

The Colombian Arbitration Statute: Towards an Export-Quality Service for Colombia*

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*“Arbitration is now a service industry,
and a very profitable one at that”.*

(MUSTILL, 1986, P. 55)

Abstract

Since the 1990's, Colombia has been relatively open to arbitration, seeking in this way alternatives to long and uncomfortable traditional judicial procedures. Although laws regulated arbitration and having ratified international conventions relative to the subject, Colombia was not characterized as an appealing venue for international arbitrations. With the entry into force of Law 1563 of 2012, which partially adopted the UNCITRAL Model Law on Arbitration, Colombia started to step forward. This article evaluates the current state and perspectives on Colombian arbitral regulations, as an appealing venue for international arbitrations.

Keywords: International Arbitration, Arbitration Tourism, UNCITRAL Model Law on Commercial Arbitration, Alternative Dispute Resolution Mechanisms.

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EL ESTATUTO DE ARBITRAJE DE COLOMBIA: HACIA UN SERVICIO DE CALIDAD DE LAS EXPORTACIONES PARA COLOMBIA

Resumen

Desde la década de los noventa, Colombia se ha mostrado relativamente abierta al arbitraje y ha buscado, de esta manera, alternativas a los largos e incómodos procesos judiciales tradicionales. A pesar de haber contado con normas que regulaban el arbitraje de manera extensiva y haber ratificado varias de las convenciones internacionales relativas a este, Colombia no se caracterizaba por ser una sede atractiva para adelantar arbitrajes internacionales. Con la promulgación de la Ley 1563 de 2012, con la que se adoptó parcialmente la Ley Modelo de Arbitraje de la CNUDMI, Colombia empezó a dar pasos en esta dirección. Este artículo evalúa el estado actual y las perspectivas sobre la regulación arbitral colombiana como sede atractiva para arbitrajes internacionales.

Palabras clave: arbitraje internacional, turismo arbitral, Ley Modelo de Arbitraje de la CNUDMI, mecanismos alternativos de solución de conflictos.

O ESTATUTO COLOMBIANO DE ARBITRAGEM PARA UMA QUALIDADE EXPORTADORA DE SERVIÇO NA COLÔMBIA

Resumo

Desde a década de noventa, a Colômbia tem se mostrado relativamente aberta à arbitragem e tem procurado, dessa maneira, alternativas aos longos e incômodos processos judiciais tradicionais. Apesar de ter contado com normas que regulamentavam a arbitragem de maneira extensiva e ter ratificado várias das convenções internacionais relacionadas com ela. A Colômbia não se caracterizava por ser uma sede atraente para adiantar arbitragens internacionais. Com a promulgação da Lei 1563 de 2012, pela qual se adotou parcialmente a Lei Modelo de Arbitragem da CNUDMI, a Colômbia começou a avançar nessa direção. Este artigo avalia o estado atual e as perspectivas sobre a regulação arbitral colombiana como sede atraente para arbitragens internacionais.

Palavras-chave: arbitragem internacional, turismo arbitral, Lei Modelo de Arbitragem da CNUDMI, mecanismos alternativos de solução de conflitos.

Introduction

Guadalupita Inc., a Mexican construction company, is about to invest US10 bn by entering into a joint-venture contract with the Peruvian government for the building of a dam in the Titicaca lake. The investment contract is finalized, except for the arbitration clause. Lawyers from both parties have agreed that, in the event of dispute, arbitration proceedings should take place in a neutral country in the region, but they have not made up their mind about the venue for the seat of arbitration. Knowing that arbitration proceedings deriving from the transaction are worth millions, their decision is a delicate one. They need a country a legislation capable of guaranteeing a fast, impartial and enforceable award.

Would they choose Colombia? It would be in the best interest of Colombia if they did. In addition to representing a key incentive for foreign investment (Schultz, 1998, p. 295), clear rules on arbitration proceedings, attract significant revenues for the host country in terms of business tourism, as it would be the case for Colombia in the example above.

This paper discusses the current *status quo* of international commercial arbitration in Colombia after the radical reforms introduced by Law 1563 of 2012, Colombia's Statute on National and International Arbitration (hereinafter, *Law 1563*, the *Arbitration Statute* or *SNIA*) and proposes punctual strategies for improvement beyond the law.

I. Prior Legislation on Commercial Arbitration

Since the early 1990s Colombia has been characterized by its relative openness to arbitration. Conscious of the need for alternatives to the usually long and cumbersome proceedings before national courts -ranked among the slowest in the world- (World Bank Doing Business Report, 2014), the government has been keen to promote an arbitration-friendly legal environment.

Prior to the enactment of Law 1563 of 2012, arbitration was regulated by Decree 2279 of 1989, and Laws 21 of 1991, 315 of 1996 and 446 of 1998, all of which were finally consolidated in the Statute of the Alternative Mechanisms for

Dispute Resolution (Decree 1818 of 1998), the second part of which was entirely dedicated to arbitration. Apart from providing procedural rules for domestic arbitration proceedings, Decree 1818 contained generally recognized arbitration principles, such as separability (Art. 118), *kompetenz-kompetenz* (Art. 147 and 207), judicial enforcement of arbitral awards (by remission to the Code of Civil Procedure), and *res judicata* (Art. 168).

Colombia had also ratified the main international treaties in the field of arbitration: the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, the ICSID Convention, and the Inter-American Convention on International Arbitration.

Fourteen years later, Colombia did not seem to be a popular venue for international arbitration. The Colombian legal environment on arbitration was perceived unattractive for parties interested in taking their disputes before a tribunal with seat in Colombia.

