to international arbitration).

191. *See* Law No. 315/96, *supra* note 35, art. 4; Law No. 80/93, *supra* note 87, art. 70; *see also* Zuleta, 2010, *supra* note 13, at 11; *see infra* notes 215-19 and accompanying text (regarding arbitration at law and "legal" arbitration).

192. Zuleta, 2010, *supra* note 13, at 11 (noting "[t]he State, State entities, and State-controlled entities, as well as private individuals, may enter into arbitration agreements, both for local and international arbitration").

193. *See* CÓDIGO CIVIL [C.C.], arts. 15, 2470, *available in Spanish at* http://www.secretariasenado.gov.co/senado/basedoc/codigo/codigo_civil.html#1 (select article number in drop-down box marked "Articulo") [hereinafter Civil Code]; Mantilla-Serrano, *supra* note 5, at 116; Zuleta, 2010, *supra* note 13, at 12.

194. Arango & Parra, *supra* note 13, at 56; Zuleta, *Colombia*, *supra* note 28, para. 9; *see also* Civil Code, *supra* note 193, arts. 2469-87 (discussing various restrictions on arbitrability).

to be equally non-arbitrable in the international sphere.[195] For example, it is unlikely that Colombian courts would allow criminal matters to be arbitrated, simply because a foreign party was involved.

The Colombian Constitutional Court has also held that "arbitrators cannot decide on matters involving public policy, sovereignty, the constitutional system, or the legality of administrative acts," although arbitrators "may rule on the economic effects" of certain administrative decisions.[196] Antitrust and consumer disputes are also not amenable to arbitration as matter of statutory law.[197] Again, at least some of these subjects would appear non-arbitrable in international as well as domestic cases.

Therefore, U.S. parties should be cautious about attempting to arbitrate disputes that deviate too far from core commercial concerns.[198] Furthermore, U.S. parties should be aware that their views about what constitutes a "commercial" dispute may be slightly skewed, since U.S. courts have defined the concept much more broadly than courts in other states have.[199] Thus, for example, U.S. courts have held that the concept of commerciality refers not only to the prototypical commercial relationship exemplified by the purchase and sale of goods between two corporations, but also to disputes involving employers and employees, consumers, shareholders, foreign state actors, antitrust issues, foreign regulatory authorities, insurers and reinsurers and maritime matters.[200] Furthermore, the U.S. Supreme Court has held that policies in favor of arbitration should be given heightened respect in the international realm, which suggests that arbitrability will be defined even more broadly in international disputes than in domestic ones.[201]

---

195. Most countries exclude these subjects from the scope of arbitrable matters. *See* LEW ET AL., *supra* note 15, paras. 9-23 to 9-24.

196. Zuleta, *Colombia*, *supra* note 28, para. 9 (citing Constitutional Court Decisions C-1436/2000 and SU-174/2007); *see also* U.S. EMBASSY, *supra* note 9, at 8-9 (citing Constitution Court Decisions C-1436/2000 and SU-174/2007 and Council of State Decisions of Feb. 23, 2000, June 8, 2000 and June 10, 2009); Zuleta, 2010, *supra* note 13, at 12.

197. *See* Zuleta, *Colombia*, *supra* note 28, para. 9 (citing Article 6 of Law No. 1340/09 and Article 42 of Decree 3466/82).

198. U.S. parties should also be aware that some Colombian parties, particularly state entities, may not wish to enter into arbitration agreements as a matter of practice, even if they are permitted to do so by law. *See* Law No. 315/96, *supra* note 35, art. 4 (using discretionary language "it can be agreed"); U.S. EMBASSY, *supra* note 9, at 8.

199. *See* BORN (ICA), *supra* note 15, at 262; STRONG, GUIDE, *supra* note 38.

200. *See* BORN (ICA), *supra* note 15, at 262.

201. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (stating "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the

Although the United States appears to reflect a somewhat broader acceptance of the notion of arbitrability than Colombia does[202] as well as a more generous definition of the concept of a commercial dispute, the Colombian approach to arbitration of state contracts is significantly more liberal than that in the United States. Indeed, a number of statutory provisions limit or prohibit the United States from engaging in binding arbitration agreements with private parties.[203] Furthermore, a number of "U.S. courts have held that the United States generally cannot enter into enforceable arbitration agreements with private parties."[204] Although U.S. courts and government agencies may be relaxing their positions on this matter to some degree,[205] Colombia clearly allows a wider range of state contracts to be arbitrated than the United States does.[206]

6. Supremacy

Finally, Article 5 of Law No. 315/96 repeals any laws that are contrary to its terms.[207] However, this does not mean that domestic laws will never apply to an international arbitration. Instead, it is implicitly recognized that Law No. 315/96 can be supplemented by provisions regarding domestic arbitration, to the extent that a gap exists in the international regime.[208] Those provisions are discussed in the next section.

---

resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context"); *see also* Francisco v. Stolt Achievement MT, 293 F.3d 270, 274-75 (5th Cir. 2002); LEW ET AL., *supra* note 15, para. 9-36.

202. The United States has been said to reflect perhaps the broadest approach to arbitrability in the world. Notably, some of Colombia's limitations are procedural only, in that certain types of arbitrations must be subject to Colombian law and procedure rather than being made subject to the more liberal provisions relating to international arbitration. *See supra* note 192. Nevertheless, the underlying disputes still may be arbitrated.

203. *See* United States v. Bankers Ins. Co., 245 F.3d 315, 319-20 (4th Cir. 2001) (citing 42 U.S.C. § 4083(b)). Since these provisions do not appear in the FAA, they may be as difficult for non-U.S. parties to find as restrictions on Colombian state arbitration are for U.S. parties to find.

204. BORN (ICA), *supra* note 15, at 630 (citing BV Bureau Wijsmuller v. United States, 1976 A.M.C. 2514 (S.D.N.Y. 1976)); Stevens Tech. Serv., Inc. v. United States, 913 F.2d 1521, 1534 (11th Cir. 1990).

205. *See Bankers Ins. Co.*, 245 F.3d at 319-20. The U.S. Department of Justice, Office of the Senior Counsel for Alternative Dispute Resolution, has also issued a policy statement regarding the use of alternative dispute resolution measures, including arbitration, although that policy statement does not create any rights in itself. *See* Policy on the Use of Alternative Dispute Resolution, and Case Identification Criteria for Alternative Dispute Resolution, 61 Fed. Reg. 36895-02 (July 15, 1996).

206. *See* Law No. 315/96, *supra* note 35, art. 4; Law No. 80/93, *supra* note 87, arts. 70-71. State contracts are also subject to conciliation efforts. *See id.* arts. 68-69.

207. *See* Law No. 315/96, *supra* note 35, art. 5.

208. *See id.*; Mantilla-Serrano, *supra* note 5, at 123.

C. Domestic Arbitration Under Colombian Law—Decree 1818/98

Domestic arbitration in Colombia is primarily governed by Decree 1818/98,[209] supplemented by various other statutory provisions.[210] Although Law No. 315/96 ostensibly preempts Decree 1818/98 in matters relating to international arbitration, Decree 1818/98 remains relevant to disputes involving U.S. parties by filling any gaps left by Law No. 315/96 and by applying to some kinds of arbitration, such as those involving certain kinds of state contracts, that may not be decided pursuant to Colombia's international arbitral regime.[211] Therefore, this Article will discuss certain aspects of Decree 1818/98, focusing on those issues that are of particular interest to U.S. parties contemplating arbitration in Colombia or with Colombian entities.[212]

Before beginning a detailed analysis of specific statutory provisions, it is helpful to identify the three types of domestic arbitration that are available in Colombia under Decree 1818/98.[213] These include "arbitration in law" (meaning that the arbitrators must decide according to strict application of the governing legal principles), "arbitration in equity" (what in international circles is known as deciding *ex aequo et bono* or as an *amiable compositeur*), and "technical arbitration" (which might be analogized to expert determination).[214] Different procedures and standards of arbitrator conduct apply to each type of arbitration.[215]

Decree 1818/98 also describes three types of arbitral procedures that may be used to resolve domestic disputes: ad hoc arbitration, wherein the parties establish their own unique procedures; institutional arbitration, wherein the parties agree to the application of rules promulgated by a national or international arbitral organization; and "legal" arbitration, wherein the rules of arbitral procedure are identical to those used in litigation.[216] "Legal" arbitration is the default provision in domestic

---

209. *See* Decree 1818/98, *supra* note 36.

210. *See supra* notes 82-92 and accompanying text.

211. *See* Decree 1818/98, *supra* note 36; Law No. 315/96, *supra* note 35, arts. 4-5; Mantilla-Serrano, *supra* note 5, at 123.

212. *See* Decree 1818/98, *supra* note 36. More comprehensive analysis of Colombia's domestic arbitration scheme is available elsewhere. *See* Zuleta, 2010, *supra* note 13, at 1-80.

213. *See* Decree 1818/98, *supra* note 36, art. 115 (also found in Article 1 of Decree 2279/89); Leichtling & Paredes, *supra* note 31, at 43; Mantilla-Serrano, *supra* note 5, at 116.

214. *See* Decree 1818/98, *supra* note 36, art. 115; Decree 2279/89, *supra* note 82, art. 1; Mantilla-Serrano, *supra* note 5, at 116; *see also* LEW ET AL., *supra* note 15, para. 1-34 (describing expert determination), paras. 18-86 to 18-96 (differentiating acting as an *amiable compositeur* from deciding *ex aequo et bono*).

215. *See* Mantilla-Serrano, *supra* note 5, at 114, 116-17.

216. *See id.* at 116-17; Zuleta, 2010, *supra* note 13, at 22-23.

disputes, which means that parties who do not specify the procedure to be used in their arbitration or who leave gaps in their chosen procedures will have a quasi-judicial proceeding.[217]

U.S. parties are not subject to the domestic default rule regarding "legal" arbitration.[218] Instead, whenever U.S. and Colombian parties fail to agree regarding the applicable procedure, the IACAC Arbitration Rules will automatically apply pursuant to Article 3 of the Panama Convention, which is given domestic application in Colombia by virtue of Law. No. 44/86 and Article 2 of Law No. 315/96.[219]

The IACAC Arbitration Rules are very similar to the types of international arbitration rules promulgated by private institutions, containing standard provisions regarding written submissions, including the notice of arbitration, the statement of claim, the statement of defense and further submissions; the appointment and challenge of arbitrators; jurisdictional issues; arbitral procedure, including the taking and presentation of evidence, interim measures of protection, default and settlement; rendering of the award, including any corrections thereof or additional elements; and fees.[220] Since 2002, the International Centre for Dispute Resolution (the ICDR, also known as the international arm of the American Arbitration Association) has been responsible for administering IACAC arbitrations.[221] The Centro de Arbitraje y Conciliación de la

217. *See* Mantilla-Serrano, *supra* note 5, at 114, 117, 123.

