

U.S. EMBASSY – BOGOTA, COLOMBIA  
COUNCIL OF AMERICAN ENTERPRISES  
COLOMBIAN AMERICAN CHAMBER OF COMMERCE  
PRESENT:

# AN OVERVIEW OF ARBITRATION IN COLOMBIA FOR U.S. COMPANIES

May 2011

The purpose of this guide is to make U.S. companies aware of the legal and institutional issues that result in a different treatment of arbitration cases in Colombia compared to other countries.



## Table of Contents

Executive Summary .....	3
Chapter 1: General Features of Arbitration in Colombia.....	4
Chapter 2: Arbitration with State and Private Entities.....	6
Chapter 3: Enforcement .....	12
Chapter 4: Other Issues .....	14
Chapter 5: Attempts to Amend Arbitration Legislation in Colombia...	15
Chapter 6: Advantages and Drawbacks of Arbitration in Colombia....	16
Chapter 7: Local Experts.....	18
Chapter 8: Colombian Arbitration v. Arbitration in Latin America.....	19
Annexes.....	23

## Executive Summary

Arbitration is a form of -dispute resolution. In Colombia, it is voluntary -and binding . It is an accepted legal practice designed for use outside a country's court system. In theory, arbitration is more specialized than ordinary justice and should move cases more expeditiously, features which especially benefit small and medium sized enterprises who have limited resources and international contract negotiation experience. Arbitration is commonly used to resolve commercial disputes, particularly those related to international business transactions. Other forms of dispute resolution include mediation and conciliation, which are forms of settlement negotiation facilitated by a neutral third party, and non-binding resolution by experts, among others.

In Colombia, arbitration is an accepted practice. The purpose of this guide is to make U.S. companies aware of the legal and institutional issues that result in a different treatment of arbitration cases in Colombia compared to the treatment received in other countries. The Bogotá Chamber of Commerce (*Cámara de Comercio de Bogotá* ) is the principal organization that manages arbitration cases. Both private and public sector cases are usually processed through this organization.

While the U.S. government can provide companies with information to help them navigate Colombia's legal system, it cannot provide legal advice or advocate on a company's behalf during arbitration proceedings. Companies should consider hiring local counsel to protect their rights before, during and after the arbitration proceedings. Companies should also consider including an arbitration clause in public or private contracts in the event that a dispute may arise.

This guide is not an exhaustive analysis of the arbitration process in Colombia. It is merely a summary of the relevant legal and institutional matters governing arbitration in Colombia that will provide basic information to assist U.S. companies in managing business decisions, dispute resolution planning and the dispute resolution itself. The annex also includes charts for clarification purposes.

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## Chapter 1 General Features of Arbitration in Colombia

The Colombian constitution and legal mechanisms recognize domestic and international arbitration<sup>1</sup>. The highest courts of law have regarded arbitration as a rigid and public method for the settlement of disputes, similar to judicial litigation<sup>2</sup>. This means that arbitrators are considered to be temporary judges, arbitration proceedings are seen as a method of justice administration, awards are deemed to be judicial decisions and there are no special confidentiality requirements applicable to the proceedings as such. Most arbitrations are conducted in Spanish.

Colombia is a party to international treaties on international commercial and investment arbitration. Colombia has adopted, among others:

- the New York Convention of 1958<sup>3</sup> on the recognition and enforcement of foreign arbitration awards
- the Inter-American Convention of 1975 on International Commercial Arbitration (the Panama Convention)<sup>4</sup>
- the Washington Convention of 1965, which created the International Center for the Settlement of Investment Disputes (ICSID) or *CIADI in Spanish*.<sup>5</sup>

In recent years, Colombia has become a party to several free trade agreements (FTAs) and multilateral and bilateral investment treaties (BITs). These treaties provide for international arbitration if an investment dispute arises between an investor and the State. This usually happens when the State breaches a standard of investment protection in the text of the treaty.

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<sup>1</sup> The basic rules applicable to arbitration, may be summarized as follows: Colombian Constitution, Article 116; Law 23 of 1991; Law 446 of 1998; Decree 2279 of 1989; Decree 1818 of 1998; Law 1285 of 2009, which amends Law 270 of 1996; and Law 315 of 1996—this is the Law of international arbitration in Colombia-.

<sup>2</sup> See: Supreme Court of Justice. Decisions of October 27, 1977 and of March 21, 1991.

<sup>3</sup> Law 39 of 1990.

<sup>4</sup> Law 44 of 1986.

<sup>5</sup> Law 267 of 1995.

Colombia recognizes ad-hoc, institutional and the denominated legal arbitration. In accordance with Colombian law, ad-hoc arbitrations are tailor-made proceedings, where the parties agree on a set of rules specifically addressing the unique facts of their case. Institutional arbitrations take place when the parties agree to subject their proceedings to the rules and administrative services of an arbitration center. Legal arbitrations take place when the parties do not or cannot choose ad-hoc or institutional arbitrations, as may occur with State contracts. Due to a highly procedural legal framework, ad-hoc arbitration is rarely used and there is no possibility of having tailor-made proceedings between private parties and the State or its entities within State contract disputes.<sup>6</sup>

Institutional arbitration is the leading type of arbitration in Colombia. The majority of processes are carried out in the Center of Arbitration and Conciliation (*Centro de Arbitraje y Conciliación*) at the Chamber of Commerce in Bogotá, the lead arbitration body in Colombia. The Center has rules laid out for arbitration proceedings, including those involving micro and small and medium-sized enterprises (SMEs). The Chamber of Commerce of Bogotá, through the Center, provides guidance to arbitration centers established in regional chambers of commerce. It is a common and legal business practice in Colombia to designate these centers as the arbitration entity in the event of disputes, effectively granting the Chamber of Commerce of Bogotá and its regional chambers, a legal monopoly over arbitration processes in Colombia. There is no arbitration center at the Colombian-American Chamber of Commerce (AmCham) in Bogota or its six branches. However, there are other arbitration centers, such as the Center of Conciliation and Business Arbitration (*Centro de Conciliación y Arbitraje Empresarial*) of the Superintendency of Corporations (*Superintendencia de Sociedades*) and the Center of Conciliation, Amiable Composition and Arbitration (*Centro de Conciliación, Amigable Composición y Arbitraje*) of the Colombian Society of Engineers (*Sociedad Colombiana de Ingenieros*), among others.

