THE MERGERS AND ACQUISITIONS LITIGATION REVIEW

THIRD EDITION

Editor
Roger A Cooper

THE LAWREVIEWS

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PREFACE

It is my great privilege to serve as the editor of the third edition of this volume on M&A litigation for the Law Reviews series. As with the first and second editions, this volume is intended to be as much a resource for litigators handling M&A disputes as it is for the deal lawyers, general counsel and dealmakers aiming to assess and manage the potential litigation risks in connection with a transaction. The multi-jurisdictional approach taken here, as in other volumes in the Law Reviews series, reflects the profoundly global nature of business and corporate transactions and gathers a diverse body of law from around the world to provide a broad overlay of the global litigation terrain. The aim here is not to be comprehensive, in either the countries included or the depth of topics covered, but to provide more of a survey of key jurisdictions in the Americas, Europe and Asia and a high-level overview and analysis of the main litigation issues and trends in those jurisdictions.

Together, the chapters show a remarkably high level of consistency across jurisdictions in the types of common disputes and the kinds of claims that may be pursued, but also significant differences in procedural and substantive law affecting the legal merits of such claims, and the frequency and means of their pursuit.

Shareholder actions for breaches of fiduciary duties provides a good example. The law in many countries imposes fiduciary duties on board members in the context of mergers or acquisitions, and many jurisdictions therefore provide for litigation to enforce those duties. Similarly common is some type of business judgement protection for certain board decisions, which in one form or another prohibits parties and a court from second-guessing those decisions. The frequency with which such actions are brought, however, varies substantially from country to country. That is due to a variety of different factors, from the number of publicly listed companies in a country, to differences in the substantive law, to whether such claims may be brought as class actions, as permitted in the United States, and whether fees may be awarded to class action plaintiffs' lawyers. The class action procedural mechanism and the availability of attorney fee awards in particular are significant factors driving the disproportionate volume of shareholder litigation in the United States, as they provide strong incentives to the plaintiffs' bar that do not exist in many other countries.

In contrast, counterparty claims arising out of disputes over the parties' transaction agreement appear to be far more common across the countries in this edition and, in many countries, to be the dominant type of M&A litigation activity. Interestingly, that is less so in the United States, where shareholder actions continue to present the dominant risk. Although there is some meaningful overlap in the types of provisions and disputes that commonly arise, the chapters also display the significant variation in disputes, reflecting in part differences in business practices both within and across jurisdictions. As with class actions, one significant procedural component for counterparty claims is arbitration, which has

become an increasingly common procedure for resolving post-closing disputes, particularly those involving cross-border transactions. This appears to be because, among other reasons, arbitration is confidential (unlike court proceedings) and thought to be cheaper, faster and more efficient.

Finally, I would like to thank the many distinguished contributors to *The Mergers and Acquisitions Litigation Review*, and give a particular thanks to the new authors in this third edition, whose contributions expand the range of jurisdictions covered. Their biographies can be found in Appendix 1 and display the impressive depth of experience and expertise they bring to this edition. I hope that you will find their analysis and insights valuable when dealing with issues arising in M&A disputes. Should you have any comments, questions or suggestions, please do not hesitate to contact me or any of the contributors directly.

Roger A Cooper
Cleary Gottlieb Steen & Hamilton LLP
New York
October 2022

Chapter 3

COLOMBIA

Mario Alejandro Vanegas Montoya[1]

I OVERVIEW

Colombia has positioned itself as a relevant actor in the Latin American M&A industry. At July 2022, the market had grown by 17 per cent compared with the first half of the previous year, represented by 129 deals worth a combined US$6.1 billion, ranked fourth in the region by both aggregate value and deal volume.[2] Most transactions related to private companies. Nevertheless, an acquisition of a publicly traded company may also be initiated by an acquirer through a public tender offer.

The amount of litigation relating to merger and acquisition transactions in Colombia is low compared with other types of corporate claims. However, the upsurge in transactions is typically followed by increased litigation proceedings associated with these operations.