218. *See* Decree 1818/98, *supra* note 36; Law No. 270/96, *supra* note 86, art. 13; Law No. 315/96, *supra* note 35, art. 4.

219. *See* Panama Convention, *supra* note 20, art. 3; Law No. 315/96, *supra* note 35, art. 2 (making international arbitration subject to all conventions ratified by Colombia); L. 44/86, septiembre 19, 1986, D.O. (Colom.), *available in Spanish at* Juriscol, http://juriscol.banrep.gov.co (search for 44 under "Leyes) (giving domestic application to the Panama Convention) [hereinafter Law No. 44/86]; IACAC Arbitration Rules, *supra* note 65; *see also* Anderra Energy Corp. v. SAPET Dev. Corp., XXII Y.B. COM. ARB. 1077, 1085 (N.D. Tex. 1997) (ordering arbitration pursuant to the IACAC Arbitration Rules in absence of party agreement to the contrary); Zuleta, *Colombia*, *supra* note 28, para. 3. This outcome could arguably apply even in cases involving state contracts, since the Panama Convention applies equally to state and private parties. *See* Panama Convention, *supra* note 20. However, the discretionary language in Article 4 of Law No. 315/96 could be construed as requiring the parties to a state contract to indicate specifically that a dispute is to be resolved by recourse to international arbitration, even though parties normally do not need to indicate that their arbitration is international to have the international provisions apply. *See* Law No. 315/96, *supra* note 35, arts. 1, 4 (stating "it can be agreed" that state contracts be subject to international arbitration); *supra* note 105 and accompanying text. Obviously the better practice is to state explicitly in the arbitration agreement what procedures are to control.

220. *See* IACAC Arbitration Rules, *supra* note 65; *see also* Zuleta, *Colombia*, *supra* note 28, para. 21 (regarding challenges to arbitrator).

221. *See* Hamilton, *supra* note 30, at 1119; Luis M. Martinez, *Are We There Yet?*, *in* ARBITRATION REVIEW OF THE AMERICAS (2009).

Cámara de Comercio de Bogotá acts as the Colombian national chapter of IACAC.[222]

Although the IACAC Arbitration Rules cover a broad range of issues, they also give the arbitral tribunal a great deal of discretion to decide procedural matters, an approach that is consistent with that found in other arbitral rules of procedure.[223] This exercise of discretion is usually exercised in consultation with the parties, as a matter of practice.[224] Because domestic arbitration in Colombia tends to be relatively formal, U.S. parties should therefore be prepared for Colombian parties and arbitrators to suggest more, rather than less, formal procedures, in accordance with domestic norms.[225] Furthermore, Colombian parties will likely request one or more oral hearings, again based on expectations derived from domestic practice, which typically involve multiple hearings, including a preliminary hearing, a number of procedural (*de trámite*) hearings and the final "award" hearing (*de fallo*), where the award is rendered and read aloud.[226]

One other preliminary point merits mention. There is increased interest in the international legal community in adopting multi-tiered (step) dispute resolution clauses in cross-border contracts.[227] U.S. parties should be aware that Colombian courts have held multi-tiered arbitration agreements to be unconstitutional in the international context, since "any requirements—such as a prior direct resolution mechanism or a prior conciliation procedure established by the parties as a step prior to arbitration—limited the access of the parties to the administration of justice."[228] This may appear somewhat anomalous, since parties to a "legal"

---

222. The Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá also acts as an independent arbitral institution outside the context of the IACAC. Other Colombian arbitral institutions include the Centro de Conciliación y Arbitraje de la Cámara de Comercio de Barranquilla; the Centro de Conciliación, Arbitraje y Amigable Composición de la Cámara de Comercio de Medellín; the Cámara de Comercio de Bucaramanga; Cámara de Comercio de Cali; and the Cámara de Comercio de Cartagena.

223. *See* IACAC Arbitration Rules, *supra* note 65, art. 12(1); LEW ET AL., *supra* note 15, paras. 21-12 to 21-13.

224. *See* LEW ET AL., *supra* note 15, paras. 8-35, 21-13, 21-36.

225. *See* Mantilla-Serrano, *supra* note 5, at 114.

226. *See id.* at 124 (noting that parties may or may not participate in *de trámite* hearings, other than at the first such hearing or at any hearing involving evidentiary matters).

227. *See* BORN (ICA), *supra* note 15, at 241.

228. Eduardo Zuleta Jaramillo, *Empresa Nacional de Telecomunicaciones - Telecom - En Liquidación v. IBM de Colombia S.A. (International Court of Arbitration of the International Chamber of Commerce, Nov. 17, 2004)*, KLUWERARBITRATION (Nov. 17, 2004), http://www.kluwer arbitration.com (citing Article 229 of the Colombia Constitution). The extraneous provision was not fatal to the arbitration, however, since the tribunal simply struck the requirement for conciliation prior to arbitration and assumed jurisdiction over the dispute in arbitration. *See id.*

arbitration in a domestic dispute are required to attempt conciliation of the dispute prior to entering into the arbitration.[229] Nevertheless, U.S. parties should avoid the use of multi-tiered dispute resolution clauses in arbitration agreements with Colombian nationals.

Having set forth the basic context for domestic arbitration in Colombia, it is time to consider specific provisions. The discussion will begin with the arbitration agreement itself.

1. Arbitration Agreement

Because Law No. 315/96 does not indicate what constitutes an arbitration agreement in an international dispute, parties must look to domestic law for guidance.[230] Decree 1818/98 specifically states that arbitration agreements may be evidenced both by an arbitration clause embedded in a larger contract drafted prior to the existence of a legal dispute (*cláusula compromisoria*) as well as by a stand-alone agreement made after a specific dispute has already arisen (*compromiso*).[231] The two types of agreements are construed in a similar fashion.[232] Furthermore, arbitration clauses that are found within a larger contract (*cláusulas compromisorias*) are considered legally separable from the underlying substantive contract, such that the validity or existence of the latter does not affect the validity or existence of the agreement to arbitration.[233]

These concepts should sound familiar to U.S. parties, since the United States takes a similar view of arbitration agreements, both with respect to the validity of agreements to arbitrate made either before or after the dispute has arisen, and with respect to the concept of separability.[234] Furthermore, this approach is consistent with the provisions of the Panama Convention, which states that agreements to arbitrate are enforceable regardless of whether they are made before or after the dispute arises.[235]

---

229. *See* Mantilla-Serrano, *supra* note 5, at 119 (citing Decree 2651/91 and Law No. 446/98).

230. *See* Decree 1818/98, *supra* note 36; Law No. 315/96, *supra* note 35.

231. *See* Decree 1818/98, *supra* note 36, art. 117; *see also* Decree 2279/89, *supra* note 82, art. 2; Law No. 446/98, *supra* note 86, arts. 115-17; Mantilla-Serrano, *supra* note 5, at 114; Zuleta, 2010, *supra* note 13, at 9. Decree 1818/98 uses the single phrase, "*pacto arbitral*," to refer to both kinds of agreements. *See* Decree 1818/98, *supra* note 36, art. 117; *see also* Decree 2279/89, *supra* note 82, art. 2; Mantilla-Serrano, *supra* note 5, at 114.

232. *See* Mantilla-Serrano, *supra* note 5, at 115.

233. *See* Decree 1818/98, *supra* note 36, art. 118; *see also* Decree 2279/89, *supra* note 82, art. 2A; Law No. 446/98, *supra* note 86, art. 116; Mantilla-Serrano, *supra* note 5, at 115-16; Zuleta, 2010, *supra* note 13, at 13 (stating principle of separability exists in domestic and international arbitration).

234. *See* Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440, 445-46 (2006); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400, 402-04 (1967).

235. *See* Panama Convention, *supra* note 20, art. 1.

However, Colombia is somewhat different than the U.S. with respect to requirements regarding the form of the arbitration agreement. Whereas the FAA simply requires a "written provision" indicating an agreement to arbitrate, Decree 1818/98 describes the arbitration agreement through use of a term (*documento*) that is defined very broadly in the Code of Civil Procedure and includes "writings, printed papers, plans, drawings, tables, photographs, cinematographic films, disks, tape recordings, radiographs, vouchers, stamps, coupons, labels, seals and, generally any movable object which has a representative or declaratory nature, including inscriptions on tombstones, monuments, edifices and the like."[236]

Although Law No. 315/96 does not use the term "*documento,*" it does use the same term—"*pacto arbitral*"—that Decree 1818/98 uses to refer to both arbitration agreements and arbitral clauses.[237] Therefore, it is likely that Colombian courts will adopt Decree 1818/98's broad description of a document that can reflect an "arbitration agreement" in international disputes.[238]

In some ways, Colombia's incorporation of the broad definition of a "*documento*" could create problems, since the Panama Convention refers to arbitration agreements in significantly narrower terms.[239] However, international standards on this issue are currently in a state of flux, with numerous states reflecting an increasingly liberal approach towards requirements regarding the form of the arbitration agreement.[240]

---

236. 9 U.S.C. § 2 (2006); Code of Civil Procedure, *supra* note 82, art. 251, *as translated in part in* Mantilla-Serrano, *supra* note 5, at 117; *see also* Decree 1818/98, *supra* note 36, arts. 118-19; Decree 2279/89, *supra* note 82, arts. 2A, 3. The precise definition of an "agreement in writing" in international commercial arbitration is currently under debate in the United States, with some circuits defining the term solely by reference to the FAA, some circuits defining the term by reference to the New York Convention, and some circuits attempting to blend the two standards. *See* New York Convention, *supra* note 19, art. II(2); 9 U.S.C. §§ 2, 202; Strong, *Writing*, *supra* note 128. Additional splits exist regarding the question of whether a signature is required. *See* Strong, *Writing*, *supra* note 128. Although U.S. courts tend to take a relatively liberal view of what constitutes a "letter or telegram" under the New York Convention's writing requirement, it is unclear whether they would go as far as Colombian courts. *See* Ahcom, Inc. v. Smeding, No. C-07-1139 SC, 2008 WL 1701731, at *2 (N.D. Cal. Apr. 10, 2008); Chloe Z. Fishing Co. Inc. v. Odyssey Re (London) Ltd., 109 F.Supp.2d 1236, 1250 (S.D. Cal. 2000); Sen Mar, Inc. v. Tiger Petroleum Group, 774 F.Supp. 879, 882-83 (S.D.N.Y. 1991).