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<sup>6</sup>Following article 6 of Law 1285 of 2009, legal arbitration is the only type of domestic arbitration available between private parties and the Colombian State or its entities. The Constitutional Court has stated that this restriction is justified. In its opinion, “public interests” of the State demand that the Congress, and not the parties, should be the one to establish regulation of arbitration between the State or its entities and the private parties: Decision C-713 of 2008.

Colombian arbitration legislation is referenced within many different legal documents in four key institutions: the Supreme Court of Justice – Civil Chamber (*Sala Civil*), the Constitutional Court, the Attorney General’s Office (*Procuraduría General de la Nación*) and the Council of State –Third Section (*Sección Tercera, Consejo de Estado*). Attempts to modernize and consolidate the legislation have been unsuccessful to date. A fourth attempt to reform Colombian Arbitration law is being undertaken by the Chamber of Commerce in Bogotá. If successful, this new legislation would help to unify existing legislation and remove this current market access barrier.

A crucial issue is that Colombian law contains methods to challenge an arbitration decision. Specifically, Colombian laws and Constitutional case law have created uncertainty as to the final and binding effects of arbitration judgments and awards. Generally speaking, arbitration decisions rendered in Colombia may be subject to annulment by local courts. Procedural errors (*errors in procedendo*) are the only basis for annulment. Substantive mistakes (*errors in iudicando*) cannot serve as the basis for annulment. The same annulment grounds apply to arbitrations between private parties and those between State entities and private parties.<sup>7</sup> However, the Public oversight authorities, such as the Attorney General’s Office and the Fiscal Auditor’s Office (*Contraloría General de la República*), have a strong influence in arbitration cases between State entities and private parties which has affected the outcome of cases.

## **Chapter 2 Key Aspects of Arbitration with State and Private Entities**

The arbitration process between private parties and between private parties and the State has different features in Colombia.

### **2.1 Arbitration between private parties**

There is a sound and stable process governing arbitration between private parties. Also, there is a reasonable degree of expertise<sup>8</sup> and specialization in

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<sup>7</sup> Article 163 of Decree 1818 of 1998 theoretically unified the legislation pertaining to the annulment of arbitration decisions for private parties and private vs. State entities. In reality, this unification took place with Law 1150 of 2007, which amended the regime of State contracts in Colombia.

<sup>8</sup> Arbitration has involved the telecommunications, banking, insurance, distribution, oil and gas, concessions and infrastructure sectors, among others. A list of Colombian arbitration experts is included in Chapter 8.

handling arbitration proceedings, including the generation of case law available for businesses and advisors to consult for business planning and dispute resolution purposes.

The Supreme Court of Justice is the competent authority for recognizing and enforcing foreign arbitration awards. Annulment of arbitration awards may be sought before civil courts of law called *Tribunales Superiores de Distrito Judicial*. These courts are hierarchically beneath the Supreme Court of Justice, which is the highest court in criminal, labor, civil and commercial matters.

One of the most controversial issues in Colombian arbitration deals with the characterization of a business transaction as a commercial agency agreement, since Colombian law protects commercial agents upon contractual termination.<sup>9</sup> Judicial and arbitration case law has developed criteria<sup>10</sup> to distinguish commercial agency agreements from other commercial -schemes (i.e. distribution agreements). However, this controversy has yet to be resolved.

A recent debate has occurred about the possibility of resolving an international arbitration dispute, under foreign law, when the underlying commercial agency contract is performed in Colombia. On one hand, the Colombian commercial code, intending to protect the agents' interests, states that an agreement with foreign law applicable to the transaction is not valid when the agreement is performed in Colombia.<sup>11</sup> On the other hand, international arbitration allows the parties to choose a foreign law to apply to their respective contract. Thus, the debate revolves around whether this is a lawful conduit for "avoiding" Colombian law and whether the Supreme Court would uphold an international arbitration award for a commercial agency transaction performed in Colombia. Documented Colombian cases are scarce on this issue, but in the past the Supreme Court of Justice has adopted a reserved attitude towards public policy as a bar to enforce foreign decisions<sup>12</sup>, increasing the likelihood of this

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<sup>9</sup> Article 1324 of the Commercial Code.

<sup>10</sup> See Supreme Court of Justice. Decisions of December 2, 1980 and of October 31, 1995, among others. Chamber of Commerce of Bogotá. Arbitration Awards: Prebel S.A. v. L'Oreal, May 23, 1997; Supercar v. Sofasa, March 31, 1998; Compañía Central de Seguros S.A. y Compañía Central de Seguros de Vida S.A. v. Maalula, August 31, 2000; and Avalnet Comunicaciones Ltda. v. Avantel S.A., July 24, 2003, among many others.

<sup>11</sup> Article 1328 of the Commercial Code.

<sup>12</sup> Supreme Court of Justice. Decision of August 6, 2004. A Portuguese tribunal, applying Portuguese law, decided that the Colombian party had breached a commercial contract and, therefore, that it should compensate the Portuguese plaintiff. The interest rates applied by the foreign tribunal were lawful under Portuguese law, but exceeded the interest

enforcement in commercial agency cases.

This issue will be problematic for both the Colombian government and Colombian companies in the future with respect to meeting obligations set forth in Free Trade Agreements and Bilateral Investment Treaties. The U.S. - Colombia Trade Promotion Agreement (CTPA) eliminates the special protections for commercial agents within six months of entry into force of the US-CTPA<sup>13</sup>. The U.S. Department of Commerce office in Colombia (U.S. Commercial Service) recommends that companies seek expert legal advice from the outset of contractual negotiations of commercial distribution schemes –such as commercial agency agreements- with Colombian parties.

## 2.2 Arbitration with State entities

The arbitration process between private parties and Colombian government entities (referred to as the “State”) is problematic when compared to other regimes in the region and abroad. The State contracts regime does not exclude arbitration between private parties and State entities. On the contrary, it encourages arbitration and other methods of dispute resolution different from litigation before the judicial courts. Yet case law, produced by the highest Colombian courts, has created barriers and limitations to arbitration. The two main limitations relate to:

- the ability to submit a dispute to an arbitration process –arbitrability-; and
- challenges to arbitration awards under constitutional grounds.

Furthermore, U.S. companies have reported State entities rejecting their request to insert arbitration clauses into contracts.