The Colombian legal framework lacks a specific regulation for M&A transactions; additionally, the case law made by local commercial courts is scarce, mainly due to the inclusion of arbitration clauses in the agreements. Through a handful of decisions made by local arbitral tribunals, the disputes relating to M&A matters have been settled.

Even with the limited amount of available arbitration awards (most of them issued fairly recently), the sense in the market is that these decisions have legal rationality and are backed by the principles and rules of Colombian corporate law, supporting the sense of a sophisticated market for merger and acquisition transactions.

The claims brought by the parties are associated with corporate and fiduciary law, contract principles and regulatory measures. Deep knowledge of these fields is vital for a successful negotiation and, hopefully, to avoid unnecessary disagreement and convey a successful deal.

To get the deal, either a stock purchase or an asset purchase agreement, both the seller and buyer parties should forestall the most frequent types of disputes before considering a merger or an acquisition.

The applicable procedures before commercial courts and arbitration tribunals are broadly the same. Both consist of a mixture of written filings and oral hearings, involving the following stages: complaint, answer, counterclaim, reply to counterclaim, evidence stage and final ruling.

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1 Mario Alejandro Vanegas Montoya is an associate at DLA Piper Martínez Beltrán.

2 https://blog.ttrecord.com/tag/colombia/.

II LEGAL AND REGULATORY BACKGROUND

Colombia is a civil law country. The rules and principles applied are coded and, as a social state based on the rule of law, the Constitution is the supreme law that permeates the relationships and agreements within its field of application.

As mentioned, there is an absence in Colombia of a specific legal framework for merger and acquisition transactions, to the point that those words are deprived of a legal definition.[3] The regulators and the parties apply a diverse set of statutes as relevant sources of law for the contracts, which includes:

a the Colombian Civil Code;
b the Colombian Commercial Code;
c the Colombian Competition Law (1340 of 2009);
d the Simplified Shares Corporation Law (1258 of 2008);
e the Colombian Bankruptcy Act (1116 of 2006);
f the Colombian Financial Statute (795 of 2003);
g the Unfair Competition Law (256 of 1996);
h the law that regulates directors', officers' and shareholders' conflicts of interests (222 of 1995); and
i the Colombian Antitrust Law (155 of 1959).

The Superintendence of Industry and Commerce (SIC) is the governmental body responsible for monitoring the country's transactions. Regarding its scope, if the parties are engaged in the same value chain (vertical integration) or similar economic activities (horizontal integration), they must be subject to merger control procedures if the transaction exceeds the total assets and operating income set by the transaction by said authority.

By means of Resolution No. 83304 of 22 December 2021, the SIC set said threshold at 1,578,781.18 tax value units, which are equivalent to 59,999,999.96 Colombian pesos (US$14,134.34). The fines for not complying with this duty are set at 100,000 times minimum wage (US$23,623.90); also, the SIC may take corrective measures such as reversing unreported integrations.

The decision issued by the SIC, as an administrative act, must firstly be appealed before the same entity as a procedural requirement. Once the authority has issued its final ruling over the matter, the interested party may file a request before an administrative court to review the decision. The decision issued by the administrative court can be appealed before the Council of State, Colombia's highest administrative court.

Finally, the Colombian Central Bank is the public entity that regulates the country's foreign exchange. The Central Bank may require specific registrations regarding foreign direct investments.

3 N Tobón, Colombia, in D Campbell, *Merger and Acquisitions in North America, Latin America, Asia and the Pacific Selected Issued and Jurisdictions*, 273, 2011.

III SHAREHOLDER CLAIMS

i Common claims and procedure

Shareholders can bring claims relating to M&A transactions in Colombia. One crucial factor to take into consideration is the applicable jurisdiction. If the company's by-laws or the shareholders' agreement contend an arbitration agreement, the shareholder must file the claim before an arbitral tribunal. Even without a former arbitration clause, the parties may still agree to submit their disputes to arbitration.

Nevertheless, if the arbitration clause does not exist in the documents mentioned above or there is no desire to resort to arbitration, the corporate and shareholder disputes must be brought before the Superintendence of Companies (SC), a public entity with judicial functions to resolve corporate legal disputes.