237. *See* Law No. 315/96, *supra* note 35, art. 1; Zuleta, *Colombia*, *supra* note 28, para. 6.

238. *See* Code of Civil Procedure, *supra* note 82, art. 251; Decree 1818/98, *supra* note 36, arts. 117-19.

239. *See* Panama Convention, *supra* note 20, art. 1 (stating that "[t]he agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications"); *see also* Bowman, *supra* note 52, at 47-48.

240. *See* Note by the Secretariat, United Nations Commission on International Trade Law (UNCITRAL), Working Group II (Arbitration), U.N. Doc. A/CN.9/WG.II/WP.139 (Dec. 14, 2005) paras. 11-23; Strong, *Writing*, *supra* note 128, at 34-37 (discussing New York Convention). Detailed discussion of issues involving form requirements is beyond the scope of this Article, although further

Furthermore, the United States is one of the jurisdictions that tends to be more flexible with respect to form requirements, which should minimize the potential for difficulties in disputes involving U.S. and Colombian parties.[241]

For a while, it was unclear whether and to what extent Colombian courts would allow an arbitration agreement to be established in cases where the arbitration provision was included in a separate document and merely incorporated by reference.[242] However, in 2010 the Council of State held that an arbitration provision contained in a conditions list was sufficient to support arbitration.[243] U.S. courts typically allow arbitration agreements to arise in these circumstances, so long as the documents that are actually exchanged are sufficiently clear as to put the receiving party on notice that arbitration has been proposed.[244]

2. Arbitral Tribunals and Arbitral Procedure

Most of Decree 1818/98's provisions regarding arbitral tribunals and procedures are unlikely to influence international proceedings, both because Law No. 315/96 gives parties to international disputes the ability to choose their own procedures[245] and because the IACAC Arbitration Rules will apply by default if the parties fail to reach agreement on any particular point.[246] As a result, Decree 1818/98 has very few gaps to fill in this regard as a matter of law.

However, arbitration is as much about discretionary practices as it is about legal requirements, since tribunals typically strive to tailor the procedures to suit the needs of the parties and the dispute at hand.[247] As such, it is important to know the customary practices of everyone involved in the arbitral process, including parties, counsel and arbitrators, since those

---

reading is available. *See* Report of the Secretary General, United Nations Commission on International Trade Law (UNCITRAL), Working Group II (Arbitration), U.N. Doc. A/CN.9/WG.II/WP.108/Add.1 (Jan. 26, 2000) para. 8; *see generally* Strong, *Writing*, *supra* note 128.

241. *See generally* Strong, *Writing*, *supra* note 128.

242. *See* Mantilla-Serrano, *supra* note 5, at 117 (writing in 2002).

243. *See* Eduardo Zuleta Jaramillo, *Consorcio L&A v. Instituto de Desarrollo Urbano [IDU]*, KLUWERARBITRATION (July 19, 2010), http://www.kluwerarbitration.com.

244. *See* Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 449-50 (3d Cir. 2003); Bothell v. Hitachi Zosen Corp., 97 F. Supp. 2d 1048, 1053 (W.D. Wash. 2000); Polychronakis v. Celebrity Cruises, Inc., No. 08-21806-CV, 2008 WL 5191104, at *4 (S.D. Fla. Dec. 10, 2008).

245. *See* Law No. 315/96, *supra* note 35, art. 2.

246. *See* Panama Convention, *supra* note 20, art. 3.

247. *See* LEW ET AL., *supra* note 15, paras. 21-12 to 21-13.

norms may find their way into an international arbitration, consciously or unconsciously.[248]

There are a number of things that U.S. parties may find helpful to know before entering into an arbitration in Colombia or with a Colombian party. First among these is that arbitrators in Colombia often have the powers comparable to those of judges, and in fact are considered the legal equivalent of a judge in many regards.[249] This has both benefits and drawbacks. On the one hand, Decree 1818/98 gives robust effect to the concept of *competence-competence* (*Kompetenz-Kompetenz*), consistent with the approach taken in many jurisdictions.[250] However, Colombian law takes the concept a step further, not only allowing arbitrators to consider their own jurisdiction but requiring them to do so as a preliminary matter in every domestic proceeding, regardless of whether the parties themselves have raised the issue.[251]

Most state laws and arbitral rules also embrace the concept of *competence-competence*, so there are no problems with this approach as a matter of international law and practice.[252] This is true even in situations where the parties have not expressly addressed jurisdictional issues, since the IACAC Arbitration Rules state that "[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question," a position that is entirely consistent with Colombian practice.[253] However, the arbitral tribunal in an IACAC proceeding is not required to determine jurisdictional issues as a preliminary issue and may instead "proceed with the arbitration and rule on such a plea in its final award."[254]

This could cause a problem in an arbitration involving a Colombian national. Not only do Colombian parties expect to receive an early determination on jurisdiction, but they can force tribunals to provide such

248. *See* S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT'L ARB., 119, 121, 145-47 (2009).

249. *See* Mantilla-Serrano, *supra* note 5, at 121.

250. *See id.*; *see also* LEW ET AL., *supra* note 15, paras. 14-13 to 14-18 (describing concept of *competence-competence*). One commentator has noted that "there is no reported international arbitration case where the principle [of *competence-competence*] has not been followed by the courts." *See* Zuleta, *Colombia*, *supra* note 28, para. 27.

251. *See* Decree 1818/98, *supra* note 36, art. 147(2); *see also* Law 446/98, *supra* note 86, art. 124; Mantilla-Serrano, *supra* note 5, at 121.

252. *See* LEW ET AL., *supra* note 15, paras. 14-13 to 14-18; IACAC Arbitration Rules, *supra* note 65, art. 18(1).

253. IACAC Arbitration Rules, *supra* note 65, art. 18(4).

254. *Id.*; *see also* Zuleta, 2010, *supra* note 13, at 36 (noting in international arbitration, a jurisdictional objection may be raised at any time).

answers through use of a procedure known as an *acción de tutela*.[255] *Tutela* actions will be discussed in more detail below, but it should be mentioned here that an *acción de tutela* has been brought in the pre-arbitration stage on at least one occasion.[256] In that case, the moving party was able to argue successfully that the party's fundamental right to due process was violated by being forced to proceed through arbitration while a jurisdictional objection was pending.[257] In so deciding, the Constitutional Court stated that:

> [t]he legal and procedural importance of the pre-arbitral phase is undeniable: although it does not settle the dispute, it shows that a public function is being carried out according to a legal procedure which is binding both on the institution and on the parties. Although the dispute is not decided in this phase, due process and right of defense may be compromised if the legal principles governing this phase are violated.[258]

Therefore, U.S. parties should be aware that Colombian tribunals will and likely should address jurisdictional issues as a preliminary matter, so as to avoid any interim judicial disputes. In many ways, this is an interesting outcome given that preliminary awards on jurisdiction rendered by a tribunal in an international arbitration are not enforceable in Colombia, since they do not settle the merits of the dispute.[259]

The decision on enforceability of preliminary awards was rendered by the Supreme Court of Justice, which set down the following rule of

---

255. An *acción de tutela* can be brought as an interim measure to provide irreversible harm to a fundamental right. *See* Colombia Constitution, *supra* note 39, art. 86; *see also infra* notes 347-87 and accompanying text.

256. *See 18 August 1999 - Corte Constitucional*, 26 Y.B. COM. ARB. 260, 260-62, paras. 19-26 at 266-67 (Albert van den Berg ed.), *available at* www.kluwerarbitration.com (summarizing and excerpting Merck & Co. Inc. v. Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá, Corte Constitucional [C.C.] [Constitutional Court], agosto 18, 1999, Sentencia T-186814) [hereinafter Corte Constitucional, Aug. 18, 1999]; Eduardo Zuleta Jaramillo, *Special Constitutional Action to Preserve International Arbitration*, 18 J. INT'L ARB. 475, 476-77 (2001); *see generally* Zuleta, 2010, *supra* note 13, at 63-64.

257. *See* Colombia Constitution, *supra* note 39, art. 29 (stating, in part, that "[d]ue process will be applied in all cases of legal and administrative measures"); Corte Constitucional, Aug. 18, 1999, *supra* note 256, paras. 19-26 at 267.

258. Corte Constitucional, Aug. 18, 1999, *supra* note 256, para. 10 at 265.

259. This proposition was settled in a second opinion arising out of the same dispute that generated the pre-arbitration *tutela* action. *See 26 January 1999 and 1 March 1999 - Corte Suprema de Justicia [Supreme Court]*, 26 Y.B. COM. ARB. 755, paras. 10, 12-13, at 759-760 (Albert van den Berg ed.) (excerpting Merck & Co. Inc. v. Tecnoquímicas S.A., Corte Suprema de Justicia [C.S.J.] [Supreme Court], enero 26 y marzo 1, 1999).

construction for cases involving jurisdictional as well as other preliminary awards:

> as the Convention does not define what it means by "arbitral awards", this term should be given the meaning which best agrees with the spirit of the Convention and, subsidiarily, of Colombian law. . . . according to this latter, "arbitral awards" are the arbitral decisions which materially end arbitration by settling the submitted disputes.[260]

Furthermore:

> [e]ven if it is formally defined an "arbitral award", because it calls itself so or because it is so called by arbitration rules, still, according to Art. I(1) of the Convention, such a decision is not a foreign arbitral award enforceable in Colombia, since, independent of how it is called in the country of origin, it is simply a preliminary and preparatory interim decision, that is, it does not settle the dispute on the merits submitted to arbitration, which is the subject matter of a further decision.[261]

Interestingly, when U.S. courts consider whether an award should be considered final, they also look past the nomenclature of the decision and focus on the substance of the award.[262] However, the ultimate issue for U.S. courts is slightly different than that enunciated by Colombian courts. In the United States, courts focus not only on whether the award itself is final (as Colombian courts do) but also on additional criteria such as whether immediate enforcement is necessary to protect the final award and whether the parties have expressed an interest in immediate resolution of this particular issue.[263]

Preliminary determinations as to jurisdiction have their drawbacks in Colombia, at least in the domestic realm. For example, a declaration by a tribunal that it lacks jurisdiction can result in the total loss of any fees otherwise payable to the arbitrator.[264] This obviously gives the arbitral tribunal significant incentive to find that jurisdiction exists. Although it is unclear whether and to what extent this practice extends to arbitrators acting in international disputes, proceedings following the IACAC Arbitration Rules may benefit from provisions regarding the use of

260. *Id.* para. 10 at 759-60.