As to the first limitation, case law has determined that the discussion about the legality of the exceptional powers (*potestades excepcionales*) of the State is not subject to arbitration, because they are linked to public policy issues and State

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rate limits contained in Colombian commercial law. When the Portuguese entity decided to seek the enforcement of the decision in Colombia, the Colombian party invoked the breach of public policy, that is to say, the breach of the interest rate limits contained in Colombian law. The Supreme Court, adopting a restrictive approach to public policy rules, enforced the decision. It could be said that the Court applied the notion of international public policy in this case.

<sup>13</sup> Colombia-US FTA, Annex 11-E

sovereignty<sup>14</sup>. These powers are contractual mechanisms given to State entities in order to best ensure the performance of State contracts and to satisfy public interests.<sup>15</sup> They are designed to be exceptional tools. This means that State entities cannot evoke these powers routinely and can only use them in specific types of State contracts.

The mentioned case law has erected significant barriers to arbitration in State contracts, not only because many contractual disputes arise from the application of these powers, but also because many public entities have exercised this authority when facing the threat of an arbitration claim by a private party related to contractual performance in order to avoid arbitration.

Since Colombia has become party to FTAs and multilateral and bilateral investment treaties, the number of international investment arbitration cases between investors and State entities will increase. These arbitration processes may help to change Colombian case law because FTAs, BITs and multilateral investment treaties empower arbitration tribunals to decide cases related to breach of treaty standards of investment protection. As these investment treaties have a broad definition of standards, accordingly, the exercise of an exceptional power under a State contract may be regarded as a breach of a treaty standard, permitting resolution of the dispute under international investment arbitration regimes.

As to the second limitation, challenges to awards and arbitration decisions have been increasingly filed by means of a constitutionally-authorized complaint (*acción de tutela*) created to protect fundamental or human rights. These complaints may be entered by a private individual, by a private company or by a State entity involved in the arbitration. The Constitutional Court has reviewed arbitration awards for State contractual disputes, despite the existence of annulment proceedings before the Council of State and the prohibition of

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<sup>14</sup> Constitutional Court. Decisions C-1436 of 2000 and SU-174 of 2007, among others; Council of State. Decisions of February 23, 2000 June 8, 2000 and June 10, 2009, among others.

<sup>15</sup> Examples of these powers include (i.) the unilateral construction of the contract, (ii.) the unilateral modification of the contract, (iii.) the unilateral termination of the contract, (iv.) contract expiration (*caducidad*) and (v.) the reversion clause within public concession projects. The strongest power is expiration of the contract; it not only brings the contract to an end, but also generates serious economic and legal consequences to the private contractor (i.e. its inability to execute State contracts for five (5) years following the application of the contractual expiration – *caducidad*-). This power is exercised when the State entity considers that the breach of contract, by the private contractor, has a direct and serious impact on the contractual performance, reflecting its possible stoppage.

reviewing substantive errors committed by the arbitrators.<sup>16</sup> This increases the likelihood of parallel and/or conflicting decisions over the same issues.

The basis for Constitutional Court review is that arbitration awards, having the same legal status of judicial decisions, may be subject to constitutional control if :

- they reflect a manifest disregard of the Law, (*vía de hecho*); and
- there has been a breach of a fundamental right, such as due process<sup>17</sup>.

Constitutional case law has broadly applied the concept of *vía de hecho* in arbitration awards.<sup>18</sup> As a result, there is more likelihood of having arbitration awards being vacated or revoked due to conceptual errors made by arbitrators. . In short, legal certainty of arbitration awards overall is compromised because a constitutionally- authorized complaint (*acción de tutela*) can be used as a legal basis to challenge arbitration awards.

The main State oversight authorities -the Attorney General's Office and the Fiscal Auditor's Office- have also played a significant role in undermining arbitration proceedings between private parties and State entities. For example, the Colombian Constitution allows the Attorney General's Office to intervene before judicial authorities to defend the legal system, public ownership (*patrimonio público*), and fundamental rights and guarantees.<sup>19</sup> The Attorney General's Office has considered protection of public ownership as the principle criteria for intervention, equating it with protection of State entities' interests

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<sup>16</sup> See Decision SU-174 of 2007, where the Constitutional Court reviewed an *acción de tutela* raised by the Province of Valle –*Gobernación del Valle*- against the arbitration tribunal that decided a dispute between this public entity and Concesiones de Infraestructuras S.A. (CISA). Also, Decision T-058 of 2009, where the court reviewed an *acción de tutela* raised by Empresa de Telecomunicaciones de Bogotá S.A. ESP (ETB) against the arbitration tribunal that decided a dispute between this entity and Telefónica Móviles Colombia S.A. In this case, the Constitutional Court annulled the arbitration award.

<sup>17</sup> Article 29 of the Colombian Constitution.

<sup>18</sup> The following are the modalities of manifest disregard of the Law (*vías de hecho*), applicable to arbitration awards in Colombia: (i.) substantive mistake – the award breaches a constitutional right because its reasoning is based on rules that are inapplicable to the case; (ii.) organic defect – arbitrators exceed their powers, for instance, by deciding on non-arbitrable disputes (i.e. lawfulness of an exceptional power within State contracts); (iii.) procedural mistake – arbitrators act beyond procedural limits, thereby affecting fundamental procedural rights of the parties; and (iv.) factual mistake – fundamental rights are breached as a result of arbitrators' disregard of a relevant evidence, of arbitrators' erroneous analysis of evidence, or of arbitrators' assessment of evidence based on a “clearly unreasonable legal interpretation”.

<sup>19</sup> Article 277.7 of the Colombian Constitution.

within arbitration or judicial proceedings. Despite the declared neutrality<sup>20</sup> of the Attorney General's Office, it has sought to annul awards when the decision goes against a State entity on the grounds of protecting public ownership.

Officers belonging to that entity, called *procuradores judiciales administrativos*, raise the issue once the arbitration tribunal has rendered its award, so that the case is submitted to the Council of State, the judicial authority for the annulment of awards. Their intervention ceases when the case reaches the Council of State for annulment. At this point, these officers are replaced by -officers of a higher hierarchy, called *procuradores delegados*, who report directly to the Attorney General. Sometimes, these officers disagree with the issue raised by the *procuradores judiciales administrativos*, thereby reflecting lack of institutional coordination and creating legal uncertainty.

Other difficulties have arisen in annulment proceedings. The Attorney General's Office may defend State entities by seeking annulment of an award contrary to the entities' interests, even if the award is considered legal by the State itself and its attorneys. Finally, -the Attorney General's Office has also played a significant role in the recognition and enforcement of foreign arbitration awards against the State.