The most significant company disputes in Colombia are conflicts between the controlling shareholder and the minority shareholder. The main claims that shareholders can assert include the following:

a claims relating to a breach of the company's by-laws;
b claims against a controlling shareholder;
c claims relating to appraisal rights;
d claims relating to a breach of shareholders' agreements; and
e claims against management.

Time frames

Shareholder claims derived from M&A transactions may be subject to the statute of limitations, depending on the claim's nature. Plaintiffs should bear in mind the timely initiation of these actions.

If the plaintiff seeks the annulment of a minute of the shareholders' meeting, the claim must be brought within two months of the issuing date of the act. However, if the shareholder pursues the deprivation of legal effects of a specific act, the suit must be filed within five years of its issuing date.

Production of documents

Regarding the collection and submission of evidence, the Colombian Procedural Code,[4] known as the General Code of Procedure, allows the parties to request the production of documents to the counterparty or a third party. The request shall comply with the following requirements:

a an identification of the facts that the party intends to prove;
b an affirmation that the other party possesses the document;
c the type of document; and
d the relationship of the document and the relevant facts.

The receptor may oppose the request, and the court or arbitrators will decide the justification of the party's opposition on a case-by-case basis and bestow the consequences if the opposition lacks ground. As a procedural requirement for the request, the party shall file a prior right of petition before the document holder, demanding the release of the documents without judicial intervention.

4 Law 1564 of 2012.

ii Remedies

Depending on the type of claim, different remedies may be applicable. Nonetheless, common remedies are as follows.

a Remedies against the company: Usually, shareholders apply these remedies against corporates:
- to deprive a corporate act of all legal effects;
- for the annulment of a shareholders' minute;
- for inadmissibility; and
- for liability for damages.

b Remedies against the management: Regarding conflicts between a shareholder and directors or officers, the remedies mentioned above can be applied, as well as:
- removal of the manager; and
- the unenforceability of board of directors' decisions.

c Remedies against other shareholders: Some of the remedies between shareholders are the following:
- breach of the shareholders' agreement;
- abuse of a dominant position; and
- liability for damages.

iii Defences

Shareholder claims defences can vary on a case-by-case basis, depending on the facts of the case, the arguments employed, the reach of the claims brought and the remedies pursued.

iv Advisers and third parties

Claims brought against advisers and third parties such as lawyers, financial advisers or consultants are not common in Colombia. Shareholders can file a claim if they prove negligence or wilful misconduct in the advisement and seek compensation for the damages.

v Class and collective actions

Colombian law provides two types of collective actions. The first is a popular action, which intends to safeguard collective rights and interests, such as environmental damages or common health issues. The second is a class action, which aims to defend the rights and interests of several people affected by the same circumstances who seek the payment of damages personally endured.

Although there is no case law relating to class actions bringing shareholder claims in Colombia, by the nature of the action, it is plausible to consider its use. On the contrary, it is hard to imagine collective rights of interests arising from shareholder meetings.

vi Insurance and indemnification

Although insurance in shareholder disputes arising from an M&A transaction is not the standard, in recent years, demand for representations and warranties insurance has increased. This type of insurance redistributes the risk of breaches of representations and warranties.

In cases of a breach of obligations, the insured party may claim directly from the insurance company the payment of the indemnity for the loss in respect of the terms of the policy. If the litigation is initiated, the insured party may seek to implead the insurance company; hence, the insurance company becomes a party to the dispute.

Another type of insurance that is high in demand is directors' and officers' liability insurance.

vii Settlement

Shareholder claims can be settled in Colombia. Settlements are typically reached through conciliation proceedings, which is the preferred alternative dispute resolution method in the country. More than 70 per cent of significant commercial disputes are settled through this mechanism.[5]

Conciliation is also a procedural requirement before filing a claim for most proceedings. The settlement agreements reached through conciliation are considered *res judicata* but can be subject to being judged null and void.