261. *Id.* para. 13 at 760.

262. *See* Publicis Commc'ns v. True N. Commc'ns, Inc., 206 F.3d 725, 729 (7th Cir. 2000).

263. *See* Hall Steel Co. v. Metalloyd Ltd., 492 F. Supp. 2d 715, 717-20 (E.D. Mich. 2007).

264. *See* Mantilla-Serrano, *supra* note 5, at 122; *see also* Decree 1818/98, *supra* note 36, arts. 145, 147; Zuleta, 2010, *supra* note 13, at 18-19.

deposits, since the arbitrators' fees will have been paid in advance, at least in part.[265] However, arbitrators in international disputes would be well advised to consider this matter at the time of appointment and perhaps address the matter specifically in a retention agreement between the arbitrators and the parties.

A negative decision on jurisdiction has other unusual ramifications in Colombia. For example, a determination that jurisdiction does not exist means that the arbitration agreement ceases to have effect.[266] The automatic termination of the arbitration agreement does not depend on the reason why jurisdiction was found not to exist, meaning that there is no requirement that the decision denying jurisdiction be based on some inherent attribute of the arbitration agreement rather than a curable procedural error, such as lack of notice.[267]

This approach is highly problematic, since it violates the parties' express desire to arbitrate their disputes[268] and can create an opportunity for wrongdoers to initiate an improper arbitration with the sole purpose of invalidating the arbitration agreement. The situation is further exacerbated by the fact that parties facing a negative determination on jurisdiction have few tactical options under Colombian law, given that Colombian courts have no power to address such matters and are only given the ability to annul an arbitral award.[269] Decisions denying jurisdiction may only be submitted for reconsideration by the tribunal.[270] However, given that Colombian law recognizes both pre- and post-dispute arbitration agreements, parties who truly wish to have the matter heard privately can simply enter into another arbitration agreement.[271]

Once the arbitration is underway, Decree 1818/98 gives arbitrators broad powers to control the proceedings, including the ability to order interim relief, even without the assistance of the court.[272] This approach is

---

265. *See* IACAC's Internal Administrative Procedures for Cases Administered Under Its Rules, Procedures 6.3, 6.4.2, IACAC Arbitration Rules, *supra* note 65.

266. *See* Decree 1818/98, *supra* note 36, art. 147 (stating "[i]f the tribunal holds that it lacks jurisdiction, the arbitration agreement shall cease to have effect in a final manner"); Law No. 446/98, *supra* note 86, art. 124; Mantilla-Serrano, *supra* note 5, at 122; Zuleta, 2010, *supra* note 13, at 13-14 (claiming the "'effects of the arbitration clause shall be extinguished' with respect to the matter submitted to arbitration").

267. *See* Mantilla-Serrano, *supra* note 5, at 122.

268. *See id.*

269. *See id.*

270. *See* Decree 1818/98, *supra* note 36, art. 147(2); Mantilla-Serrano, *supra* note 5, at 122.

271. *See supra* note 230 and accompanying text. Of course, it is often difficult to reach agreement on procedural issues after a dispute has arisen. *See* LEW ET AL., *supra* note 15, para. 6-5.

272. *See* Decree 1818/98, *supra* note 36, art. 152; *see also* Decree 2279/89, *supra* note 82, art. 31(2); Mantilla-Serrano, *supra* note 5, at 122; Zuleta, *Colombia*, *supra* note 28, para. 30 (noting lack of

consistent with the provisions of both the IACAC Arbitration Rules and the procedural rules of many international arbitral institutions.[273] In domestic arbitrations, the tribunal decides all issues relating to the production and presentation of evidence, and can even allow cross-examination of witnesses.[274] The tribunal's powers are supplemented by that of the Colombian courts, which have the ability to order the production of documents at the request of a party or ex officio, based on Article 179 of the Colombian Code of Civil Procedure.[275]

This latter provision is somewhat unusual, in that few countries allow parties to arbitration to make document production requests directly to a judge.[276] However, the United States is one of the few other jurisdictions in the world where a judge can grant party-initiated requests for the production of documents in arbitration, although U.S. courts only do so in exceptional circumstances.[277] Therefore, U.S. parties should not find the Colombian approach inherently problematic. Similarly, U.S. parties will not find the use of cross-examination in arbitration troubling, although they should be prepared for Colombian counsel to have more advanced skills in this regard than lawyers from most other civil law jurisdictions.[278]

U.S. parties should also be prepared for Colombian parties and arbitrators to adopt a high degree of formality with respect to the admission of evidence, based on provisions in Decree 1818/98 that analogize the admission of evidence in arbitration to procedures used in Colombian courts.[279] Hearsay evidence is explicitly allowed under Decree 1818/98, although the statute outlines in detail how such evidence is to be introduced

---

similar provision in international arbitrations). Somewhat unusually, the arbitral tribunal may even call on the police to assist with enforcement of arbitral orders. *See* Mantilla-Serrano, *supra* note 5, at 122; Zuleta, 2010, *supra* note 13, at 25.

273. *See* IACAC Arbitration Rules, *supra* note 65, art. 23; Zuleta, 2010, *supra* note 13, at 29.

274. Mantilla-Serrano, *supra* note 5, at 122; Zuleta, 2010, *supra* note 13, at 24-25; Zuleta, *Colombia*, *supra* note 28, paras. 26, 32 (noting international arbitrators will typically respect the parties' agreement on production of documents).

275. *See* Code of Civil Procedure, *supra* note 82, art. 179; *see also* Zuleta, *Colombia*, *supra* note 28, para. 31 (regarding production of evidence from a third party).

276. *See* BORN (ICA), *supra* note 15, at 1930.

277. *See id.*

278. States following the civil law tradition typically do not permit cross-examination in judicial actions, and it is unusual for such procedures to be available in domestic arbitration in a civil law jurisdiction. However, cross-examination is often used in international commercial arbitration, which blends practices used in both the common and civil law. *See* LEW ET AL., *supra* note 15, paras. 8-35 to 8-36, 21-35.

279. *See* Decree 1818/98, *supra* note 36, arts. 155-57; Mantilla-Serrano, *supra* note 5, at 124. Nevertheless, Colombian law does not require international arbitrations to follow judicial rules of evidence applicable in Colombian courts. *See* Zuleta, 2010, *supra* note 13, at 25.

and handled.[280] Notably, use of hearsay is not improper under the IACAC Arbitration Rules, since the arbitral tribunal has a great deal of discretion in how evidence is to be presented,[281] nor is hearsay prohibited in U.S. arbitral practice.[282]

Domestic arbitration law in Colombia gives arbitrators the ability to fill gaps and modify the parties' agreement as a matter of both substance and procedure.[283] For example, Decree 1818/98 allows arbitrators to set the place of arbitration if the parties have not done so, a practice that is consistent with the IACAC Arbitration Rules and U.S. law.[284] Colombian law also states that domestic tribunals may modify the substance of the contract in cases of hardship, even if the parties have not given the tribunal the power to act as *amiable compositeurs.*[285] Because this provision is found in the Commercial Code rather than Decree 1818/98, it may arguably apply to an international arbitration if the merits of the dispute are governed by Colombian law.[286] Nevertheless, arguments can be made that it should not be given effect in international disputes, particularly those governed by procedures such as the IACAC Arbitration Rules that state that arbitrators may only act as *amiable compositeurs* if the parties have agreed to grant the tribunal such powers.[287]

Although Colombian arbitrators have broad powers, they are also expected to fulfill their arbitral duties with the utmost diligence, consistent with their quasi-judicial status.[288] Thus, arbitrators in both national and international arbitrations may be subject to the same standards of impartiality and independence as a judge.[289] Furthermore, Decree 1818/98

---

280. *See* Decree 1818/98, *supra* note 36, art. 156. Interestingly, the Colombian approach is similar to methods proposed for use in international arbitration. *See* S.I. Strong & James J. Dries, *Witness Statements Under the IBA Rules of Evidence: What to Do About Hearsay?* 21 ARB. INT'L 301, 308-15 (2005).

281. *See* IACAC Arbitration Rules, *supra* note 65, arts. 12, 21-22.

282. *See* D.E.I., Inc. v. Ohio, 155 F. App'x. 164, 170 (6th Cir. 2005).

283. *See* Zuleta, 2010, *supra* note 13, at 12 (noting this power normally must be expressly authorized).

284. Decree 1818/98, *supra* note 36, art. 132; *see also* Decree 2279/89, *supra* note 82, art. 11 (allowing the same). *See* IACAC Arbitration Rules, *supra* note 65, art. 13; Mantilla-Serrano, *supra* note 5, at 123; *see also* Capitol Converting Co. v. Curioni, No. 87 C 10439, 1989 WL 152832 (N.D. Ill. Nov. 9, 1989).

285. *See* Commercial Code, *supra* note 82, art. 868; Mantilla-Serrano, *supra* note 5, at 123.

286. *See* Commercial Code, *supra* note 82, art. 868; Decree 1818/98, *supra* note 36.

287. *See* IACAC Arbitration Rules, *supra* note 65, art. 30(b) (noting also that the law applicable to the arbitration agreement must permit the tribunal to act as an *amiable compositeur,* a situation that would exist in Colombia); LEW ET AL., *supra* note 15, paras. 18-86 to 18-96.

288. *See* Mantilla-Serrano, *supra* note 5, at 121.