The Fiscal Auditor's Office, in turn, exercises fiscal control over private parties and arbitrators in State contracts.<sup>21</sup> The underlying idea is that the State's economic loss (*detrimento patrimonial*) may occur as a result of a fiscal performance carried out with bad faith or negligence.<sup>22</sup> The Fiscal Auditor's Office has disregarded arbitration awards indicating that the private party may have a fiscal liability, regardless of its contractual conduct. This argument has even been made in cases where an international arbitration award has

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<sup>20</sup> See: Constitutional Court. Decisions C-479 of 1995, C-568 of 1997, C-743 of 1998 and T-006 of 1994, among others. Also, Council of State. Decisions of May 14, 1993 and of February 27, 1997, among others.

<sup>21</sup> Law 610 of 2000 regulates proceedings of fiscal liability carried out by the Fiscal Auditor's office. Article 3 – translated- states that fiscal performance is “(...) the set of economic, legal and technological activities, carried out by public officers and private parties who handle or manage public funds or resources, seeking an adequate acquisition, planning, conservation, administration, custody, exploitation, sale, consumption, adjudication, expense, investment and disposal of public goods, as well as the collection, management and investment of rents in order to comply with the State's goals.”

<sup>22</sup> Article 1 of Law 610 of 2000. See also: Constitutional Court. Decision C-840 of 2001.

determined that the State is liable for breach of contract.<sup>23</sup>

Fiscal proceedings have also been held against arbitration tribunals when the Fiscal Auditor (*Contralor*) considers that the amount of the award that the State must pay is unreasonable.<sup>24</sup> Fiscal proceedings have also taken place against arbitration tribunals that accept settlements by conciliation of disputes between State entities and private contractors<sup>25</sup> when the fiscal controller considers the conciliation to be against the State's financial interests. Finally, the Fiscal Auditor's Office recently requested the Constitutional Court to review constitutionally-authorized complaints (*acciones de tutela*) of arbitration cases between a public telecommunications entity and private contractors, since the public entity had lost its case before arbitration tribunals and before the Council of State.<sup>26</sup>

In summary, both case law and interventions by public oversight authorities have contributed to the uncertainty of arbitration awards and arbitration itself between State entities and private parties.

### **Chapter 3: Enforcement Issues**

In arbitrations between private parties, the general rule is that the losing party honors the award voluntarily. In international commercial arbitrations between private parties, the Colombian Supreme Court has stated that an interim award, issued by an arbitrator within an International Chamber of Commerce arbitration in the United States, could not be

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<sup>23</sup> See the case between Unysis and Empresa de Telecomunicaciones de Bogotá S.A. ESP (ETB). In this case, an ICC arbitration award, rendered in Switzerland, ordered ETB to compensate Unysis due to ETB's unlawful termination of a contract for the implementation of an information technology solution. The fiscal controller disregarded the award, seized assets belonging to the private contractor and decided to carry out fiscal proceedings due to the private contractor's alleged breach. The case took eight years to resolve achieving resolution when the statute of limitations for constitutionally-authorized complaints (*tutelas*) ran out.

<sup>24</sup> See, for example: Fiscal Auditor's Office. Reporte de control excepcional. Instituto de Desarrollo Urbano (IDU)-CCR-CDSIFTCEDR, July, 2001.

<sup>25</sup> This happened in the case between Instituto Nacional de Concesiones (INCO) and Sabana de Occidente, regarding the breach by the contractor, of a contract for the construction of a national road. The conciliation approved by the arbitrators, modified the terms of contractual performance by the private contractor. The Fiscal Auditor's Office considered the conciliation as detrimental to the State's economic interests.

<sup>26</sup> These are cases between ETB and Comcel, a mobile phone company. See *El Tiempo* newspaper February 20, 2009.

regarded as an award since it only defined the arbitrator's legal competence to hear the case. According to the court, awards could only cover decisions ending a dispute.<sup>27</sup>

In arbitrations between private parties and State entities, the general rule is that when the State loses, different mechanisms are used to challenge the award, such as annulment proceedings and constitutionally-authorized complaints (*acciones de tutela*). In practice, this situation occurs regardless of the fairness of the arbitrators' decisions.

The Supreme Court of Justice is the judicial authority with the competence to recognize and enforce foreign arbitration awards. Recognition and enforcement of foreign arbitration awards in Colombia has become lengthy and complex, similar to normal judicial proceedings. One of the main reasons for delays has to do with the ability to request evidence in accordance with local procedural law. This may be contrary to Article III of the New York Convention which determines that local procedural law should not be more difficult for a foreign arbitration award to be enforced than the local procedural law regarding national awards.

The Attorney General's Office, invoking the protection of public ownership, has ordered State entities to refuse voluntary compliance of foreign arbitration awards arising out of international commercial arbitrations. The New York Convention allows the losing party to resist enforcement of foreign arbitration awards, based on the grounds established in Article V. However, this attitude towards compliance of arbitration awards, poses paradoxical risks over public ownership:

- interest accrual for late payment of awards continues during the *exequatur* proceeding. (Exequatur is the term used for judicial proceedings regarding the recognition and enforcement of foreign judicial or arbitration decisions); and
- the foreign award could be enforced in other countries without being enforced in Colombia.

The Fiscal Auditor's Office applies a similar policy, also based on the protection of public ownership.

As mentioned earlier, Colombia's becoming a party to FTAs and multilateral

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<sup>27</sup> Supreme Court of Justice – Civil Chamber - Decision of January 26, 1999.

and bilateral investment treaties will likely increase the number of international investment arbitration cases between investors and the Colombian State. State policies will come under increased scrutiny and these arbitrations may be resolved with ICSID arbitration awards, which are deemed to be final, binding and directly enforceable within the territory of the State concerned. Generally, no recognition and enforcement proceedings need to take place to enforce an ICSID award. The State should honor ICSID arbitration awards unless it has previously and successfully challenged the award before an ICSID ad-hoc arbitration committee.

Nonetheless, Latin American countries like Argentina have taken steps to impede direct enforcement of ICSID arbitration awards. Colombia also may be moving in the same direction as evidenced by case law and public oversight authorities' treatment of arbitration between State entities and private parties. One example is the decision by the Constitutional Court which determined, with some ambiguity, that the U.S. - Colombia Trade Promotion Agreement was not contrary to the Constitution regarding investment protection and dispute resolution.<sup>28</sup> This may open the possibility for constitutionally-authorized complaints (*acciones de tutela*) against arbitration awards rendered against the State as a result of investment arbitrations.