In M&A litigations, it is typical to initiate a lawsuit with the prospect that a settlement may be available in the future. Often, the other party contemplates a settlement only when the judicial proceeding has started.

viii Other issues

Interim measures are available in shareholder disputes relating to merger and acquisition transactions in Colombia. The Colombian Procedural Code allows the court, the Superintendence of Corporations or arbitrators to decree and practise these remedies in declarative reliefs or even execution proceedings.

The party can issue a request for the enforcement of the best type of interim relief to protect its rights while the respective ruling is issued. In a case-by-case scenario, the court, arbitral tribunal or SC evaluates the measure type and modulates the request if deemed necessary. Also, it can decree a bond of up to 20 per cent of the value of the claims for the protection of the party affected by the measure.

IV COUNTERPARTY CLAIMS

Disputes between parties are the principal area of litigation regarding M&A transactions in Colombia. Due to the scarcity of regulation in merger and acquisition matters, contractual provisions determined by the parties become of utmost relevance.

Hence, most pre-closing and post-closing disputes will be governed essentially by what the parties concurred and per the principles and the general rules of law that apply to the contracts.

i Common claims and procedure

Pre-closing claims

At the early stages of an M&A negotiation in Colombia, although the parties tend to sign preliminary or pre-contractual documents agreeing that most of them are not legally binding, there are some exceptions to the rules. According to the national regulatory legal framework, the documents may refer to autonomous contracts, a letter of intent, a memorandum of understanding, a term sheet or a non-binding offer.

It is rare to find parties focused on bringing claims relating to pre-closing matters; however, most are linked to the breach of non-disclosure and exclusivity agreements.

5 https://www.sicaac.gov.co/Informacion/Estadistica.

A non-disclosure agreement, which generally has only a unilateral reach over the buyer as the receptor of the target's confidential information, can mutate, incorporating a new obligation to both parties in the following phases of the transaction.

It is essential to determine the confidentiality of the exposed target's legal, financial and technical information. The party that drafts the first framework of the contract has the upper hand over the statements it covers. The target will tend to classify all the data provided as strictly classified, and the buyer will only categorise confidential information regarded as such in the contract.

The breach of this agreement by the receptor of the information constitutes a contract violation, and the seller can bring legal actions, including asking for damages for the harm suffered. The compensation's scope ranges from a fixed penalty determined in the agreement and all the claims that arise from contractual liabilities.[6]

The receptor is not the only one with liabilities relating to the information in this phase, as the target must comply with disclosure requirements. As the party that knows everything about the target and the environment of the business, the seller should provide the buyer with sufficient information for the decision-making process over the transaction. The conduct displayed in this phase and the acquired contractual obligations play a significant role in the subsequent claims that may arise.

Even without an agreement between the parties over the confidentiality of the target's data, the seller could be protected from the buyer's actions if the release of the information can be contemplated as an act of unfair competition, which may be punished by the unfair competition law.[7]

The exclusivity agreement can also be implemented with a specific contract, but it is common in the Colombian legal market to execute the agreement through one of the above-mentioned documents.

Frequently, the parties sign these agreements without legal assistance, which is why, occasionally, the term of the contract does not match the obligation of exclusivity. This may result in an odd situation relating to the term of the memorandum of understanding or any other type of contract because, even though it remains valid, it does not maintain the exclusivity obligation in force.[8]

A breach of an exclusivity agreement tends to have the same outcome as a violation of a confidentiality agreement, with the exception that it is common to include a penalty clause in these contracts.

Post-closing claims

The most frequent claims in M&A transactions in Colombia are those relating to post-closing matters that generally derive from price adjustments and breaches of representations and warranties.

The disputes relating to price adjustment are classified as those arising from earn-out adjustments and differences in the calculation of the adjustment of the price, usually relating to working capital, cash flow and debt obligation discrepancies at the sale's closing.

6 N Parra, *La autorregulación de los tratos preliminares. Análisis de las cartas de intención, memorandos de entendimiento y buena fe precontractual, Revista Derecho Privado*, 50. 2013.

