Latin America Isn't 'Going South': A Qualitative Sampling Analysis

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This article analyses a qualitative sample of recent judicial decisions from Argentina, Colombia, Costa Rica, Chile, the Dominican Republic, Mexico and Peru. Almost all decisions in the sample show ordinary courts' deference towards arbitration. As long as the courts operate within the framework established by the UNCITRAL Model Law or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arbitral awards enjoy a high level of autonomy and protection against unjustified attacks. This allows for conclusion that Latin America isn't 'Going South' on its path into global arbitration realm.

At the same time, in almost all jurisdictions included in the sample, Constitutional courts and Tribunals and constitutional actions for protection of fundamental rights play an extremely – indeed excessively – relevant role. Admittedly, these constitutional actions have been mainly unsuccessful and have not led to amendments of arbitral awards. Nonetheless, its sole availability generates legal uncertainty and undermines the reliability of arbitration as a mechanism of dispute resolution. It seems to be the last hurdle that Latin American countries will have to overcome before they are considered safe and appealing seats for international arbitration.

Keywords: Arbitration, Latin America, setting aside, recognition and enforcement, amparo, constitutionalization of arbitration

1 INTRODUCTION

After decades of cautious or rather pessimistic diagnostics,[1] a more favourable perception of international arbitration in Latin America has finally emerged.[2]

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1 P. C. Szasz, *The Investment Disputes Convention and Latin America*, 11 Va. J. Int'l L. 256, 265 (1971); H. A. Grigera Naon, *Arbitration and Latin America: Progress and Setbacks*, 21 Arb. Int'l 133, 134 (2005).

2 P. E. Mason & M. Gomm Ferreira Dos Santos, *New Keys to Arbitration in Latin-America*, 25 J. Int'l Arb. (2008); G. N. Arce De Smith & B. E. Gordon, *The Good, the Bad, and the Northern Andes: Current International Arbitration Trends in Latin America*, 30 Alternatives (2012); F. Mantilla Serrano, *Major Trends in International Commercial Arbitration in Latin America*, 17 J. Int'l Arb. 138 (2000); E. Mereminskaya, *El camino se hace al andar: Recurso de nulidad en la jurisprudencia latinoamericana*, Arbitraje Comercial Internacional. Reconocimiento y Ejecución de Sentencias y Laudos Arbitrales Extranjeros (Organización de los Estados Americanos 2014).

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Over the past two decades we have witnessed how Latin America has become a relevant player in the universe of foreign investment arbitration.[3] During that same period, a true international arbitration boom has taken place, as almost all Latin American countries have endorsed new legal frameworks, mainly based on the UNCITRAL Model Law on International Commercial Arbitration. The two trends followed different paths in order to overcome different conceptual hurdles from the past.[4]

As wisely noted by Sundaresh Menon, Chief Justice of the Supreme Court of Singapore, 'international organizations provide an effective platform for attaining consensus and harmonization … while domestic legislatures and courts put the flesh on these bones by making sense of and applying the law in international legal instruments'.[5]

While the more favourable legislative approach to arbitration can be taken for granted for the majority of Latin America, this article will address the most recent selected jurisprudence to show how the local courts make sense of the new and notoriously more liberal and less ritualized legal framework.

The twenty-one Latin American countries are duly represented in the Kluwer Arbitration database with a significant number of judicial decisions. For practical reasons, this analysis will conduct a selective qualitative sampling covering Argentina, Colombia, Costa Rica, Chile, the Dominican Republic, Mexico, and Peru.

These countries were selected due to their distinct geographical location (North, Central and South America), dissimilar size of their markets, and their different approach to the regulation of arbitration, that is, dualistic versus monistic.

To provide a contemporary update, this research includes the most representative recent court decisions issued between 2019 and 2021. This qualitative sampling analysis will show that – notwithstanding some idiosyncratic distinctions – commercial arbitration in Latin America has taken off and it is not 'going South'.[6]

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[3] *The ICSID Caseload – Statistics Issue 2021-2*, https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics (28 Jul. 2021) (accessed 16 Dec. 2021). Indeed, the states from the region have been defendants in a significant number of cases. According to ICSID statistics, 22% of the state parties involved in disputes were South American, and 6% were Central American and the Caribbean states, i.e., a total of 28% of all cases. ICSID statistics include Mexico within the North American region together with Canada and the United States, which makes it hard to determine the exact percentage of the Latin American states acting as defendants.

[4] A. Jana, *International Commercial Arbitration in Latin America: Myths and Realities*, 32 J. Int'l Arb. (2015).

[5] S. Menon, *The Influence of Public Actors on Lawmaking in International Arbitration: Domestic Legislatures, Domestic Courts and International Organizations* 132 (Jean Engelmayer Kalicki & Mohamed Abdel Raouf eds, © Kluwer Law International 2019).