#### **Chapter 4: Other Issues**

Local and foreign investors may execute legal stability contracts with the State under certain conditions.<sup>29</sup> These contracts are designed to protect the agreed upon conditions under which a investment is carried out in Colombia, should legal or regulatory changes occur. In practice, these contracts have been successful for investors when there are tax changes. However, regarding arbitration, the law only authorizes domestic arbitration under Colombian law, even if one of the parties is a foreign investor.

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<sup>28</sup> Decision C-750 of 2008. In relation to investment protection and dispute resolution, the court held that "(...) although the exhaustion of local remedies is not a requirement to refer to international arbitration for the solution of investment disputes, no Colombian authority loses the exercise of its powers, and especially no judicial authority loses said powers when solving issues concerned with the protection of constitutional rights. It should also be stated that internal judicial decisions shall not be subject to international arbitration since said decisions are subject to the res judicata principle." (translated)

<sup>29</sup> Law 963 of 2000.

Under an FTA, BIT or multilateral investment treaty, acts carried out by the State affecting the agreed upon conditions (legal stability contract) of investments may be construed to be a breach of treaty obligations, entitling the investor to initiate international arbitration against the State. Therefore, international investment arbitration under FTAs, BITs and multilateral investment treaties may become useful tools to overcome the difficulties generated by the dispute resolution provision contained in the legal stability contracts' regime.

Finally, employment relationships need to be taken into account. Employers and employees in Colombia cannot subject disputes to arbitration unless:

- they execute an arbitration agreement once the dispute has arisen, called a submission agreement or *compromiso arbitral*; or
- the arbitration agreement has been specified under a collective labor agreement.

## **Chapter 5: Attempts to Amend Arbitration Legislation in Colombia**

Attempts to modernize Colombia's existing arbitration law have been unsuccessful. Generally speaking, previous initiatives have sought to:

- fill procedural gaps in domestic arbitrations;
- set special arbitration rules for disputes between State entities and private parties;
- enhance the possibility of Attorney General's Office interventions in arbitration proceedings; and
- adopt an existing law covering international arbitration, such as the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on International Commercial Arbitration, since the law in Colombia is not sufficiently comprehensive<sup>30</sup>.

Congressional debates have focused on arbitration of State contracts. The Attorney General's Office intervened and proposed including special defense mechanisms in favor of the State. This position has faced strong opposition from scholars and private associations.

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<sup>30</sup> Law 315 of 1996. Peru adopted the UNCITRAL) Model Law on International Commercial Arbitration and substantially improved upon the model resulting in a modern and competitive arbitration process with little or no interference by the Courts in the system.

The Chamber of Commerce of Bogota has drafted the latest bill, the fourth attempt in eight years, to present to the next congress which began on July 21, 2010.

## **Chapter 6: Advantages and Drawbacks of Arbitration in Colombia**

### *Advantages*

- Since arbitrators are treated as judges, arbitration gains effectiveness, because arbitrators enjoy enforcement powers and their awards have the same binding effects of judicial decisions.
- Colombia has a relatively consolidated arbitration tradition and culture. Arbitration not only has been used for many years, but there are also academic and professional organizations that have steadily promoted its study and development.
- The use of arbitration between private parties is expanding and has gained a significant degree of specialization.
- Colombia has been advancing towards modern international arbitration, adopting many international instruments and negotiating FTAs, BITs and multilateral investment treaties.
- The Colombian Government, scholars and the private sector recognize the need to modernize the existing laws. There have been three attempts to reform the laws in the last eight years.
- Annulment of awards is treated the same under private contracts and state contracts.
- Grounds for annulment are based on procedural due process considerations.
- Case law has been applied accurately when refusing to annul arbitration awards rendered in foreign countries.
- Case law has been applied accurately relying upon a restrictive approach to public policy as a bar to the enforcement of foreign decisions.

### *Disadvantages*

- Arbitration is highly procedural, lacking flexibility, particularly in arbitrations between State entities and private parties.
- Case law has not been consistent in treating arbitrators as judges, especially in State contracts' arbitration.
- Case law and intervention by public surveillance or oversight authorities has created hostility towards arbitrations between State entities and private parties.
- High courts and judicial organs lack knowledge of international arbitration processes and trends.
- Case law has generated legal uncertainty for arbitration awards, especially for State contracts' arbitration due to the wide application of constitutionally-authorized complaints (*acciones de tutela*).
- Investment arbitrations with the State may generate enforcement difficulties in Colombia due to the current constitutional case law.
- Arbitration is perceived as slow and lengthy in Colombia, especially when enforcement issues arise in foreign arbitration awards.
- Compliance by State entities in domestic and foreign arbitration awards is difficult due to the intervention by public oversight authorities.
- Foreign investors cannot go to international arbitration against the State if there is a dispute arising from a legal stability contract, unless there is an applicable FTA, BIT or multilateral investment treaty permitting arbitration.
- Efforts to modernize the existing arbitration law have been hampered, due in part to disagreements between public oversight authorities, private practitioners and scholars.

### **Chapter 7: Local experts**

This is a brief list of local experts in international arbitration and their contact

information, in alphabetical order:

Rafael Bernal

Juan Pablo Cárdenas

Martha Cediél

Gilberto Peña

Jorge Suescún

Santiago Talero

Alberto Zuleta

Eduardo Zuleta

## Chapter 8: Colombian Arbitration v. Arbitration in Latin America

Traditionally, arbitration laws in Latin America have been considered hostile to arbitration. Recent trends within this decade indicate this attitude may be changing<sup>31</sup>.

Venezuela and Costa Rica have been considered non-attractive arbitration venues because their arbitration laws do not distinguish between domestic and international arbitration<sup>32</sup>. Therefore, international arbitrations in their territories are subject to local rules which are ill-suited to the needs of international arbitration.

Countries like Colombia, Bolivia and Ecuador have also been considered non-attractive arbitration venues because while the Law in these countries distinguishes between domestic and international arbitrations, the rules and their application to the latter are insufficient<sup>33</sup>.

Other countries like Mexico and Chile have adopted the UNCITRAL Model Law on International Commercial Arbitration with a clear goal of modernizing their local arbitration legislation<sup>34</sup>. However, archaic local procedural rules may still be applied to arbitrations held in those countries.