7 Law 156 of 1996.

8 F Cuberos and T Acosta, *Fusiones y Adquisiciones de Empresas una Perspectiva Iberoamericana*, 109. 2021.

On the other hand, violations of the representations and warranties usually are related to the absence of claims and litigation, inaccurate financial statements, compliance with laws, titles to share, lack of liens or encumbrances, labour disputes and improper tax declarations by the target or seller. The buyer must prove the breach of the agreement and the damages generated by said violation to file an indemnification claim. These disputes may involve the following stages:

a notification of the claim to the seller regarding the portion of the price withheld; and

b if there is disagreement on the claim, the dispute resolution methods provided in the contract are activated.[9]

If the buyer knows of a contingency or potential contingency relating to the target company or the businesses in general, they will tend to include indemnities in the agreement as a threshold for their exposure to the potential liability. It is essential to consider the seller's awareness of the contingency and the reach of the disclosure. If the party acted in bad faith or there was wilful misconduct, there is no limit on the seller's liability.

Regarding the reach of indemnification and remedies, local arbitration tribunals[10] and the Constitutional Court of Colombia's case law have accepted the use of pro-sandbagging and anti-sandbagging provisions in agreements to qualify the breach of the representations and warranties.[11]

Time frames and production of documents

The time frames depend on the action that the party may bring. The statute of limitations for a legal proceeding for declarative relief is 10 years and for an execution proceeding is five years.

The remarks in Section I regarding the production of documents in claims brought by shareholders apply similarly to claims filed by the parties of the transaction.

ii Remedies

In Colombia, the parties tend to apply for remedies contained in the contract, which are utilised on a case-by-case basis. In the event of an absence of an express pact, the following remedies may be brought.

a Monetary conservative remedies: Their purpose is the conservation of the contract. For example, the buyer may seek an adjustment of the price or compensation for the damages caused.

b Non-monetary conservative remedies: They also aim to preserve the contract, with the difference that the party does not seek financial compensation but rather the fulfilment of the counterparty obligations, generally through a writ of injunction.

c Extinctive remedies: The purpose of these remedies is the termination of the contract. The party seeks for the agreement to cease to have effect; however, they usually pursue compensation for the violations of the contract and the damages generated.[12] Some of the forms of this type of remedy are (1) a request for the termination of the contract, (2) the return of the contract's object to the seller, (3) restitution of the

9 A Linares, *Esquemas de fusiones y adquisiciones empresariales*, 188. 2022.

10 Arbitrator's award dated 30 March 2006 (*Bancolombia SA v. Jaime Gilinski Bacal*).

11 Constitutional Court of Colombia's decision dated 9 December 2010 (C-1008 of 2010).

12 A Linares, *Esquemas de fusiones y adquisiciones empresariale*s, 179.

price paid to the buyer, (4) the transaction is null and void, and (5) compensation for damages. For instance, one party could allege that the transaction is null and void if the non-compliance of the other side translates into actions that directly impact the motives of the first one and are relevant enough to consider that the consent of said contracting party has been vitiated.[13]

iii Defences

As is asserted in Section III, defences against the shareholder's claims also depend on the arguments employed and can vary on a case-by-case basis, depending on the facts of the case, the arguments employed, the reach of the claims brought and the remedies pursued.

iv Arbitration

In Colombia, case law made by local courts relating to M&A transactions is rare compared with domestic arbitration tribunals' decisions. The reasons for this preference for arbitration over local courts result from the benefits that arbitration provides. Arbitration in Colombia is known for its efficiency and convenience for technical and complex disputes such as M&A transactions. Additionally, parties prefer to submit their dispute to arbitrators with recognised experience rather than local courts.

The applicable rules for domestic and international arbitration are contained in the Arbitration Statute,[14] which regulates domestic and international arbitration differently, being a dualist law.

Regarding domestic arbitration, in the absence of a particular regulation in the Statute, tribunals must apply the General Code of Procedure as a secondary source. On the other hand, concerning international arbitration, parties can agree on the rules of procedure that apply to the dispute.

Domestic arbitration is a procedure similar to a judicial process, with defined stages, terms and rules that the parties cannot modify. Domestic arbitrators are recognised as judges by Colombia's Constitution and have jurisdiction to solve, temporarily and only regarding the matters included in the scope of the arbitral pact, the controversies brought by the parties. In addition, it provides for two types of arbitration: institutional and ad hoc.