289. *See* Zuleta, *Colombia*, *supra* note 28, para. 20.

allows courts to sanction arbitrators for any default (such as might occur for lack of diligence in moving the proceeding along), with penalties including the reduction or complete withdrawal of any fees payable to the arbitrator.[290] Arbitrators can also find their fees reduced in cases where an award is annulled for reasons associated with arbitrator error.[291] Although it has been suggested that rules regarding fee reduction will not apply in international arbitrations, since arbitrators in those situations are "not . . . considered to exercise the jurisdictional power of the State and therefore it would not be possible to treat them as if they were judges," this is nevertheless a matter that parties and arbitrators should keep in mind, since the question does not yet appear to have been addressed by a court.[292]

Arbitrators in international disputes do not need to be Colombian nationals.[293] However, there may be some disparity between the law on the books and what actually happens in practice, to the extent that one of the nation's leading arbitral institutions—the Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá, which also happens to be the national office for the IACAC—names arbitrators from a list made up entirely of Colombian nationals.[294] However, this may relate to requirements that arbitrators be qualified to practice in Colombia if they are deciding a dispute as a matter of Colombian law.[295] There is no requirement under the IACAC Arbitration Rules that arbitrators be of a particular nationality.[296] To the contrary, the IACAC Arbitration Rules state that the appointing entity may "take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."[297]

3. Post-arbitration Proceedings

Once the arbitration has concluded, parties have very limited recourse to the Colombian courts under Decree 1818/98 and can only seek annulment of the award (vacatur), revision of the award or correction of an

290. Decree 1818/98, *supra* note 36, art. 165; *see also* Decree 2279/89, *supra* note 82, arts. 18, 34, 40(4), 44(2) (allowing the same); Mantilla-Serrano, *supra* note 5, at 121; Zuleta, 2010, *supra* note 13, at 18-19 (outlining types of misbehavior).

291. *See* Decree 1818/98, *supra* note 36, art. 165; Mantilla-Serrano, *supra* note 5, at 121.

292. Zuleta, 2010, *supra* note 13, at 20-21.

293. *See* Panama Convention, *supra* note 20, art. 2 (incorporated into domestic law via Law No. 44/86); Decree 1818/98, *supra* note 36, art. 197 (reflecting Article 2 of Law No. 315/96); Law No. 315/96, *supra* note 35, art. 2. Provisions requiring arbitrators in domestic disputes to be Colombian citizens have also been repealed. *See* Mantilla-Serrano, *supra* note 5, at 120; Zuleta, *Colombia*, *supra* note 28, para. 17.

294. *See* INST. FOR TRANSNAT'L ARB, *supra* note 18, at 23.

295. *See* Zuleta, 2010, *supra* note 13, at 14.

296. *See* IACAC Arbitration Rules, *supra* note 65, art. 5.

297. *Id.* art. 5(7).

award.[298] These types of post-arbitration procedures are equally applicable to domestic disputes and international disputes seated in Colombia.[299] Parties may also bring an *acción de tutela*, which is a special action seeking the protection of a fundamental right.[300] Although *tutela* actions are meant to be extraordinary constitutional remedies, they have been brought with increasing frequency in arbitration, although "there is no reported international arbitration case where it was successfully used in such [a] way."[301] *Tutelas* are discussed separately in Section II.C.4 below.[302]

Traditionally, parties in Colombia could not waive their right to annulment, correction or revision proceedings.[303] However, a Superior Tribunal decision from 2010 put the common understanding regarding waiver of annulment proceedings into doubt.[304] Parties to an international dispute may waive or amend their right to correction under Decree 1818/98 if the procedural rules applicable to the arbitration address correction.[305]

---

298. *See* Decree 1818/98, *supra* note 36, arts. 160-61; Mantilla-Serrano, *supra* note 5, at 128-30; Zuleta, *Colombia*, *supra* note 28, para. 37 (including translations of the provisions regarding the grounds for annulment and revision of the award).

299. *See* Gomm-Santos, *supra* note 28, at 15 (discussing annulment proceedings in *SAP Andina y del Caribe C.A. Colombia v. Colombia* and noting the Superior Tribunal relied on Article 161 of Decree 1818/98); Zuleta, *Colombia*, *supra* note 28, para. 37 (citing *Empresa Colombiana de Vías Férreas (Ferrovías) v. Drummond Ltd*., No. 25.25, Consejo de Estado, Oct. 24, 2003); Zuleta, 2010, *supra* note 13, at 56-57. *But see* Zuleta, 2010, *supra* note 13, at 39 (suggesting parties to international arbitration may contract around Decree 1818/98's provisions regarding the correction of awards). Although Decree 1818/98 "theoretically unified the legislation pertaining to the annulment of arbitration decisions for private parties and private vs. State entities[, i]n reality this unification took place with Law 1150 of 2007, which amended the regime of State contracts in Colombia." U.S. EMBASSY, *supra* note 9, at 6.

300. *See generally* Zuleta, *Colombia*, *supra* note 28, para. 37 (citing article 86 of the Colombian Constitution and Decree 2591/91); *see also* Colombia Constitution, *supra* note 39, art. 86 (setting forth constitutional basis for an *acción de tutela*); *infra* notes 347-87 and accompanying text.

301. Zuleta, *Colombia*, *supra* note 28, para. 38; *see also* Arango & Parra, *supra* note 13, at 57 (noting "[o]ne of the current issues affecting arbitration is the challenge of arbitration awards by means of constitutional fundamental rights actions ("*Tutela*")).

302. *See generally infra* notes 347-87 and accompanying text.

303. *See* Mantilla-Serrano, *supra* note 5, at 128 (stating in 2002 that waiver is not allowed); Zuleta, 2010, *supra* note 13, at 58-60 (suggesting waiver is not typically possible).

304. *See* Gomm-Santos, *supra* note 28, at 14-15 (suggesting in 2010 that waiver may be possible under the Superior Tribunal's decision in *SAP Andina y del Caribe C.A. v. Unknown,* May 21, 2010); Eduardo Zuleta Jaramillo, *SAP Andina y del Caribe C.A. Colombia v. Unknown*, *Superior Tribunal of Bogotá*, KLUWERARBITRATION (May 21, 2010), http://www.kluwerarbitration.com (stating "the mere fact of raising an annulment recourse does not deprive [the award] of being a final decision, and although the parties enjoy autonomy to tailor the proceedings, they cannot act against due process in order to determine whether the proceeding agreed by the parties was fulfilled; thus, the [annulment] recourse is [in principle] available") [hereinafter SAP Andina]; *see also* Zuleta, 2010, *supra* note 13, at 56-59.

305. *See* Zuleta, 2010, *supra* note 13, at 39.

Requests for correction are similar to those seen in other countries, typically focusing on ministerial or administrative errors, such as those involving arithmetical miscalculations.[306] Requests for revision (*recurso extraordinario de revisión*) are somewhat unique to Colombia and arise in cases involving:

> (i) fraud in the proceedings (perjury, forgery of documentary evidence or collusion); (ii) due process violations (lack of notice of the proceedings and lack of proper representation if such irregularities were not subsequently cured); (iii) production of new evidence that would have modified the outcome of the decision, but was not produced by the moving party due to *force majeure* (*Caso Fortuito*) or the actions of the other party, and (iv) when the decision is null and void and not subject to appeal.[307]

Procedures for annulling an award in Colombia are also similar to those seen elsewhere. Courts may only undertake a limited review, with the substance of the arbitral award protected from judicial scrutiny.[308] The only grounds on which annulment may be grounded are, generally speaking, a "void or expired agreement, irregular composition of the tribunal, failure by the arbitrator to comply with his terms of reference, and breach of due process."[309] Colombian courts have also indicated that Decree 1818/98 constitutes the exclusive ground upon which an award may be set aside.[310] Thus, a claim that the tribunal lacked jurisdiction over the dispute is not grounds for annulling an award, and to grant such annulment would violate concepts of due process.[311]

Interestingly, Decree 1818/98 does not permit a court to annul an arbitral award based on a violation of public policy.[312] This provision was the subject of an *acción de tutela* in 2005, with certain parties to a domestic

---

306. *See* Decree 1818/98, *supra* note 36, art. 160; *see also* Decree 2279/89, *supra* note 82, art. 36; Mantilla-Serrano, *supra* note 5, at 129; *see also* Code of Civil Procedure, *supra* note 82, arts. 309-12.

307. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 40, para. 10; *see also* Code of Civil Procedure, *supra* note 82, arts. 379-80; Mantilla-Serrano, *supra* note 5, at 130 (summarizing grounds for recourse as involving "fraud, collusion, duress or corruption on the part of the arbitrators, witnesses, or forged documents that were decisive for the award, etc.").

308. *See* Decree 1818/98, *supra* note 36, arts. 161-65; *see also* Decree 2279/89, *supra* note 82, arts. 37-40; Mantilla-Serrano, *supra* note 5, at 128-29.

309. Mantilla-Serrano, *supra* note 5, at 129; *see also* Decree 1818/98, *supra* note 36, art. 163 (listing nine grounds that are also found in Articles 38 and 39 of Decree 2279/89).

310. *See* Eduardo Zuleta Jaramillo, *Bancolombia v. Bogotá Civil Tribunal, Supreme Court of Justice,* KLUWERARBITRATION (Mar. 1, 2008), http://www.kluwerarbitration.com.

311. *See id.*

312. *See* Mantilla-Serrano, *supra* note 5, at 129.

arbitration agreement claiming that their right to equal treatment was being violated because participants in international arbitration may rely on public policy as grounds for non-enforcement of an award under the New York or Panama Convention.[313] Ultimately the action failed, with the Constitutional Court affirming the constitutional validity of the current approach on the grounds that there are sufficient differences between international and domestic arbitration to justify the difference in legal treatment.[314]

Notably, this limitation on public policy arguments only relates to motions to annul under Decree 1818/98.[315] Parties may still object to the enforcement of a foreign arbitral award under the New York and Panama Conventions on the grounds that the award violates Colombian public policy.[316] However, Colombian courts appear to construe this exception very narrowly, based on a 2004 decision from the Supreme Court of Justice describing the grounds on which a public policy objection can be raised in the enforcement of a foreign judgment as well as a 1996 decision from the same court involving the enforcement of a foreign arbitral award.[317]

For example, in the 2004 case involving a foreign judgment, the Supreme Court of Justice held that "[t]he consideration of domestic public policy rules does not imply that every Colombian mandatory law must be applied," since that would "likely result in the annulment of every foreign judgment, contradicting the essence of the *exequatur* process, the purpose of which is recognition of a foreign judgment."[318] This is consistent with the 1996 decision involving a foreign arbitral award, which also recognized that an arbitral award that disregards a mandatory provision of law does not necessarily violate public policy.[319] This philosophy is also very much in

313. *See* Eduardo Zuleta Jaramillo, *Decision C-800/2005, Constitutional Court,* KLUWERARBITRATION (Aug. 2, 2005), http://www.kluwerarbitration.com [hereinafter Decision C-800/2005]; *see also* Zuleta, *Colombia*, *supra* note 28, para. 37. Decision C-800/2005 is also summarized in Zuleta, 2010, *supra* note 13, at 57-58.