The weaknesses of Decree 1818 were clear for all to see. Let us list a few:

First, Decree 1818 compiled without a systematic approach all the norms and treaties up to 1998 on mediation, conciliation, amicable composition, national and international arbitration and even investment arbitration. That compilation made unclear the procedures and scope specific to each of those categories of alternative dispute resolution methods. Moreover, arbitration-related legislation continued to be confusingly scattered as Decree 1818 did not derogate the previous relevant norms.

Second, the lack of clarity and uniformity on arbitration proceedings was particularly worrisome as regards international arbitration. By mandate of Law 315 of 1996 (the original piece of legislation on international arbitration), procedural issues on this kind of proceedings were left entirely to the parties' agreement. If there was no such an agreement, international disputes were subject to national arbitration procedures and its strict rules, more akin to litigation than arbitration itself.

Third, arbitrability of international disputes was also subject to intense debate (Silva, 2013, p. 348). The chapeau of article 1 of Law 315 indicated that arbitration was international "when parties had so agreed". Even though Law 315 was inspired by UNCITRAL Model Law on International Arbitration (hereinafter, the *Model Law*), a literal interpretation of the chapeau –obviously not inspired by the Model Law– required parties to agree, not only on arbitrating their dispute, but also on qualifying the proceedings as 'international'; otherwise, the arbitration

agreement could be interpreted as referring to national arbitration. That sort of “double consent” ended up harming the arbitration institution in Colombia.

Fourth, due to an over-regulated procedure and the sluggishness of the Colombian judicial system, enforcement took over three years of court litigation (Strong, 2011). The winning party in an international arbitration was forced to initiate proceedings before the Civil Chamber of the Supreme Court and go through proceedings that included evidence gathering, exchange of written submission and final decision (Council of American Enterprises; Colombian American Chamber of Commerce, 2011, p. 13).

Fifth, arbitral awards, whether they were national or international, were prone to constitutional challenges via the *acción de tutela*. The general framing of this constitutional complaint (still in force today) allowed judges to review the award on the merits if it was found that a fundamental right such as the due process had been violated in the course of the arbitration proceedings.

II. A little bit of history: The Uphill road to a modern Arbitration Statute

In order to achieve Law 1563 of 2012, many efforts from the government, the academia and the arbitration community were required. Indeed, six Ministers of Justice and four arbitration draft laws¹ were necessary so that Colombia could finally adopt the current Arbitration Statute.

In 2002, 2007 and 2008, several draft laws on arbitration were withdrawn or discontinued in Congress for lack of consensus, not only among the parliamentarians debating them, but –even worse– among the actors involved in their preparation: the Government, the Office of the General Attorney (*Procuraduría*) and the academia (Council of American Enterprises; Colombian American Chamber of Commerce, 2011, p. 17).

In order to overcome such a problematic difference of opinions, in October 2010, the Government of President Santos set up an Experts Commission comprising the most distinguished representatives from all the trends of thought on

¹ Draft law 085 of 2002-Senate; Draft Law No. 177 of 2007 Chamber of Representatives; Draft Law No. 014 of 2008 Chamber of Representatives; and definitive Draft Law 018 of 2011-Senate / 176 of 2011-Chamber of Representatives, which turned into Law 1563 of 2012.

arbitration. The Commission's assignment was to assess the legislation then in force, to prepare a new draft law to be presented to the Congress in 2011.

Decree 3993 of 2010, as modified by Decree 4146 of 2010, appointed the members of the "Experts Commission for the Preparation of the Draft Law on National and International Arbitration". The Commission was divided into two sub-commissions: one for national arbitration, and the other one for international arbitration.

The Sub-Commission for International Arbitration was headed by Mr Rafael Bernal, and their members were Adriana Zapata de Arbeláez, Juan Pablo Cárdenas Mejía, Eduardo Zuleta Jaramillo, Carlos Urrutia Valenzuela, Martín Carrizosa Calle and Nicolás Gamboa Morales.

Professor Fernando Hinestrosa (R.I.P.), rector of Externado University and one of the most influential lawyers and scholars of Colombia, presided the Commission taking care of even the smallest details (including spelling and grammar) of the works of both sub-commissions. Prof. Hinestrosa passed away shortly before the Statute was enacted, so President Santos and the members of the Experts Commission rendered tribute to his memory by referring to the Statute as the "Hinestrosa Law".

Thus, Law 1563, far from being improvised, was built on the basis of deep reflection and discussions of the most renowned arbitration experts in the country, whose main objective was to spread the use of arbitration in Colombia and update its regulation in line with the realities of the 21st century.

Their hard and dedicated work, accompanied by scholars and the rest of the Colombian arbitration community, was incorporated into the Draft Law 018 of 2011-Senate. For over a year, Minister of Justice Juan Carlos Esguerra, member of the Commission and president of the Sub-Commission on National Arbitration, was in charge of passing the draft law through the Congress up until its ultimate approval on 12 July 2012.

As required by law, the Statute entered into force three months later, on 12 October 2012: a historical date as it commemorated both the 520th anniversary of the discovery of America by Columbus (the Italian explorer whom Colombia is named after) and the entry into force of the longed-for arbitration law.

III. Law 1563 of 2012: Adoption of the UNCITRAL Model Law on Commercial Arbitration

The Arbitration Statute contains a dualist arbitration system. While national arbitration and amiable composition are regulated under Sections I and II of the law; international arbitration is dealt with in Section III.

Section III fully adopts the 2006 revised Model Law succeeding in what the United Nations has recognized as “the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice” (United Nations Resolution 40/72, 1985).