Decisions issued by domestic arbitrators are not confidential and are usually published by local arbitration centres. Furthermore, if a public entity is one of the parties, the whole proceeding, including documents, briefings and phonetics transcriptions of hearings, may be disclosed by the arbitration centre to a third party.

In respect of international arbitration, the Arbitration Statute adopted almost in its entirety the UNCITRAL Model Law on International Commercial Arbitration. Also, Colombia is a signature party to the New York Convention and the Panama Convention, which facilitate the recognition and enforcement of foreign arbitral awards.

13 P Munar, *Derecho de las Obligaciones*, 2009.

14 Law 1563 of 2012.

The Statute defines that arbitration shall be considered international whenever the proceeding meets one of three set conditions:

a the parties have domiciles in different states;

b the place where a substantial part of the obligations is to be performed is located outside the state in which the parties have their domiciles; and

c the dispute directly affects the interests of international trade.

The regulatory legal framework for international arbitration proceedings in Colombia can be labelled as modern, giving the parties ample flexibility to agree on the rules of procedure. In contrast with domestic arbitration and local court litigation, international arbitration may provide a confidential means of resolving disputes.

Enforcement

Local awards can be enforced in the same way as Colombian court rulings. However, the enforcement of international awards depends on the seat of the arbitration. If the award was rendered in Colombia, it is considered a national decision, like a domestic tribunal, and is enforceable in the same way as a judicial ruling or domestic award. Nevertheless, if the arbitration is not seated in Colombia, the award must be enforced through recognition and enforcement proceedings.

Annulment

In Colombia, the parties cannot appeal the arbitration awards, but once the tribunal has ruled its decision, any party can bring an annulment procedure.

In domestic arbitration, the jurisdiction may vary depending on the parties involved in the dispute. If the parties are private, the district's Superior Court has jurisdiction over the annulment request. Nevertheless, if a public party is involved in the dispute, the Council of State has jurisdiction over the annulment.

In international arbitration, the parties must adhere to the procedure set up in Article 109 of the Statute to request the annulment of the award. The Civil Chamber of the Supreme Court of Justice has jurisdiction if the parties are private. On the other hand, if a party is public, the Council of State has jurisdiction over the annulment.

v Other issues

The arbitral tribunal may order any appropriate interim measure in international arbitration proceedings. The civil circuit courts have jurisdiction to enforce or refuse to enforce said measures by request of the other party or *ex officio*.

V CROSS-BORDER ISSUES

A foreign investor may acquire a Colombian company by the purchase of its shares or its assets. However, the foreign investor should consider critical points regarding the regulation authorities. For instance, the scope of the SIC regarding its control over the merger and acquisition transactions does not distinguish between mergers, consolidations or integrations between national or foreign companies. Therefore, if the cross-border transaction impacts on the Colombian market because the operation involves vertical or horizontal integrations, the parties involved should notify the SIC of the agreement.

i Choice of law

The Colombian Civil Code is the governing law of contracts between Colombian citizens and applies to disputes relating to civil matters. The Code prohibits the prevalence of private stipulations against regulations of public interest; therefore, in this type of dispute, non-Colombian law cannot be applied. Colombia does not allow the waive of its authority by the parties over matters subject to its exclusive jurisdiction.

Although local law does not prohibit the application of non-Colombian law in international agreements with a foreign element, the courts may appear reluctant to the applicant of foreign law. For these instances, the General Code of Procedure allows the courts to obtain a report issued by an expert on the governing law to provide the judge with arguments for its ruling.

One of the exceptions where the courts allow the application of a non-Colombian law is before a contract in which the parties established international arbitration as the designated mechanism to solve their dispute if one of the three conditions for international arbitration is met.

In international arbitration, the parties' right to select the law applicable to a contract is limited only by international public order provisions. If they do not choose the applicable law, the arbitral tribunal will apply the rules of law that it deems appropriate, the application of the law most connected to the object of the contract or the jurisdiction where a substantial part of the obligations was executed.

ii Jurisdiction

The parties can choose the jurisdiction applicable to their dispute if they do not fail to conform to public interest regulations. In application of the competence-competence principle, by request of the party or *ex officio*, the court may redirect a claim that has an arbitral pact with the contract of dispute.