[6] To illustrate the way in which the courts address arbitration-related matters, the analysis includes selected quotations translated from Spanish by the author, who has tried to strike a balance between a

2 ARGENTINA

Until 2018, international commercial arbitration in Argentina remained subject to the same rules applicable to domestic arbitration. As of 4 July 2018, international commercial arbitration is governed by the International Commercial Arbitration Law No. 27.449. As a result, Argentina has departed from a unified or so-called monistic arbitration regime, under which international arbitrations had not received any specific regulation, to a dualistic regime. Save for a few features, Law No. 27.449 is based on the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006.[7]

While the case law which ensues under this new law awaits to be seen, two decisions applying the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') may illustrate the way in which Argentine courts deal with international arbitration issues.

The first case concerns a dispute between a private company and Astilleros Río Santiago (ARS), a shipyard, owned by the Province of Buenos Aires, related to a construction contract of two bulk carriers. An arbitral award was issued in favour of the private company, which sought its recognition and enforcement before the Contentious Administrative Court of First Instance. ARS appealed the decision solely in respect of the costs awarded by the arbitral tribunal. The Contentious Administrative Court of Appeals developed its own analysis of the matter and concluded that there was neither a valid contract nor a valid arbitration agreement, thus, the dispute should not have been referred to arbitration.

The private company appealed this decision before the Supreme Court of Justice for the Province of Buenos Aires, which denied the appeal. The Supreme Court of Justice of Argentina annulled that decision, arguing that Article V(2) of the New York Convention did not authorize the superior courts to raise *sua sponte* the public policy defense which had been addressed and denied by the first-instance tribunal.[8]

The Supreme Court approached the case from the angle of the fundamental principles enshrined in the Constitution. It relied on its previous case law concerning jurisdictional activity of the courts. That is, the constitutional principles compel the courts to observe the congruence between parties' claim and the claim

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verbatim translation and the need to streamline the original expressions to make them more easily readable.

7 R. J. Caivano & V. Sandler Obregón, *La nueva Ley Argentina de arbitraje comercial internacional*, 11 Arbitraje: Revista de Arbitraje Comercial y de Inversiones (2018); A. M. Garro, *Chapter 1: The Legal Framework of Arbitration in Argentina*, in *Arbitration in Argentina* (Fabricio Fortese ed., Kluwer Law International 2020).

8 *Argentina No. 2021-1, Milantic Trans S.A. v. Ministerio de la Producción (Astilleros Río Santiago), Corte Suprema de Justicia de la Nación, CSJ 1460/2016/CS1* (Stephan W. Schill ed., ICCA & Kluwer Law International 2021).

granted or denied in the ruling. This requirement limits the scope of judicial activity and the scope of the remedies that can be granted. The public policy argument was addressed and finally adjudicated by the first-instance tribunal and was brought up on appeal. Therefore, the Court of Appeals' ruling that analysed and applied the public policy provision *sua sponte* violated the due process guarantee.

It is interesting to keep in mind that, rather than applying arbitration-related provisions, the Supreme Courts based its decision on constitutional principles of a general procedural nature.

The second case concerns an award issued in New York, which ordered the public entity National Savings and Security Fund (Caja Nacional de Ahorro y Seguro) to pay a capital sum plus the corresponding interest accrued from a contractual relationship.[9]

The first instance court denied the enforcement of the award due to an alleged violation of public policy. However, the Court of Appeals reversed such decision and partially recognized the award. At the same time, it modified and adjusted the arbitral decision to bring it in accordance with Laws Nos 23.982 and 25.565 on the regime of consolidation of State debts. The Court of Appeals relied on Articles III and V(1)(c) and (2)(b) of the New York Convention and Articles 517 and 519 of the Code of Civil and Commercial Procedure. It argued that, instead of rejecting the award, a more favourable solution was its adaptation to the local regime to secure compliance with the national public policy.

The National Savings and Security Fund filed an extraordinary appeal before the Supreme Court, arguing that the decision of the Court of Appeals breached public policy and exceeded its powers by modifying the award, while it was only authorized to issue an acknowledgment whether to order the enforcement or not.

To appreciate the specific issues involved in this decision, it is worth remembering that, in 2004, the Supreme Court rejected a request for recognition and enforcement of a judgment issued by the Southern District Court of New York. That decision ordered the Argentine State to pay the securities and interest thereon, which was seen as intended to circumvent the debt through a restructuring of regulations. The Court contended that Law No. 25.565 'integrates the public order of Argentine law, and therefore the exequatur cannot be granted to the judgment of a foreign court that is clearly opposed to such provisions'.