The Model Law, for its part, does not require full adoption. That is why it has been promoted as a “model”, instead of an international treaty binding on the states as a whole. As REED illustrates:

The Model Law is intended to be an internationally acceptable law based upon the principle that the local courts in the place of arbitration should support but not interfere with the arbitral proceedings. *Countries can enact the Model Code fully, or partially taking into account crucial local legal requirements or idiosyncrasies.* Advisers should be sure to check that any local amendments made to the Model Law do not substantially detract from its acceptability. (Emphasis added). (Reed, 2002, p. 571).

In this sense, Colombia to a certain extent followed the example set by Singapore (Boo and Lim, 2001), whose “International Commercial Arbitration Act”, instead of just adopting the Model Law in its entirety, enacted specific norms and institutions adequate to its own necessities. Likewise, with the aim of attracting the arbitration market, Colombia adopted the Model Law as a bottom base, upon which a particularly pro-arbitration system was built.

But, what is the practical effect of this adoption? A quick comparison between the Arbitration Statute and the Model Law results in “full incorporation” with some significant variations:

- a. International character of arbitration proceedings (SNIA, Art. 62): The Arbitration Statute does not include the internationality criterion provided in article 1.3 (b) (i) of the Model Law, according to which, an arbitration is international if the place of arbitration, determined pursuant to the

arbitration agreement, is situated outside the state in which the parties have their place of business. Moreover, the Arbitration Statute excludes the provision, provided in article 1.3 (c), according to which arbitration is international if “the parties have expressly agreed that the subject matter of arbitration agreement relates to more than one country”. In addition, the Arbitration Statute contains a new internationality criterion, according to which, the arbitration is international if the dispute submitted to arbitration affects the international commerce interests. (SNIA, Art. 62 (c)) (Zuleta, 2013).

- b. International State Arbitrations (SNIA, Art. 62) The Arbitration Statute includes a provision, according to which, neither the state, nor a state-owned enterprise, which is a party to an arbitration agreement, may invoke the provisions of its domestic legislation to avoid participating in the arbitration procedure. (SNIA, article 62) (Zuleta, 2013).
- c. International interpretation (SNIA, Art. 64): International arbitration is no longer subject to national interpretation, and should be oriented to an international, uniformity-directed reading. Law 1563 fully adopted the provisions of article 2 of the Model Law in this respect.
- d. Waiver of the right to object (SNIA, Art. 66): Once again, the Arbitration Statute includes, without any modifications, Model Law Article 4.
- e. Arbitration agreement (SNIA, Art. 69): With regard to the arbitration agreement, Law 1563 has chosen option a) of article 7 of the Model Law, which gives a much wider interpretation to the requirement of writing, which can either be fulfilled by any form of record, including via electronic communications.
- f. Interim measures (SNIA, Arts. 80 to 90): The Arbitration Statute, with some few additions, includes the regime of interim measures provided for in the Model Law. Thus, Law 1563 gives discretionary powers to arbitrators to any interim measure it deems necessary for the preservation not only of the assets, but also of the arbitral proceedings, and the evidence (SNIA, article 80). Furthermore, The Statute regulates, following the Model Law, the procedure for granting such measures (SNIA, article 80), and allows for preliminary orders, which can be issued for even before the formal beginning of the arbitration proceedings (SNIA, arts. 82 and 83). On the other hand, Law 1563 eliminates some conditions provided in the Model

Law for granting interim measures, such as the proof of “the reasonable possibility that the requiring party will succeed of the merits on the claim”. (Model Law, article 17A. 1 (a)).

- g. Conduct of arbitral proceedings (SNIA, Arts. 91 to 100): Law 1563 overcomes the strictness of Decree 1818 in which arbitration was somehow assimilated to a litigation procedure with several mandatory stages including conciliation hearing, request of evidence and decision hearing. Consistent with Cicero’s aphorism “rigorous law is often rigorous injustice”, the new Arbitration Statute clearly provides parties with freedom to choose their procedural rules applicable to their dispute. Broadly speaking, the Arbitration Statute adopts the general provisions contained in The Model Law with regard to the conduct of arbitral proceedings. Thereby, it includes, with minor modifications, the provisions related to equal treatment of parties (SNIA, article 91), determination of rules of procedure (SNIA, article 92), place of arbitration (SNIA, article 93), commencement of arbitral proceedings (SNIA, article 94), language (SNIA, article 95), statement of claim and defense (SNIA, article 96).
- h. Court assistance in taking evidence (SNIA, Art. 100 and GCP Art. 608): Under the Arbitration Statute, as well as under the Model Law, the arbitration tribunal has the support of national courts for evidence taking. The judicial authority, according to the Statute, shall proceed, in this case, as if it were a judicial commission.
- i. Recourse against the award (SNIA, Art. 107 to 110) and refusal to enforcement (Art 111 to 116): Consistent with the Model Law and the 1958 New York Convention the Arbitration Statute contains limited and objective grounds for parties to request the national courts to set aside or refuse the enforcement an arbitral award. This brought to an end the deficiency of the previous legislation, which allowed the parties to apply for annulment of an award on grounds such as lack of evidence, among others. Thereby, Colombian courts may set aside or refuse to enforce an award, for example, if finds that, under Colombian law, the subject-matter of dispute is not capable of settlement by arbitration or the award is contrary to Colombia’s international public policy (SNIA, arts. 108 (2) and 112 (b)). The Statute deals with the parties’ agreement excluding the possibility to set aside an award, which is valid, provided that neither party has

his place of business in Colombia (SNIA, article 107). Nevertheless, a recognition proceeding, in this case, is mandatory. (SNIA, article 111 (3)) (Zuleta, 2013).

Also, now that the enforcement procedure for international awards is designed to be much faster with a short procedure and with request for evidence, one would expect that enforcement before the Supreme Court can be carried out in about a month.