Finally, countries like Peru and Paraguay have been deemed as attractive venues for international arbitrations within their territory<sup>35</sup>. Peru has been considered to have the most modern arbitration regime in Latin America, built on the UNCIRAL Model Law on International Commercial Arbitration, which was further improved upon in 2008<sup>36</sup>.

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<sup>31</sup> See José Antonio Moreno. *Temas de Contratación Internacional, Inversiones y Arbitraje*. Ediciones Jurídicas Catena y CEDEP. Paraguay. 2006, pp. 257-260.

<sup>32</sup> Law 26.430 of 1998 (Venezuela) and Law 7727 of 1997 (Costa Rica).

<sup>33</sup> See Law 145/97 of Arbitration and Mediation of Ecuador and Law 1770 of Arbitration and Conciliation of Bolivia.

<sup>34</sup> Mexico amended its Federal Commercial Code, while Chile adopted the Law 19971 of 2004.

<sup>35</sup> See Law 1071 of 2008 (Peru) and Law 1879 of 2002 (Paraguay).

<sup>36</sup> —At present, Peru has perhaps the most modern arbitration law in Latin America. Unlike the other Latin American countries, the new Peruvian arbitration law contains the amendments introduced in 2006 to the UNCITRAL Model Law on International Commercial Arbitration. The main amendments refer to a wider scope of written arbitration agreement and to the arbitrators' possibility of granting interim measures of protection.

The following chart compares Colombia's arbitration regime to that of other Latin American countries<sup>2</sup>:

<b>Arbitration Issue</b>	<b>Colombia</b>	<b>Latin American Countries</b>
UNCITRAL Model Law	Has not adopted the Model Law. However, criteria to determine whether arbitration is international are similar to the Model Law's criteria.	Chile, Guatemala, Mexico, Nicaragua, Paraguay, Peru and Venezuela have adopted the Model Law.
New York Convention	Member – Law 39 of 1990	Most Latin American countries have adopted the New York Convention.
ICSID – Washington Convention	Member – Law 267 of 1995	Most Latin American countries have adopted the Washington Convention. Bolivia withdrew from ICSID in 2007. On December 4, 2007, Ecuador notified ICSID's Secretary General that it would not consent to arbitrations concerning natural resources such as hydrocarbons and minerals. Brazil and Mexico are not parties to ICSID, however, Mexico appears to be considering becoming a member.
Investment arbitration experience	Colombia does not have much international investment arbitration experience.	Argentina leads the list of Latin American countries with the most investment-related arbitration cases. Other Latin American countries with experience include: Mexico, Ecuador, Chile and Bolivia, among others. Mexico is not an ICSID member, but has been a party to several NAFTA arbitrations.
Scope of written arbitration agreements	Colombia's legislation is antiquated regarding the notion of written arbitration agreements	Latin American Model Law countries have a more flexible approach regarding this issue. Peru adopted the recent amendments to the Model Law, thereby widening the scope of the written arbitration agreement.

Arbitration Issue	Colombia	Latin American countries
Non-signatory parties to arbitration agreements	Colombia is restrictive in extending the scope of the arbitration agreement to non-signatory parties <sup>37</sup> . In these cases, the parties should indicate their inclusion within the arbitration's agreement scope.	Brazil and Peru have extended arbitration agreements to non-signatory parties. This was done in Brazil under the "group of companies" theory, where it was held that an arbitration agreement, contained in by-laws of a company incorporated by a Brazilian company and by the Brazilian branch of a Swedish corporation should be extended to the Swedish corporation, due to the latter's involvement in the negotiation prior to the company's incorporation <sup>38</sup> . In Peru, the extension of the arbitration agreement to non-signatory parties is expressly stated in the Law. <sup>39</sup>
Confidentiality	Arbitration is deemed as a public method of dispute resolution	Peruvian law expressly provides for confidentiality. However, confidentiality does not apply to awards between private parties and the Peruvian Government.
Applicable substantive Laws	The current law on international arbitration only states that the parties may agree on the applicable laws, but does not suggest any solution when this does not occur. Thus, unless there is a well-known institution arbitrating, the arbitration tribunal would have to adopt the Colombian conflict of law rules.	Latin American countries have a different solution. When the Model Law has been adopted without modifications, the rule is that the arbitrators may choose the applicable national law based on the conflict of law rules considered appropriate. Costa Rica, however, has a curious provision whereby arbitrators must choose Costa Rican law in the absence of the parties' making the choice.

<sup>37</sup> Generally, a non-signatory party is an entity that does not formally participate in an arbitration agreement, but which may be included within the agreement due to its intervention in the business transaction between disputing parties.

<sup>38</sup> 7th Chamber of the São Paulo Appellate Court. Decision of May 15, 2002. Anel v. Trelleborg Do Brazil.

<sup>39</sup> Article 14 of Law 1071 of 2008.

<p>Feasibility of arbitrators' deciding on their own legal ability to carry out and solve a case</p>	<p>In Colombia, this is a matter for the arbitrators to decide, as it is in many places worldwide.</p>	<p>The Panama Supreme Court rendered a decision, on December 13, 2001, holding that arbitrators had no legal standing, under the Constitution, in order to decide the existence and limits of their own jurisdiction to carry out and decide a case. Conversely, countries like Peru have rules providing arbitrators with complete autonomy when determining their jurisdiction.</p>
<p>Arbitrability of disputes</p>	<p>In general terms, Colombia has a flexible approach towards the possibility of solving different types of disputes by arbitration. However, - certain State contracts' disputes are excluded and subject only to judicial courts' decisions.</p>	<p>Most Latin American countries have the same flexible approach. Peru does not have a restrictive approach towards arbitration of disputes between private parties and the State. Moreover, the State is prohibited from invoking its power in order to impede arbitration.</p>
<p>Reasoning of awards</p>	<p>Colombia regards the reasoning of awards as a matter of due process and public policy.</p>	<p>Some Latin American countries, like Chile, Bolivia, Paraguay and Venezuela believe reasoning is necessary unless parties agree otherwise.</p>
<p>Annulment of awards</p>	<p>Annulment of awards is deemed as part of the fundamental right to have access to justice.</p>	<p>Uruguay Appeals Tribunal issued Decision 161 of 2003, denying the possibility of annulment proceedings regarding an award, rendered in Uruguay, between Argentinean and Chilean companies. The underlying reason was the fortuitous character of Uruguay as a seat of arbitration in that case between foreign parties. Peru also allows the parties to waive annulment proceedings, if neither party is a Peruvian national or is domiciled in Peru.</p>
<p>Other challenges to arbitration awards</p>	<p>Colombia allows constitutional challenges to arbitration awards, especially within the field of State contracts' arbitration, by means of a constitutionally-authorized complaint (<i>acción de tutela</i>.)</p>	<p>Peru, Venezuela and Argentina also allow constitutional challenges to arbitration awards.</p>