Pursuant to Article 29 of the Arbitration Statute, the local arbitral tribunal is competent to resolve over its jurisdiction and has general jurisdiction over other civil or administrative courts that may pursue the same claim.

VI YEAR IN REVIEW

In *Mercantil Galerazamba y CIA SCA and other v. Muñoz merizalde & CIA S en C and other*,[15] the tribunal, over a dispute relating to a share and purchase agreement where the claimant was the buyer who was also the target's majority shareholder, made the following decisions.

a Allocation of risks: in the absence of a stipulation by the parties, the tribunal adopted an anti-sandbagging stance in favour of the seller. However, the award does not clarify whether this position is embraced due to the implicit knowledge that the plaintiff, as the buyer and majority shareholder, held over the target.

15 Arbitrator's award dated 24 September 2020 (*Galezaramba y CIA SCA y Gabriel Hernán Rafael Echavarría Obregón as the buyers and claimants v. Muñoz Merizalde & CIA S en C y Fernando Daniel Muñoz Merizalde as the sellers and plaintiffs*).

b Representations and warranties: the arbitral award acknowledged the possibility of qualifying the representations and warranties with standards such as materiality and relevance. Even if the Colombian legal framework does not define these terms, the tribunal applied comparative law for its analysis.

c Claims procedure: the tribunal held that the procedural requirements implemented in the agreement were of strict compliance and had to be respected by the parties promptly and thoroughly. The award stated that, as the sellers agreed to widen the scope of their liabilities, the buyer had to comply with the agreed proceeding to bring a claim. In this case, the claimant did not fulfil these requirements; hence, the tribunal concluded that the notice of claims was not formulated per the contract.

VII OUTLOOK AND CONCLUSIONS

Colombia continues to stand out as a friendly country for foreign investment. Proof of this is the constant growth in the number of M&A transactions, a fact attributed to the modernisation of its legal framework, attention to the needs of the foreign investor and the reinvention of the system to provide solutions to those needs.

However, there are still many challenges to be met and legal needs to be implemented. A sample of them is the necessity to undertake reforms to improve the applicable framework for companies. In this regard, the Colombian government presented a new bill[16] including a new regime applicable to directors and officers, the protection of minority shareholders, the introduction of flexible mechanisms for corporate governance, strengthening the SIC's institutional structure and, overall, the intention of recovering the economy.

Another development we may see in the coming year is the reform of the Arbitration Statute. The Colombian government[17] presented a bill relating to this matter, which the Congress of Colombia is currently considering. The bill intends to make the arbitration process more expeditious, modifying the judge who decides an arbitrator's recusal request and creating an emergency arbitrator.

16 https://www.supersociedades.gov.co/Noticias/Paginas/2021/La-reforma-al-Regimen-General-de-Sociedades.aspx.

17 https://www.elespectador.com/judicial/radicaron-proyectos-que-busca-modificar-estatutos-de-arbitraje-y-conciliacion/.

Appendix 1

ABOUT THE AUTHORS

MARIO ALEJANDRO VANEGAS MONTOYA

DLA Piper Martínez Beltrán

Mario Alejandro Vanegas Montoya is an associate in the insurance and tort practice area of DLA Piper Martínez Beltrán, focusing his practice on advising national and foreign companies in national and international arbitrations and proceedings before the ordinary jurisdiction and contentious administrative jurisdiction. He has more than five years of experience counselling clients on corporate and commercial law matters. Mario graduated from Externado de Colombia University and has a postgraduate degree in commercial law from Los Andes University.

Before joining DLA Piper Martínez Beltrán, he worked in arbitration and litigation proceedings at a Latin American law firm and as an arbitration lawyer at the Center of Arbitration and Conciliation of the Chamber of Commerce of Bogotá.

He is currently the president of the board of directors of the Young Arbitration Network of the Chamber of Commerce of Bogotá, Colombia.

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