- j. Appointment of arbitrators (SNIA, Art. 73): Law 1563 goes farther than the Model Law as it includes some new rules with regard to the arbitrators' appointment. For instance, the arbitrators, pursuant to the parties agreement, may be or not attorneys (SNIA, article 73 (2)).
- k. Challenge procedure (SNIA, Art. 76): The Arbitration Statute, which adopted the Model Law provisions in this matter, includes some new rules. For instance, it states, in case of only one arbitrator, that the challenge shall be decided by the appointing authority or, in the absence of this, by the judicial authority (SNIA, article 76 (d)).

For greater detail on the similarities and differences between the Arbitration Statute and the Model Law, the reader may refer to the appendix at the end of this paper.

IV. Colombia's Performance assessed in the Light of the Criteria of 'Arbitration-Friendliness'

The government's expectations about the Arbitration Statute are quite high. In his speech on the occasion of the sanction of Law 1563, President Santos stated: "The modern statute that we are promulgating has been considered by many as the state of the art in today's world, and we hope it contributes to the promotion of this institution, making of Colombia a new destination for the resolution of international disputes".

Does Law 1563 live up to those expectations? To answer that question, we must now assess how Colombia's regime scores in the light of the criteria taken into account for determining whether or not a country has a favorable environment for arbitration proceedings.

Reed, who considers favorable legal regulation as “the most important factor” (Reed, 2002, p. 569) at stake when deciding the seat of the arbitration tribunal, suggests five criteria: i) Enforceability of agreement to arbitrate; ii) Interference with proceedings; iii) Finality of the award; iv) Restrictive local requirements; and v) UNCITRAL Model Law (Reed, 2002) (Davis, 2003, pp. 478-479).

- i) Colombia is on the safe side as regards the first criterion (enforceability of agreements to arbitrate). As said above, by and large, Colombian courts enforce both national and international arbitration agreements and show great deference to arbitral decisions. In fact, the General Code of Procedure (CGP, Art. 9, Prg. 1) specifically provides for stay of judicial proceedings at the first stage of the trial when faced with evidence of an arbitration agreement presented as a preliminary objection (*excepción previa*).
- ii) This is also the case with respect to the second criterion (judicial interference). One can see that Colombia strikes “the correct balance between court intervention when support is required (e.g. to protect property, subpoena witnesses) and undesired court interference (e.g. by enjoining arbitral proceedings)” (Reed, 2002, p. 570). As for judicial support, Law 1563 goes as far as giving powers to arbitrators to order interim measures (Bernal, 2013, pp. 503-512) (SNIA, Art. 80-87) or request evidence; orders which the competent judge is required to enforce (SNIA, Arts. 88 and 100; CGP, Art. 608). At the same time, judicial intervention in international arbitration is exceptional, limited to a closed list of activities including appointment of arbitrators in the absence of parties’ agreement, the recognition and enforcement of awards, the request for annulment, and the enforcement of arbitral orders as described above (Zuleta, 2013). Any intervention outside that list is considered undue interference in arbitral proceedings and is therefore illegal (SNIA, Art. 67).
- iii) Regarding the third criterion “it is important that the local courts and legislation respect the finality of the award and give effect to any agreement of the parties to restrict and/or exclude rights of appeal”. Under the previous legislation Colombia did not reach this threshold. Following a strict interpretation of article 116 of the Constitution, arbitrators, including international arbitrators, were considered by the Constitutional Court to be vested with temporary judicial powers (Colombian

Constitutional Court, C-347/97, 1997), and as such, their decisions were subject to judicial control via *exequatur* and *tutela* action. In other words, the arbitration awards, even after being recognized could be subject to challenges on the substance, potentially hindering parties' willingness to submit their disputes to Colombian arbitration.

Law 1563 made every possible effort to avoid this pitfall. First, as shown above, judicial intervention is prohibited "except in the circumstances and for the purposes specifically provided for" in the international arbitration section (SNIA, Art. 68); second, the arbitral tribunal is said to be "the only one" competent to decide on its own jurisdiction (SNIA, Art. 79); third, annulment is proclaimed to be the "the only judicial recourse against an arbitral award" (SNIA, Art. 107); and fourth, recognition of enforcement of foreign arbitral awards is subject to a single procedure against which "no recourse or action of any kind is applicable" (SNIA, Art. 113).

Nevertheless, Art 116 of the Colombian Political Constitution remains unchanged. Given the evident efforts made by the newly issued statute to restrict constitutional challenges, one would expect a new interpretation of the Constitutional Court more respectful of the private autonomy of the parties involved in international arbitration proceedings.

- iv) As to the fourth criterion (restrictive local requirements), Art. 92 of the Arbitration Statute presents a positive outlook. Parties to international commercial arbitration can opt out of the default rules regarding proceeding and substantial applicable law. Moreover, Law 1563 does not require international arbitrators or counsels to be Colombian nationals or registered with Colombian professional cards.
- v) Finally, on the fifth criterion, "some countries should be avoided on the basis that their legislation applicable to international arbitration is simply outdated, unclear, conflicting and difficult to navigate. One shorthand way of ascertaining whether an unfamiliar country has a legislative framework suitable for international arbitration is to check whether that country has adopted the UNCITRAL Model Law on International Arbitration" (Reed, 2002, p. 571). This is perhaps Colombia's most important recent accomplishment. In fact, Colombia's inclusion in the list of Model Law countries will allegedly boost investor's confidence in the juridical security of the country and will attract the desired foreign arbitration proceedings.

The balance is quite straightforward: Colombia should now be regarded as a more desirable venue for international arbitration proceedings. Indeed, “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” (Strong, 2011, p. 105).