Public Policy	Procedural public policy is contained in the grounds of annulment of arbitration awards. Constitutionally-authorized complaint ( <i>Acciones de tutela</i> ) also require a review of the merits- based on substantive public policy. However, case law has adopted a restrictive approach in relation to public policy as a bar to the enforcement of foreign decisions.	Procedural public policy is also contained in the grounds of annulment of arbitration awards in other Latin American countries, as occurred in Model Law States. However, Peru and Paraguay expressly state that international public policy is the ground for annulment or for denial of the recognition and enforcement of awards. These rules aim to avoid the annulment of awards based on the review of merits of the case <sup>40</sup> .
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## Annexes

Chart 1 – Private Parties’ Arbitration in Colombia

Chart 2 – State Contracts’ Arbitration in Colombia

Chart 3 – Recognition and Enforcement of a foreign arbitration award against the State in Colombia

Chart 4 – ICSID Investment Arbitration (Foreign Investors – Colombian State)

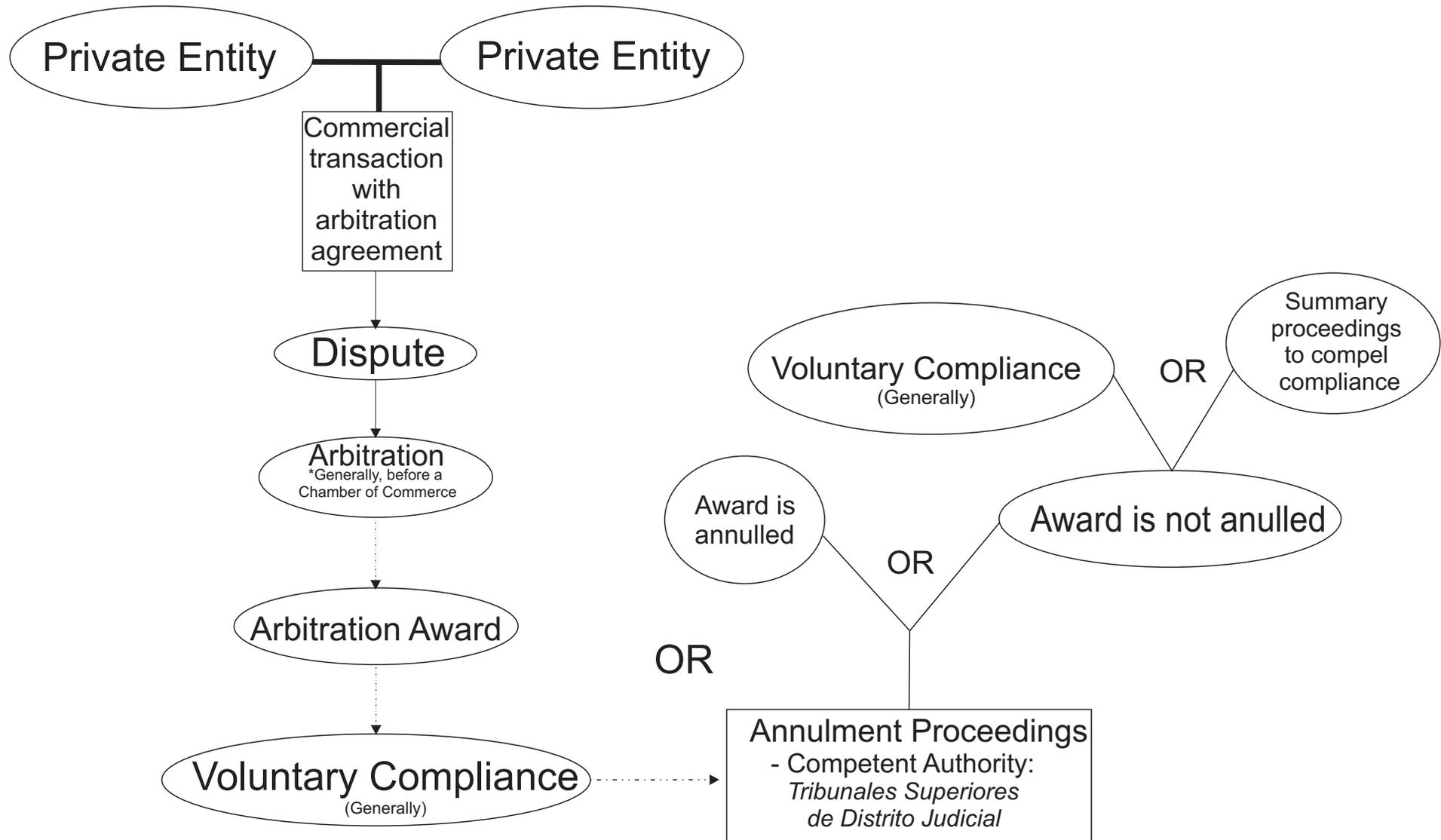
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<sup>40</sup> Articles 40 and 46 of Law 1879 (Paraguay) and articles 63(1)(f) and 75(3)(b) of Law 1071 of 2008 (Peru).