314. *See* Decision C-800/2005, *supra* note 313.

315. *See* Decree 1818/98, *supra* note 36, art. 163.

316. *See* New York Convention, *supra* note 19, art. V(2)(b); Panama Convention, *supra* note 20, art. 5(2)(b).

317. *See* Eduardo Zuleta Jaramillo, *Supreme Court of Justice*, KLUWERARBITRATION (Aug. 6, 2004), http://www.kluwerarbitration.com [hereinafter Supreme Court of Justice, Aug. 6, 2004]; Zuleta, *Colombia*, *supra* note 28, para. 48 (citing unnamed case from the Supreme Court of Justice dated November 5, 1996).

318. Supreme Court of Justice, Aug. 6, 2004, *supra* note 317.

319. *See* Zuleta, *Colombia*, *supra* note 28, para. 48 (citing unnamed case from the Supreme Court of Justice dated November 5, 1996).

accord with the pro-enforcement bias reflected in the New York and Panama Conventions and in U.S. law.[320]

Furthermore, the Supreme Court of Justice decision from 2004 recognized that allowing a Colombian court to consider the differences between Colombian law and the substantive law under which the judgment was made would be equivalent to permitting the Colombian court to review the merits of the case, an outcome that the Court criticized and refused to permit.[321] Instead, the Court held that, rather than comparing foreign law and Colombian mandatory law, the enforcing court should compare foreign law and fundamental principles of Colombian law as a more general matter.[322] Again, this view of the public policy exception is consistent with views taken by the international arbitral community as well as views enunciated by U.S. courts.[323]

Finally, the Colombian Supreme Court of Justice indicated in its 2004 decision that the concept of public policy must be interpreted in an international light.[324] The Court also stated that enforcing courts should consider public policy objections in the context of the needs of a changing global economy.[325] This echoes rationales enunciated in 1996, when the Court stated that non-enforcement of a foreign arbitral award for a violation of public policy is only appropriate when the recognition of the award affects "indispensable principles that safeguard society, principles regarding the essential interests of any country related to the political, moral, religious or economical order."[326] This is again very much consistent with international legal norms regarding the enforcement of foreign arbitral awards.[327]

The issue of annulment versus non-enforcement raises the issue of primary and secondary jurisdiction. The international arbitral regime gives certain courts—those with primary jurisdiction—the exclusive ability to

320. *See* BORN (ICA), *supra* note 15, at 2833; Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 190 F. Supp. 2d 936, 945 (S.D. Tex. 2001) (discussing U.S. recognition of the "pro-enforcement bias" of the New York Convention).

321. *See* Supreme Court of Justice, Aug. 6, 2004, *supra* note 317.

322. *See id.*

323. *See* BORN (ICA), *supra* note 15, at 2833; *see also* Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RATKA), 508 F.2d 969, 974 (2d Cir. 1974).

324. *See* Supreme Court of Justice, Aug. 6, 2004, *supra* note 318.

325. *See id.*

326. Zuleta, *Colombia*, *supra* note 28, para. 48 (translating an excerpt from an unnamed case from the Supreme Court of Justice dated November 5, 1996).

327. *See* BORN (ICA), *supra* note 15, at 2833.

address various procedural matters associated with the arbitration.[328] Courts with primary jurisdiction are those located in the place where the award was made (i.e., the arbitral seat) or in the place under whose law the award was made.[329] Courts in all other countries have only "secondary jurisdiction," regardless of whether they have any other preexisting connection with the parties, the arbitration or the dispute.[330]

Perhaps the most important power associated with primary jurisdiction is the ability to annul or vacate an arbitral award.[331] Only the court with primary jurisdiction (typically the court at the seat of the arbitration) is allowed to undertake such an action.[332] All other courts (i.e., courts with secondary jurisdiction) are only allowed to refuse enforcement of what to them is a foreign arbitral award.[333] The distinction is important because annulment and non-enforcement can involve different standards and procedures.[334]

The concept of primary and secondary jurisdiction has been adopted by both the United States[335] and Colombia,[336] which means that only a court at the arbitral seat has the ability to annul or vacate an arbitral award. Therefore, the grounds for annulment reflected in Decree 1818/98 cannot be relied upon in cases involving an award rendered outside of

---

328. *See id.* at 1286, 2337-38. The distinction between primary and secondary jurisdiction developed pursuant to language in the New York Convention indicating that a court may refuse to enforce an award rendered in another state if the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention, *supra* note 19*,* art. V(1)(e).

329. *See* BORN (ICA), *supra* note 15, at 1286, 2337-38. In virtually all cases, both analyses point to the same state. *See id.*

330. *See id.*

331. *See id.* Decree 1818/98 uses the phrase "annulment" to refer to the process of setting aside an award in the place where it was made, whereas U.S. jurisprudence generally speaks of "vacating" such awards. *See* Decree 1818/98, *supra* note 36, art. 160-61; 9 U.S.C. § 10 (2006). The three phrases - annulment, vacatur and set-aside - all mean the same thing. For ease of analysis, the phrase "annulment" will primarily be used in the context of Colombian law and "vacatur" will be used in the context of U.S. law.

332. *See* BORN (ICA), *supra* note 15, at 1286, 2337-38.

333. *See id.*

334. The Model Arbitration Law attempts to avoid this dichotomy by establishing standards for annulment (i.e., set-aside) that are essentially identical to those for non-enforcement, but neither Colombia nor the United States has adopted the Model Arbitration Law. *See* Model Arbitration Law, *supra* note 22, arts. 34-36.

335. *See* Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287 (5th Cir. 2004).

336. *See* Empresa Colombiana, Apr. 27, 2004, *supra* note 177; Empresa Colombiana, Apr. 22, 2004, *supra* note 177*;* Empresa Colombiana, Oct. 24, 2003, *supra* note 177; U.S. EMBASSY, *supra* note 9, at 7; Zuleta, *Colombia*, *supra* note 28, para. 37 (citing Articles 161-62 of Decree 1818/98).

Colombia.[337] Instead, parties in those cases have to look to the grounds for non-enforcement under the New York or Panama Convention.[338] As stated previously, the two conventions are virtually indistinguishable in this regard.[339]

Although Colombia is very similar to the United States with respect to its substantive approach to correction, revision, annulment and non-enforcement, U.S. parties may find Colombia's procedural requirements unusual. For example, it has been suggested that a court that orders partial annulment of an arbitral award may have the power to correct errors or even step into the shoes of the arbitral tribunal and address a substantive question if the tribunal failed to rule on a question submitted to arbitration.[340] However, a court that sets aside an award in its entirety has no remaining jurisdiction over the substantive issues and therefore cannot exercise these sorts of curative powers.[341] Although this provision does not appear to apply in an international arbitration, U.S. parties should nevertheless be aware of it, since it is always possible that a court could take this task upon itself.[342]

Decree 1818/98 contemplates other procedures that U.S. parties may find unusual. For example, an application to set aside an arbitral award must be made to the president of the arbitral tribunal or to the sole arbitrator within five days of the notification of the award (which, in the case of a *de fallo* procedure, will be at the final hearing).[343] This is an important requirement to remember, since submitting the request directly to the court will render the request invalid.[344] Furthermore, even if the annulment proceedings fail, prevailing parties will still have to complete *exequatur* procedures, as discussed above.[345]

---

337. *See* Empresa Colombiana, Apr. 27, 2004, *supra* note 178.

338. *See* New York Convention, *supra* note 19, art. V; Panama Convention, *supra* note 20, art. 5.

339. *See* New York Convention, *supra* note 19, art. V; Panama Convention, *supra* note 20, art. 5; *supra* note 61 and accompanying text.

340. *See* Mantilla-Serrano, *supra* note 5, at 130. Notably, this remedy is adopted only in exceptional cases. *Id.*

341. *See id.*

342. *See* Zuleta, 2010, *supra* note 13, at 40.

343. *See* Decree 1818/98, *supra* note 36, art. 161; Mantilla-Serrano, *supra* note 5, at 129; *see supra* note 277 and accompanying text (regarding *de fallo* procedure).

344. *See* Gomm-Santos, *supra* note 28, at 14 (discussing *SAP Andina y del Caribe C.A. Colombia v. Colombia,* lower court decision of 20 Mar. 2010); *see also SAP Andina*, *supra* note 304. Ultimately the matter will be heard by the court at the seat of the arbitration. *See* Decree 1818/98, *supra* note 36, art. 166; Mantilla-Serrano, *supra* note 5, at 129.

345. *See supra* notes 156-71 and accompanying text.

4. Constitutional Issues

One of the most novel aspects of Colombian arbitration law is the extent to which the field has become constitutionalized in recent years.[346] While the form of relief known as an *acción de tutela* is meant to be used as an extraordinary remedy of last resort in cases involving a violation of a fundamental right, the device has been used in the arbitral realm with considerable frequency in the last five years.[347] The action can be used to address acts and omissions of either private persons or the state, and requires an actual or threatened violation of a fundamental constitutional right.[348] Although the *tutela* may be seen as allowing a substantive review of the merits of the award, "there is no reported international arbitration case where it was successfully used in such [a] way."[349]

Two lines of cases appear to exist in the arbitral realm, one focusing on equal treatment and one focusing on party autonomy.[350] Although these decisions arose in the domestic context, they nevertheless provide important information about the way in which Colombian courts consider these types of constitutional arguments. As will be seen, Colombian courts appear well aware that a broad right to mount a constitutional challenge to arbitral procedures could have a potentially devastating effect on arbitration. As a result, courts appear hesitant to find a constitutional violation and have denied relief in all cases where it has been sought in the arbitral context.[351]

---

346. *See* Arango & Parra, *supra* note 13, at 57; Zuleta, *Colombia*, *supra* note 28, para. 38.