V. Proposals Beyond Law 1563 to Promote International Arbitration

So far, we have made palpable that the arbitration Statute is a first –enormous– step for considering Colombia as an arbitration-friendly venue. However, the adoption of the Model Law alone is insufficient to turn Colombia into the “venue of choice” of Latin America. The reason for that is simple: though uniformity is plausible; it does not give room for competitive differentiation. How so? “If arbitration laws are truly interchangeable, which one applies becomes irrelevant. In this sense, the impact of individual national laws decreases” (Kaufmann-Kohler, 2002, p. 1321).

Furthermore, as STRONG pointed out when the Arbitration Statute was nothing but a project, “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. The substantive benefits are not quite as clear (...)” (Strong, 2011, pp. 106-107).

Consequently, in order to present Colombia as a venue of choice, the Arbitration Statute should not be interchangeable with other Model Law countries, like Peru, one of the best regarded in the region (Council of American Enterprises; Colombian American Chamber of Commerce, 2011, p. 19). On the contrary, it should have enough advantages, as to have a positive impact in parties’ choice.

To begin with, the implementation of Law 1563 ought to be accompanied by additional efforts and resources from the government and the arbitration institutions to promote international arbitration. The following measures could be contemplated in this regard:

- a. Advertising and education: International and national campaigns, principally targeted to lawyers and judges, should take place with the purpose of creating awareness of Law 1563 and its inherent advantages (Talpis, 2006, p. 415).

For instance, making an effort to develop scholarly research about the statute in English would reach a wider audience of arbitration practitioners interested in finding out about Colombia's newly issued legislation.

- b. Adoption of online, fast-track proceedings for low-value claims on international e-commerce: The wide-ranging freedom granted to parties to choose their procedural rules in international arbitration, along with the use of new technologies, opens up endless possibilities for online mechanisms providing a low-cost and expedite solution to international contract disputes, including those deriving from e-commerce.

Building upon the works of UNCITRAL Group III on Online Dispute Resolution, Colombia may very well be the seat of fast-track international arbitrations where parties make their statements on an online format with their evidence presented as attached files. In this procedure, the arbitrator should decide immediately, in a term no longer than two weeks, with no mandatory hearings or further request evidence.

As a long-term objective, once the advantages and drawbacks of Law 1563 are put to the test in real cases, further a blunter legal reform could be pursued. Below are some ideas for future legal improvement:

- a. Special courts for arbitration matters: A first suggestion is "to have special courts handle the various motions and procedures involving arbitration, especially for commercial matters" (Talpis, 2006, p. 414). Currently, these matters are dealt with by the overburdened and slow civil judges, administrative judges, the Civil Chamber of the Supreme Court and the State Council (*Consejo de Estado*). Fast courts for dealing with arbitration issues are deemed beneficial.
- b. Definition of "Colombian International Public Order": According to Law 1563, the violation of the international public order of Colombia is a ground for annulment (SNIA, Art. 108.2 (b)) and setting aside (SNIA, Art. 112(b) (ii)) of international arbitration awards. In order to avoid any judicial interpretation of this intrinsically ambiguous expression that could hinder arbitration (Zimbabwe Supreme Court, 1999), it would be useful to define the ground of public policy as involving a clear violation of international public morals, including for example issues like children pornography, and the white slave-trade.

- c. Regulation regarding inclusion of non-signatory parties: Arbitral proceedings would benefit from additional certainty through statutory reception of the jurisprudential criteria for inclusion of non-signatory parties, i.e., incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel.
- d. Immunity of arbitrators: Current regulations subject arbitrators to the same disciplinary regime as judges. Immunity would be an incentive to both the parties and the arbitrators to participate in proceedings conducted in Colombia.
- e. Extension of time bar or statutory limitation: The current bar of 2 to 5 years to initiate action should be extended. If parties are aware that they are going to have more time to file their claims, they may be encouraged to choose Colombia as their arbitration venue.
- f. Tribunal's power to investigate depending on the parties: As is the case with civil law countries, the Statute currently provides for a mandatory inquisitorial process, where the arbitration tribunal has similar powers as the judge to obtain evidence. It should be up to the parties to determine whether the tribunal assumes an accusatory rather than an inquisitorial approach in the gathering of evidence.
- g. Subpoena powers in evidence-gathering: Arbitrators should be granted the power to impose fines on reluctant witnesses or parties in order to compel attendance.
- h. Enforceability of arbitral awards based on *lex mercatoria* and UNIDROIT: Specific provisions should be made mandating national courts to enforce arbitral awards based on *lex mercatoria* and UNIDROIT. Courts should not be allowed to refuse enforcement by submitting that the substantial law applicable does not belong to any State.
- i. Reliefs and remedies as appropriate: Arbitrators should be provided with broad powers to grant remedies as demanded by the circumstances of the case. These remedies should not be limited to the ones prescribed by the Civil Code.
- j. Contracting out of review for Colombian parties: Colombian parties should be allowed to agree that their arbitration award would be exempt from annulment or any other judicial review. This should no longer be a benefit limited to foreign parties (SNIA, Art. 107).
- k. Adoption of the IBA Guidelines on Conflicts of Interests in international Arbitration: In order to promote uniformity in the field, the IBA guidelines

on conflicts of interests should be adopted for international arbitrations conducted in Colombia.

- l. Fixed arbitration fees: Extremely high fees may be a deterrent to arbitration. In Colombia, Decree 1829 of 2013 has endorsed a system of fixed, relatively low fees based on the lump sum in dispute for national arbitration dispute. This capped-fee system could be applied by analogy by Colombian arbitration centers to international arbitration proceedings in order to make them more attractive in terms of costs.
- m. Constitutional reform: Lastly a constitutional reform should be implemented in order to immunize international arbitral awards from undue interference by the courts. This could be achieved through the express prohibition of *tutela* challenges against international arbitral awards (Talpis, 2006, p. 413).