# Report on Arbitration in Colombia

## CHART 1

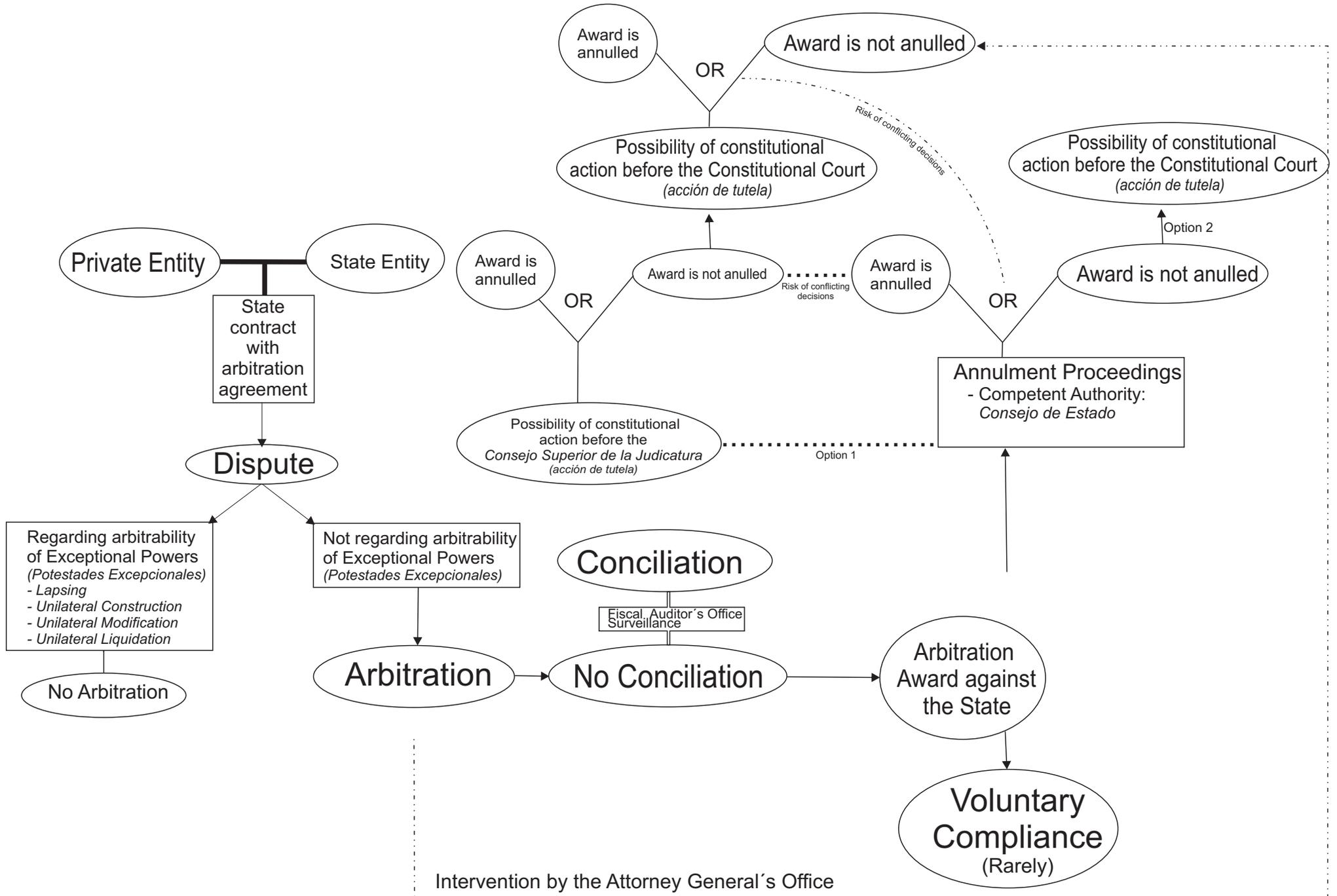
### Private Parties Arbitration in Colombia



# Report on Arbitration in Colombia

## CHART 2

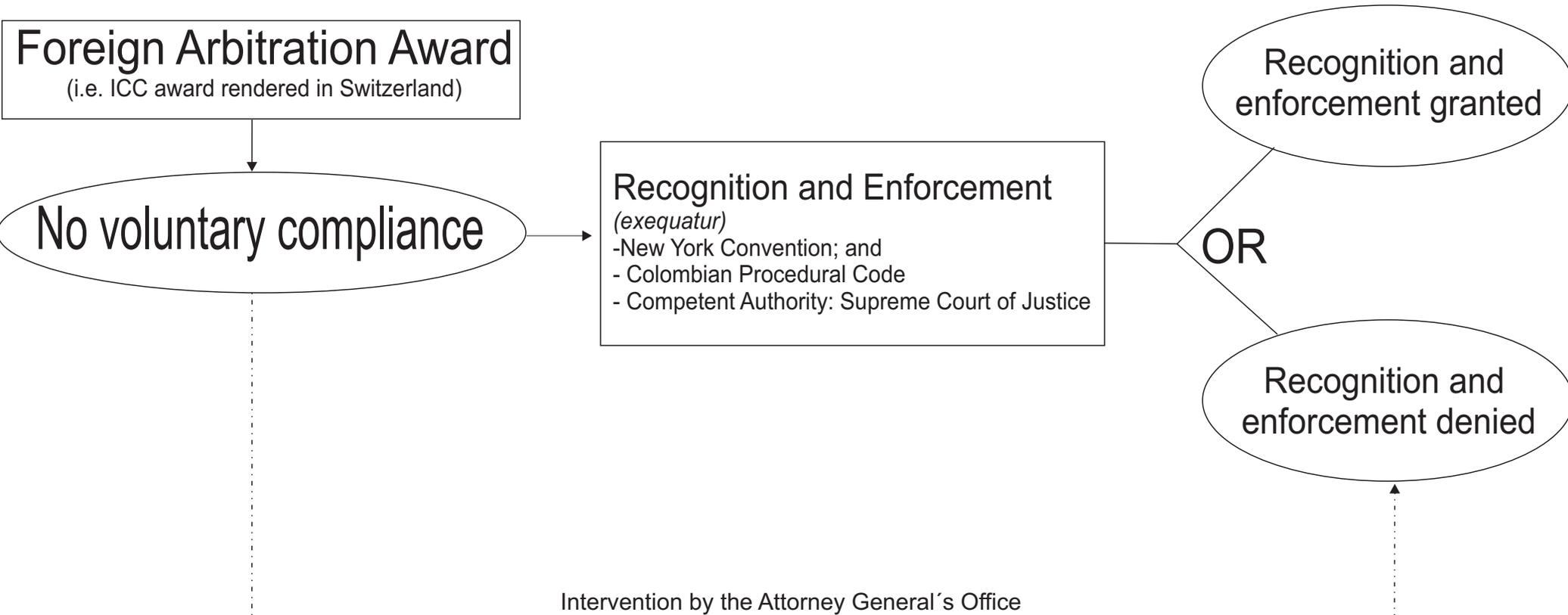
### State Contracts' Arbitration in Colombia



# Report on Arbitration in Colombia

## CHART 3

### Recognition and Enforcement of a foreign arbitration award against the State in Colombia



# Report on Arbitration in Colombia

CHART 4

## ICSID Investment Arbitration (Foreign Investors - Colombian State)