347. *See* Colombia Constitution, *supra* note 39, art. 86; D. 2591/91 noviembre 29, 1991, D.O. (Colom.), *available in Spanish at* Juriscol, http://juriscol.banrep.gov.co (search for 2591 under "Decretos) (outlining procedure) [hereinafter Decree 2591/91]. Fundamental rights are found in Title II, Chapter I, of the Colombia Constitution. *See* Colombia Constitution, *supra* note 39, arts. 11-41.

348. *See* Decree 2591/91, *supra* note 347, art. 2; Zuleta, 2010, *supra* note 13, at 63-64. Although the *tutela* is commonly referred to as involving only fundamental rights, Article 2 of Decree 2591/91 suggests that there is room for expansion. *See* Decree 2591/91, *supra* note 347, art. 2 (stating that "[t]he *acción de tutela* guarantees fundamental constitutional rights. When a *tutela* decision refers to a right that is not expressly indicated to be a fundamental right under the Constitution, but whose nature permits a *tutela* in specific instances, the Constitutional Court will give it priority consideration in its review of that decision") (author's translation). However, some limitations on possible *tutela* rights are reflected in Article 4 of Decree 2591/91, which states, "The rights protected by the *acción de tutela* shall be interpreted in conformity with the international human rights treaties ratified by Colombia." *Id.* art. 4 (author's translation).

349. Zuleta, *Colombia*, *supra* note 28, para. 38.

350. *See* Colombia Constitution, *supra* note 39, arts. 13, 28; *see also supra* notes 257-62 and accompanying text (discussing *tutela* actions in the context of preliminary awards on jurisdiction).

351. *See* Zuleta, 2010, *supra* note 13, at 64.

a. Equal Treatment

One line of analysis involves the right to equal treatment under the law.[352] The first case in this series, Decision C-800/2005, was introduced in the preceding subsection in the context of the discussion about public policy being unavailable as grounds for annulment under domestic law.[353] Here, the moving party claimed that the absence of a public policy objection in domestic arbitration law violated the right to equal treatment because parties to international arbitrations could object to enforcement of a foreign award based on violations of Colombian public policy.[354] This claim, which was decided by the Colombian Constitutional Court in 2005, was ultimately unsuccessful on the grounds that the two types of arbitration—domestic and international—were sufficiently different to support disparate treatment.[355]

Although Decision C-800/2005 could be seen by U.S. parties as problematic in that it establishes the availability of *tutela* actions in cases involving arbitration and thus expands the number of post-arbitration judicial proceedings available in Colombia, the decision can also be viewed in a more positive light to the extent that it suggests that the Constitutional Court is willing to uphold certain basic differences between international and domestic arbitrations.[356] As such, Decision C-800/2005 could be seen as limiting the number of challenges that might be made to an international arbitration because it creates precedent suggesting that international arbitration is inherently different than domestic arbitration.[357] This is not to say that an *acción de tutela* will never be brought against an international arbitration based on an alleged violation of the right of equal treatment, but the Constitutional Court does not appear sympathetic to that argument as an initial matter. Interestingly, the Colombian Constitutional Court's view in this regard is somewhat reminiscent of statements by the U.S. Supreme

352. *See* Colombia Constitution, *supra* note 39, art. 13 (stating, in part, "[a]ll individuals are born free and equal before the law, will receive equal protection and treatment from the authorities, and will enjoy the same rights, freedoms and opportunities without any discrimination on account of gender, race, national or family origin, language, religion, political opinion, or philosophy. The State will promote the conditions so that equality may be real and effective and will adopt measures in favor of groups that are discriminated against or marginalized.").

353. *See supra* notes 313-15 and accompanying text.

354. *See* Eduardo Zuleta Jaramillo, *Decision C-800/2005, Constitutional Court*, KLUWERARBITRATION (Aug. 2, 2005), http://www.kluwerarbitration.com; *see also supra* notes 313-15 and accompanying text.

355. *See* Decision C-800/2005, *supra* note 314.

356. *See id.*

357. *See id.*

Court recognizing that there are certain aspects of international arbitration that do not exist in domestic arbitration.[358]

One other challenge in the arbitral realm has been based on a claim of unequal treatment.[359] This action arose purely as a matter of domestic law in the context of the arbitrability of shareholder agreements.[360] The company in question was of a special type that was subject to reduced regulation, allowing shareholder disputes to be arbitrated.[361] The claim was made that the constitutional principle of equal treatment was violated because shareholders of other types of companies could not subject their claims to arbitration and thus were being treated differently than shareholders of these sorts of limited-regulation companies.[362] In Decision C-014/2010, the Constitutional Court ruled that a constitutional violation did not occur, since these types of companies were different enough to justify different treatment.[363] Furthermore, the Court noted that the then-recent revisions to Article 6 of Law No. 1285/09 reflected a "more flexible standard of arbitration" than had been recognized in earlier decisions, thus permitting arbitrations in this context.[364] Finally, the Court held that party consent was respected because arbitration could not proceed without the unanimous consent of all shareholders.[365]

Decisions C-800/2005 and C-014/2010 are interesting for several reasons. On the one hand, they appear to reflect a pro-arbitration policy that is consistent with positions taken in the United States and elsewhere.[366] This obviously bodes well for international parties seeking assurance that

---

358. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (stating that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context").

359. *See* Eduardo Zuleta Jaramillo, *Fabián López-Guzmán v. Unknown, Decision C-014/2010, Constitutional Court,* KLUWERARBITRATION (Jan. 20, 2010), http://www.kluwerarbitration.com (claiming violations of due process and access to justice) [hereinafter Decision C-014/2010].

360. *Id.* This action does not appear to be an *acción de tutela,* but instead is a public constitutionality action (*acción pública de inconstitucionalidad*). *See id.* Nevertheless, the principles discussed are useful to the current discussion.

361. *See id.* (citing L. 1258/08, mayo 12, 2008, D.O. (Colom.)).

362. *See id.* Interestingly, Germany recently revised its laws to allow shareholder arbitration in certain types of corporate disputes, suggesting a trend in civil law jurisdictions. *See* S.I. Strong, *Collective Arbitration Under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?*, 29 ASA BULL. 145, 149-64 (2011).

363. *See* Decision C-014/2010, *supra* note 360.

364. *Id.*

365. *See id.*

366. *See id.*; Decision C-800/2005, *supra* note 314; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985).

their arbitration agreements will be respected. On the other hand, the decisions suggest that challenges regarding the right of equal treatment can be interpreted across societal lines in Colombia. This is somewhat problematic for international parties, who are more used to seeing concerns about equal treatment arise between the actual parties to the arbitration.[367] This is not to say that parties to an international dispute can safely ignore issues regarding equal treatment between the parties to the dispute, but simply to note that constitutional challenges in Colombia arise in a broader context than is usually the case in arbitration.

b. Party Autonomy

The second line of constitutional cases involves the principle of party autonomy.[368] Although the first case to arise in this context, Decision SU-174/2007, arose in the context of domestic rather than international arbitration, it nevertheless laid the foundation for several important legal principles that have developed over the last five years.[369]

First, Decision SU-174/2007 firmly established that parties not only may agree upon the rules applicable to their arbitration without fear of violating the Colombian Constitution, but also that arbitral institutions may promulgate procedural rules that differ from those reflected in national rules of arbitration.[370] This approach was subsequently confirmed by Decision C-713/2008, which suggested that any abrogation of party autonomy, even when effectuated by the legislature, is contrary to the Colombian Constitution.[371] In this second opinion, the court specifically indicated that its decision eliminated the grounds on which the infamous

367. *See* LEW ET AL., *supra* note 15, paras. 5-69, 16-11 to 16-12, 22-62.

368. *See* Colombia Constitution, *supra* note 39, art. 28 (stating, in part, that "[e]very individual is free").

369. *See* Eduardo Zuleta Jaramillo, *Empresa de Teléfonos de Botogá v. Tribunal de Arbitramento Telefónica, Decision T-058/2009, Corte Constitucional*, KLUWERARBITRATION (Feb. 2, 2009), http://www.kluwerarbitration.com (discussing Decision SU-174/2007) [hereinafter Empresa de Teléfonos]; Gomm-Santos, *supra* note 28, at 15; Zuleta, *Colombia*, *supra* note 28, para. 9 (noting Decision SU-174/2007 also permits a settlement in situations where it refers to obligations having an economic nature).

370. *See* Gomm-Santos, *supra* note 28, at 15; *see also* Empresa de Teléfonos, *supra* note 370 (discussing Decision SU-174/2007).

371. *See* Decision C-713/2008, *supra* note 98; Gomm-Santos, *supra* note 28, at 15, 50 (translating Decision C-713/2008 as stating that the "party autonomy principle constitutes one of the most important characteristics of arbitration; it gives the parties the opportunity to agree (or not) to arbitrate and to decide on the applicable rules of procedure to be followed in order to resolve the controversy"); *see also* Morales, *supra* note 28, at 168.

TermoRio case[372] was founded, thus eliminating the possibility that such an outcome will be repeated in the future.[373]

Decision C-713/2008 does not mean that party autonomy in Colombia is now absolute, for the court specifically indicated that this principle will not be interpreted in such a way as to undermine the regulatory authority of the state.[374] Instead, party autonomy remains bounded by fundamental constitutional rights including those involving due process and procedural fairness.[375] This approach is entirely consistent with that reflected elsewhere in the international arbitral regime.[376]

Second, Decision SU-174/2007 was instrumental in delineating the criteria that should be used to determine whether an *acción de tutela* is available.[377] The court outlined four factors.