VI. Towards a Solid, Efficient and Arbitration-Friendly System in Colombia (Conclusions)

In the quest for competitiveness, it is clear that international commercial arbitration is not a field which Colombia, or any country, can afford to neglect (Mustill, 1986, p. 54). Legal reform is not only desirable, but fundamental for that matter.

We have endeavored to demonstrate that Colombia is on the right track for achieving a solid, efficient and arbitration-friendly legislation. With the 2012 Arbitration Statute, Colombia repealed the discordant and confusing provisions of Decree 1818 of 1998 and adopted the Model Law while improving its contents so as to guarantee greater legal certainty for the international business community. We sincerely hope that the innovations brought up by the Arbitration Statute turn Colombia into a more attractive arbitration venue for non-Colombian parties.

Nonetheless, knowing that there is room for improvement beyond the Model Law, we have intended to come up with some ideas to promote the effectiveness of the arbitration proceedings in the country. Advertising campaigns, online arbitration procedures and further legal reform are all on the table.

“Colombia has played an important role among Latin American countries in the rehabilitation of international commercial arbitration and in the Latin American movement toward the acceptance of supranational dispute resolution mechanisms” (Schultz, 1998, p. 300); now the time has come for Colombia to play the leading role as a venue for international commercial arbitration in the region.

Appendix

Comparative Chart between the Arbitration Statute and the UNCITRAL Model Law

Subject	Full Incorporation	Model Law Minus	Model Law Plus
<p>Scope of application (Art. 62 law 1563 of 2012)</p>	<p>Art. 1 (3) a) UNCITRAL Model law Art. 1 (3) b) (ii) UNCITRAL Model law</p>	<ul style="list-style-type: none"> • Colombian law does not include the nationality criterion provided for in Art. 1(3) c) of the UN Model law, according to which arbitration is international if <i>"the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country"</i>. • Colombian law does not include the nationality criterion provided in the Art. 1 (3) a) (i) UNCITRAL Model law, according to which, the arbitration is international if the place of arbitration, determined pursuant to the arbitration agreement, is situated outside the state in which the parties have their place of business. 	<p>Colombian law states a new internationality criterion, according to which, the arbitration is international if the dispute submitted to arbitration affects the international commerce interests (Art. 62 (c) law 1563 of 2012).</p>
<p>Plurality of place of business (Art. 62 law 1563 of 2012)</p> <p>International arbitration with public entities (Art. Law 1563 of 2012)</p>	<p>Art. 1(4) UNCITRAL Model law</p>		<p>Colombian law includes a provision, according to which, neither the state, nor a state-owned enterprise nor an organization controlled by the state, which is part in the arbitration agreement, may invoke his own right for challenge his ability for being part in the arbitration procedure or the arbitrability of a dispute covered by the arbitration agreement. (Art. 62 law 1563 of 2012).</p>

Subject	Full Incorporation	Model Law Minus	Model Law Plus
Definitions (Arts. 63 and 64 law 1563 of 2012)	Art. 2 UNCITRAL Model law		
Receipt of written communications (Art. 65 law 1563 of 2012)	Art. 3 UNCITRAL Model law		Colombian law states a regulation for the communications made by electronic means. (Art. 63 (b) law 1563 of 2012).
Waiver of right to object (Art. 66 law 1563 of 2012)	Art. 4 UNCITRAL Model law		
Extent of court intervention (Art. 67 law 1563 of 2012)	Art. 5 UNCITRAL Model law		
Arbitration agreement (Art. 69 law 1563 of 2012)	Art. 7 (option 1) UNCITRAL Model law		
Arbitration agreement and substantive claim before court (Art. 70 law 1563 of 2012)	Art. 8 (1) UNCITRAL Model law		Colombian law also includes the provision provided in Art. 8 (2) UNCITRAL Model law, nevertheless, it modifies some expression. Thus, <i>“where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, even (while, according to UNCITRAL Model law), the issue is pending before the court”</i> . (Art. 70 law 1563 of 2012). Which is not clear, with regard to the terminological change made by the Colombian law, is which are the consequences when the issue is pending before the court.
Arbitration agreement and interim measures by court (Art. 71 law 1563 of 2012)	Art. 9 UNCITRAL Model law		
Number of arbitrators (Art. 72 law 1563 of 2012)	Art. 10 UNCITRAL Model law		Colombian law, unlike the UNCITRAL Model law, indicates that the arbitrators' number should be, in any case, odd.

Subject	Full Incorporation	Model Law Minus	Model Law Plus
Appointment of arbitrators (Art. 73 law 1563 of 2012)	Art. 11 UNCITRAL Model law		<p>Colombian law includes, with this respect, some few modifications:</p> <ul style="list-style-type: none"> • The arbitrators, pursuant to the parties' agreement, may be or not attorneys. (Art. 73 (2) law 1563 of 2012). • It is not necessary, to represent the parties before the arbitral tribunal, to be licensed in the arbitration place or having such nationality. (Art. 73 (3) law 1563 of 2012). • According to Colombian law, the decisions, which are entrusted to the judicial authority by the paragraphs 5, 6 or 7 of Art. 73, shall not be subject to any recourse. Such decisions, according to the UNCITRAL Model law, shall be subject to no appeal and, by this way, may be subject to other resources. The Colombian source, thereby, is more restrictive.
Appointment of arbitrators in cases of plurality of parties (Art. 74 law 1563 of 2012)	Art. 10 UNCITRAL arbitration rules		
Grounds for challenge (Art. 75 law 1563 of 2012)	Art. 12 UNCITRAL Model law		

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Subject	Full Incorporation	Model Law Minus	Model Law Plus
<p>Challenge procedure (Art. 76 law 1563 of 2012)</p>	<p>Art. 13 UNCITRAL Model law</p>	<ul style="list-style-type: none"> The law does not include a time limit within a party, who intends to challenge an arbitrator, shall send a written statement of the reasons of the challenge. The UNCITRAL Model law, on the other hand, sets out a time limit of fifteen days. 	<p>Colombian law states, beyond the UNCITRAL Model law, some modifications in this regard:</p> <ul style="list-style-type: none"> Colombian law states, in case of only one arbitrator, that the challenge shall be decided by the appointing authority or, in the absence of this, by the judicial authority. The UNCITRAL Model law, meanwhile, does not deal with this issue. (Art. 76 (d) law 1563 of 2012). The law provides, in case of more than one arbitrator, that the other ones must decide by absolute majority. It also includes, unlike the UNCITRAL Model law, a clear solution in case of draw. (Art. 76 (d) law 1563 of 2012). Colombian law deals with the issue of challenges, for the same cause, to more than one arbitrator. (Art. 76 (d) law 1563 of 2012). The law provides, when a challenge is not successful, then the challenging party may refuse the decision through the annulment recourse against the award (Art. 77 (5) law 1563 of 2012). The UNCITRAL Model law, meanwhile, states that <i>"the challenge party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal"</i>.

Subject	Full Incorporation	Model Law Minus	Model Law Plus
Failure or impossibility to act (Art. 77 law 1563 of 2012)	Art. 14 UNCITRAL Model law		
Appointment of substitute arbitrator (Art. 78 law 1563 of 2012)	Art. 15 UNCITRAL Model law		
Competence-Competence (Art. 79 law 1563 of 2012)	Art. 16 (1) UNCITRAL Model law		<p>1. The Art. 79 law 1563 of 2012 includes a wide approach to the Competence-competence principle. Indeed, the article allows the tribunal rule on its own jurisdiction, including any objections with respect to:</p> <ul style="list-style-type: none"> • The existence, validity and inefficacy of the arbitration agreement; • Arbitrability of the dispute; • Prescription, expiration, res judicata and any other which seeks to prevent the arbitral procedure. (Art. 79 par. 2). <p>2. The Art. 79 par. 6 allow any part to request the annulment of the award whereby the arbitral tribunal declines his own jurisdiction. (Model law, instead, provides this recourse only if the arbitral tribunal rules as a preliminary question that it has jurisdiction).</p> <p>3. The Art. 79 par. 7 deals with the case in which the arbitral tribunal rules, as a preliminary question, that it hasn't jurisdiction over certain matters.</p>

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Subject	Full Incorporation	Model Law Minus	Model Law Plus
Autonomy of the arbitration agreement (Art. 79 law 1563 of 2012)	Art. 16 UNCITRAL Model law		The Art. 79 include a wide approach to the autonomy of the arbitration agreement principle. The article allows the arbitral tribunal decides the dispute, though the existence, validity or efficacy of the contract that contains the arbitral agreement is in doubt.
Power of arbitral tribunal to order interim measures (Art. 80 law 1563 of 2012)	Art. 17 UNCITRAL Model law		
Conditions for granting interim measures (Art. 81 law 1563 of 2012)	Art. 17 a) UNCITRAL Model law	The Colombian law exempts the parties to prove some facts that constitute, in the UNCITRAL Model law, conditions for granting interim measures. (For example, the <i>"reasonable possibility that the requiring party will succeed on the merits of the claim"</i>).	
Applications for preliminary orders and conditions for granting preliminary orders (Art. 82 law 1563 of 2012)	Art. 17 b) UNCITRAL Model law		
Specific regime for preliminary orders (Art. 83 law 1563 of 2012)	Art. 17 c) UNCITRAL Model law		The preliminary order, according to the Colombia law, expires after thirty (30) days from the day on which it was issued by the tribunal. (The preliminary order, according to UNCITRAL Model Law, expires after twenty (20) days).
Modification, suspension and termination of preliminary orders (Art. 84 law 1563 of 2012)	Art. 17 d) UNCITRAL Model law		
Provision of security for a preliminary order (Art. 85 law 1563 of 2012)	Art. 17 e) UNCITRAL Model law		

Subject	Full Incorporation	Model Law Minus	Model Law Plus
Disclosure of information for a preliminary order (Art. 86 law 1563 of 2012)	Art. 17 f) UNCITRAL Model law		
Cost and damages caused by the measure (Art. 87 law 1563 of 2012)	Art. 17 g) UNCITRAL Model law	Colombian law eliminates the condition according which the arbitral tribunal has to determine that, in the circumstances, the measure or the order should not have been granted.	Colombian law, on the other hand, includes, in this case, a fault-based liability.
Recognition and enforcement of interim measures (Art. 89 law 1563 of 2012)	Art. 17 h) UNCITRAL Model law		
Ground for refusing recognition or enforcement of an interim measure (Art. 89 law 1563 of 2012)	Art. 17 i) UNCITRAL Model law	Colombian law excludes the provision, according to which, the tribunal may refuse the recognition or enforcement of a interim measure if finds that <i>"the interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance"</i> (Art. 17 i) b (i) UNCITRAL model law)	Colombian law includes, as a condition for refusing recognition or enforcement of an interim measure that the aggrieved party has been invoked the refusal circumstances against the arbitral tribunal.
Court-ordered interim measures (Art. 90 law 1563 of 2012)	Art. 17 j) UNCITRAL Model law		