First, Colombian courts are to demonstrate "[r]espect for the autonomy of the arbitrators or the arbitral tribunal."[378] This means that "the scope of deliberation by the arbitrator cannot be invaded by the constitutional judge," lest the arbitrator's ability "to render a decision on the merits of an issue submitted to arbitration" be impeded.[379]

---

372. *See* Uran-Bidegain, *supra* note 28 (summarizing TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 936 (D.C. Cir. 2007)). *TermoRio* involved an arbitration that had initially been understood to be international in character but that was later determined to be domestic. *See id.* The arbitration, which was seated in Colombia, had proceeded pursuant to the ICC Arbitration Rules and a final award had been rendered. *See id.* However, because Colombian law at that time stated that domestic arbitrations could not proceed subject to institutional rules such as those promulgated by the ICC, the award was annulled. *See* Decision C-713/2008, *supra* note 98 (discussing *TermoRio*); *see also* Uran-Bidegain, *supra* note 28. Further controversy arose in the United States when the Circuit Court for the District of Columbia refused enforcement on the grounds that the New York Convention required non-enforcement when an award had been set aside at the place of arbitration, a holding that was out of step with previous U.S. precedent indicating that non-enforcement in such circumstances was discretionary under the New York Convention. *See* New York Convention, *supra* note 19, art. V(1)(e); *TermoRio*, 487 F.3d at 936-38; Chromalloy Aeroservs. v. Egypt, 939 F. Supp. 907, 911 (D.D.C. 1996) (upholding an arbitral award against nullification in Egyptian courts). Both the U.S. and Colombian decisions have been criticized. *See* BORN (ICA), *supra* note 15, at 2679, 2683-84; Christopher Koch, *The Enforcement of Awards Annulled at Their Place of Origin,* 26 J. INT'L L. 267, 285-90 (2009); Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law,* 38 GA. J. INT'L & COMP. L. 25, 34-36 (2009).

373. *See* Decision C-713/2008, *supra* note 98 (noting that *TermoRio* was based on rationales found in Decision C-037/1997, which is no longer valid in light of Decision C-713/2008).

374. *See* Gomm-Santos, *supra* note 28, at 50.

375. *See* Decision C-713/2008, *supra* note 98; Gomm-Santos, *supra* note 28, at 50.

376. *See* New York Convention, *supra* note 19, art. V; Panama Convention, *supra* note 20, art. 5; BORN (ICA), *supra* note 15, at 1750.

377. *See* Empresa de Teléfonos, *supra* note 370 (summarizing criteria under Decision SU-174/2007); *see also* Zuleta, *Colombia*, *supra* note 28, para. 37.

378. Empresa de Teléfonos, *supra* note 370.

379. *Id.*

Second, judges are to consider "[t]he exceptional nature of the writ of fundamental rights, which requires that the award in question manifestly violates [sic] fundamental rights."[380] Although no known cases elucidate the standard to be used for "manifest violation," the test appears to be relatively high.

Third, courts may only consider an *acción de tutela* in cases where "the writ [is] admissible according to the court's case-law on the different scenarios where the fundamental right to due process could be defaulted on by arbitral awards (*vías de hecho*)."[381] A *vía de hecho* only exists when a judge or arbitrator "uses its legal powers for a purpose different to that justifying them; has no competence to decide on the subject matter of the dispute; deviates from the procedure indicated by law; or makes its decision with no evidentiary support."[382] This limits constitutional challenges to those involving well-established, fundamental notions of due process, which is a standard used elsewhere, including the United States, even when challenges to arbitral awards have not been constitutionalized.[383]

Fourth, "[t]he auxiliary nature of the writ of fundamental rights . . . may only be exercised once the ordinary remedies are exhausted (most notably the petition to annul the award)."[384] Although this provision will have the effect of extending the time it takes to confirm or enforce an arbitral award in Colombia, it does eliminate the possibility of complex constitutional litigation in the first instance.

These four factors obviously reflect a strong bias in favor of arbitration, a perspective that international parties will doubtless welcome. Furthermore, the Constitutional Court's reluctance to interfere with arbitral awards bodes well for the future of arbitration in Colombia. Unfortunately, some of the clarity of Decision SU-174/2007 was lost in 2009 when the First Revision Chamber of the Constitutional Court modified this four-part

---

380. *Id.*

381. *Id.*

382. Zuleta, *Colombia*, *supra* note 28, para. 37.

383. *See* Panama Convention, *supra* note 20, art. 5 (describing grounds for non-enforcement of a foreign arbitral award or an award considered by a state to be non-domestic); 9 U.S.C. § 10(a) (2006) (allowing vacatur "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made").

384. Empresa de Teléfonos, *supra* note 370 (summarizing criteria under Decision SU-174/2007).

test and replaced it with "a general requirement of a threat or a violation of a fundamental right."[385] This of course unsettles the law in this area, making it somewhat difficult to predict the scope of review that will be necessary in the future for *acciones de tutela* involving arbitral awards.[386]

CONCLUSION

By all accounts, Colombia has created a legal and economic environment that provides a solid, reliable foundation for long-term development.[387] Commercial actors from the United States and elsewhere are looking at Colombia with fresh eyes, seeking investment and business opportunities in a country that is poised to establish itself on the world stage.[388]

Nevertheless, some obstacles remain. One of the more pressing issues involves Colombia's remarkably slow judicial system. This is a problem for many international commercial actors, since they will refuse to enter into a cross-border transaction if they cannot find a reputable and reasonably efficient means of enforcing contractual obligations.[389] Fortunately, litigation is not the only method of resolving international commercial disputes, and all three branches of the Colombian government—legislative, executive and judicial—appear united in their desire to establish a thriving arbitration culture, particularly with respect to international disputes.[390]

Notably, these efforts are ongoing. Although the last major reform measures were undertaken in 1998, when Decree 1818/98 was promulgated,[391] additional attempts were made in 2001, 2007, 2009 and 2010.[392] Yet another bill was introduced in June 2011.[393] This new proposal focused specifically on making Colombia a more hospitable place for

---

385. *Id.*; *see also* U.S. EMBASSY, *supra* note 9, at 10 (framing the analysis as "manifest disregard of law," which is a U.S. term of art in arbitration but which appears to be to be an incorrect translation of the phrase "vías de hecho"); Zuleta, *Colombia*, *supra* note 28, para. 37 (defining "vías de hecho").

386. *See* Empresa de Teléfonos, *supra* note 370; *see also* Arango & Parra, *supra* note 13, at 57.

387. *See supra* notes 7-10 and accompanying text.

388. *See supra* notes 5-10 and accompanying text.

389. *See supra* note 14 and accompanying text.

390. The legislature has passed numerous laws liberalizing the arbitral regime, while the executive has promulgated several decrees doing the same. *See supra* notes 82-92 and accompanying text. Furthermore, the Colombian courts appear to be establishing a strong pro-arbitration policy in both the domestic and international realms. *See supra* notes 347-87 and accompanying text.

391. *See* Decree 1818/98, *supra* note 36.

392. *See* Morales, *supra* note 28, at 167-68; *see also* U.S. EMBASSY, *supra* note 9, at 15-16.

393. *See* Carter, *Improving Recognition*, *supra* note 28; *see also* Anteproyecto de Ley No. __ - 2011 Camara, Por medio de la cual se expide el Estatuto de Arbitraje Nacional e Internacional y se dicta otras disposiciones (proposed law) (on file with author).

international arbitration by significantly reducing the amount of time needed to obtain recognition of an award (reportedly allowing a final determination within thirty days) and barring any appeal or challenge to the decision to recognize the award.[394] Although the future of the bill is unclear, it is safe to say that arbitration law in Colombia is in a constant state of evolution.[395]

Nevertheless, there are some existing elements of Colombian arbitration law that can cause concern in the United States. For example, not only does enforcement of an arbitral award take a significant amount of time (although this period is far shorter than would be the case if the dispute was litigated), but parties to Colombian disputes run the risk of facing an *acción de tutela*. However, Colombian courts appear inclined to limit the availability of this type of action in arbitration, and the situation is bound to improve as judicial precedent establishes the perimeters of *tutela* relief. Furthermore, other jurisdictions have been known to allow constitutional challenges to the enforcement of arbitral awards, suggesting that Colombia's *acción de tutela* only appears striking in contrast to U.S. law, which does not tend to discuss arbitration in constitutional terms.[396]

Given the proactive nature of the Colombian legislature, questions have been raised as to whether Colombia is on the brink of adopting the Model Arbitration Law.[397] While such a move would be as useful in Colombia as it would be in the United States,[398] the primary benefit of such a reform would be procedural, in that it would help unify the patchwork of legislation that is currently in place.[399] The substantive benefits are not quite as clear, since Colombia's arbitral regime is already highly consistent

394. *See* Carter, *Improving Recognition*, *supra* note 28 (including informal translation of draft articles on recognition and enforcement of arbitral awards). Notably, a decision on *exequatur* is already non-appealable, although those decisions may be subject to a motion for revision or an *acción de tutela. See* INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 38, para. 10; *see supra* note 384 and accompanying text (noting an *acción de tutela* is only available after other remedies have been exhausted).

395. *See* Zuleta, *Colombia*, *supra* note 28, para. 50.

396. *See* PETER B. RUTLEDGE, ARBITRATION AND THE CONSTITUTION (forthcoming 2011); S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1, 32, 59-60, 73, 95 (2008) (discussing constitutional issues in Spain and Germany).

397. *See* Morales, *supra* note 28, at 167 (suggesting this is the case).

398. Calls have been made to reform or amend the FAA to correspond more closely with the principles outlined in the Model Arbitration Law. *See* 9 U.S.C. §§ 1-307 (2006); Model Arbitration Law, *supra* note 22; William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1243 (2003).

399. *See supra* notes 82-92 and accompanying text.

with international norms. Although there are some practices and procedures that U.S. parties will find unfamiliar, there is little to cause alarm.

In large part, this is due to the fact that Colombian law gives parties to an international arbitration a great deal of autonomy in how they structure their proceedings. As U.S. parties gain a better understanding of the Colombian arbitral regime, they will be in a better position to know what factors can and should be addressed in an arbitration agreement involving a Colombian party or a Colombian seat. As a result, U.S. commercial actors will be able to negotiate cross-border transactions with increased confidence that any arbitration that eventually arises will be adequate to their needs and expectations.

This is not to say that an arbitration between a U.S. and Colombian party will be perfect in every possible way. However, transparency and full disclosure about risks and potential exposure is all that can ultimately be aspired to in law or in business. There is nothing that Colombia, or indeed any nation, can do to make arbitration entirely risk- or cost-free. Instead, the only reasonable goal is to make the process fair, consistent and relatively efficient. In that, Colombia has succeeded.