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Subject	Full Incorporation	Model Law Minus	Model Law Plus
Conduct of arbitral proceedings (Arts. 91 to 100 law 1563 of 2012)	<ul style="list-style-type: none"> • Art. 18 UNCITRAL Model law (Equal treatment of parties) • Art. 19 UNCITRAL Model law (determination of rules of procedure) • Art. 20 UNCITRAL Model law (place of arbitration) • Art. 21 UNCITRAL Model law. (Commencement of arbitral proceedings) • Art. 22 UNCITRAL Model law (language) • Art. 23 UNCITRAL Model law (statement of claim and defence) • Art. 24 UNCITRAL Model law (hearings and written proceedings) • Art. 25 UNCITRAL Model Law (default of a party) • Art. 26 UNCITRAL Model law (expert appointed by the arbitral tribunal) • Art. 27 UNCITRAL Model law (court assistance in taking evidence) 		Colombian law includes, with regard to the conduct of arbitral proceedings, some few modifications: <ul style="list-style-type: none"> • In case of failing parties' agreement on the procedure to be followed, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, case in which, according to Colombian law, the arbitral tribunal may not consider the local rules of procedure. (Art. 92 par. 2 law 1563 of 2012). • Colombian court, in case of assistance in taking evidence, has to proceed like in the case of judicial commission.

Subject	Full Incorporation	Model Law Minus	Model Law Plus
Rules applicable to substance of dispute (Art. 101 law 1563 of 2012)	Art. 28 UNCITRAL Model law	Colombian law does not include, unlike de UNCITRAL Model law, the possibility of the parties' agreement by which the arbitral tribunal may decide as <i>amiable compositeur</i> .	
Decision making by panel of arbitrators (Art. 102 law 1563 of 2012)	Art. 29 UNCITRAL Model law		Colombian law sets out, like the UNCITRAL Model law, that in arbitral proceedings with more than one arbitrator, any decision of the tribunal shall be made, unless otherwise agreed by the parties, by majority of all its members. Nevertheless, Colombian law, unlike model law, relies on the presiding arbitrator decision in case of lack of absolute majority. (Art. 102 law 1563 of 2012).
Settlement by the parties (Art. 103 law 1563 of 2012)	Art. 30 UNCITRAL Model law		
Form and contents of award (Art. 104 law 1563 of 2012)	Art. 31 UNCITRAL Model law		<p>Colombian law provides, in this respect, some modifications:</p> <ul style="list-style-type: none"> • The law provides, with regard to proceedings with more than one arbitrator, that the signature of presiding arbitrator shall suffice. Moreover, the law stresses that the lack of some signature does not entails the award's invalidity. (Art. 104 (1) law 1563 of 2012). • In cases where parties have agreed that no reasons are to be given by the arbitral tribunal, the Colombian law requires, unlike the model law, that neither party have their place of business in Colombian land. (Art. 104 (2) law 1563 of 2012).

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Subject	Full Incorporation	Model Law Minus	Model Law Plus
Termination of proceedings (Art. 105 law 1563 of 2012)	Art. 31 UNCITRAL Model law	<ul style="list-style-type: none"> Colombian law, unlike the UNCITRAL Model law, does not include, as an event of termination of the arbitral tribunal mandate, the one provided in the Art. 34 (4) UNCITRAL Model law. Thus, the law does not deal with the case in which <i>"the court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds or setting aside"</i>. 	<p>Colombian law provides, in this respect, some modifications:</p> <ul style="list-style-type: none"> The arbitral proceedings are terminated, according to Colombian law, by the final award or- and this is new- by the decision resolving a request to correct or interpret the award or, if it's the case, by the additional award. (Art. 105 (1) law 1563 of 2012).
Correction and interpretation of award (Art. 106 law 1563 of 2012)	Art. 33 UNCITRAL Model law		

Subject	Full Incorporation	Model Law Minus	Model Law Plus
<p>Recourse against arbitral awards (Arts. 107 to 110 law 1563 of 2012)</p>	<p>Art. 34 UNCITRAL Model law</p>		<p>Colombian law includes some modifications:</p> <ul style="list-style-type: none"> • When asked to set aside an award, the Court cannot consider the merits of the dispute or the evidentiary assessments made by the arbitral tribunal. (Art. 107 law 1563 of 2012). • The law deals with the parties' agreement excluding the possibility to set aside the award, which is valid provided that neither party has his place of business in Colombia. (Art. 107 par. 2 law 1563 of 2012). • An application for setting aside, according to Colombian law, may not be made after one month have elapsed from the date on the party making that application had received the award. This term, in the UNCITRAL Model law, reaches the three months. (Art. 109 (1) law 1562 of 2012). • The law includes, in three cases, the possibility of outright rejection of an application for setting aside an award. (Art. 109 (2)). • Colombian law, finally, regulates the annulment procedure against the local court (Art. 109 (3) law 1563 of 2012) and the consequences of setting aside an award (Art. 110 law 1563 of 2012).

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Subject	Full Incorporation	Model Law Minus	Model Law Plus
<p>Recognition and enforcement of awards (Arts. 111 to 116 law 1563 of 2012)</p>	<p>Art. 35 UNCITRAL Model law (Recognition and enforcement) Art. 36 UNCITRAL Model law (grounds for refusing recognition or enforcement)</p>		<p>Colombian law provides, in this regard, certain modifications:</p> <ul style="list-style-type: none"> • The international awards, adopted in Colombian land, are considered local awards and, therefore, need not be recognized as binding by the local courts. (Art. 111 (2)). Internationals awards, not adopted in Colombia, shall be recognized as binding by the local courts. (Art. 111 (3) law 1563 of 2012). • Colombian law, unlike the UNCITRAL Model law, includes some provisions about the recognition procedure and the rules applicable to the recognition. (Arts. 113 to 114 law 1563 of 2012).

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