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[9] *Deutsche Rückversicherung AG v. Caja Nacional de Ahorro y Seguro, in liquidation*, et al., Corte Suprema de Justicia de la Nación, CCF 6461/20091CS1 (24 Sep. 2019), www.saij.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-deutsche-rckversicherung-ag-caja-nacional-ahorro-seguro-liquidac-otros-proceso-ejecucion-fa19000141-2019-09-24/123456789-141-0009-1ots-eupmocsollaf.

In its decision in the *National Savings and Security Fund* case, the Supreme Court signals its willingness to go an extra mile and endorse the enforcement of the award by partially adapting its content to the public order requirements.[10]

Most of us will applaud all measures that strengthen the free circulation of arbitral awards as the cornerstone underling the New York Convention. However, we might wonder how far the adjustment of awards can go before it is transformed into a review on appeal.

3 COLOMBIA

In the same way as Argentina, Colombia follows a dualistic approach to arbitration, by providing separate legal regimes for domestic and international arbitration. In the case of Colombia, both mechanisms are regulated by one and the same legal act. The arbitration statute known as Law No. 1563/12, in force since 12 October 2012, provides separate chapters for domestic arbitration (Chapter I) and international arbitration (Chapter III).

To help in understanding Colombian jurisprudence, a short explanation of its judicial system is necessary. Colombian superior courts include the Council of State (Consejo de Defensa de Estado), the highest court for administrative matters. The Council of State has jurisdiction to decide on requests to set aside or requests for recognition of domestic and international awards in cases involving Colombian public entities. In turn, the Supreme Court of Justice, the highest court for civil and commercial matters, has jurisdiction to decide on those same issues when Colombian public entities are not involved. Finally, the Constitutional Court can intervene and make final decisions on constitutional actions (*acciones de tulela*) for the protection of fundamental constitutional rights allegedly violated in arbitration.[11]

The first case reviewed here involved Bioenergy Zona Franca S.A.S. (Bioenergy), as the principal, and Isolux Ingeniería S.A. (Isolux), as the contractor, both parties to a construction contract. The contract was governed by Colombian law and provided for International Chamber of Commerce (ICC) arbitration with the seat in the United States.[12]

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[10] M. Bustillo, *El orden público como barrera para la ejecución de laudos arbitrales dictados en el extranjero*, https://abogados.com.ar/ (19 Nov. 2019) (accessed 16 Dec. 2021).

[11] E. Zuleta, *National Report for Colombia (2020-2021)*, in *ICCA International Handbook on Commercial Arbitration* 1, 4 (Lise Bosman ed., ICCA & Kluwer Law International 2020).

[12] Colombia No. 2021-1, *Isolux Ingeniería SA v. Bioenergy Zona Franca SAS*, Consejo de Estado, Administrative Chamber, Third Section, File No. 11001-03-26-000-2019-00015-00(63266), 20 Apr. 2020, in Yearbook Commercial Arbitration, 1 (Stephan W. Schill ed., ICCA & Kluwer Law International 2021).

After a dispute arose between the parties, Bioenergy resorted to arbitration. The arbitral tribunal partially accepted the claims of Bioenergy and the counterclaim of Isolux, ordering the parties to make reciprocal payments. Bioenergy failed to fully comply with the award and Isolux sought recognition of the award before the Council of State, because Bioenergy was ultimately controlled by a public entity. Bioenergy resisted the recognition of the award, nonetheless, the Council of State granted it.

First, the Council of State concluded that the law applicable to the validity of the arbitration clause was the substantive law of the contract, that is, Colombian law.[13] It further decided that, in accordance with Article 62 of Law No. 1563/12, the State or companies owned or controlled by it are prohibited from challenging their capacity to agree on arbitration or the arbitrability of a dispute if they have agreed to be party to an arbitration agreement. Therefore, this challenge brought by Bionergy was rejected.

On the other hand, when analysing the grounds that may be considered by the tribunals *ex officio*, i.e., that the subject matter of the dispute was not arbitrable and that the recognition or enforcement of the award would be contrary to Colombia's international public policy, the Council of State concluded that none of these grounds had been met.

The decision highlights that the parties resorted to arbitration to solve a dispute of contractual origin arising from design, construction and assembly obligations. The decision referred to the reciprocal allegations of breach of the contracting parties; the early termination of the contract due to such breach; the damages arising therefrom; and the cost overruns incurred by the contractor in the execution of the works. In other words, it was an eminently asset-related matter, connected to economic rights freely available to the parties and susceptible of being waived. Thus, the matter in dispute was arbitrable and could have been submitted to arbitration.

The Council of State further concluded regarding the substantive international public policy, that the award 'was limited to establishing several contractual breaches of the parties and to ordering them to pay reciprocal compensation for the damages'. Therefore, such decision:

> only affected the private interest of the parties and did not transcend to matters that could compromise essential or fundamental values and principles of the State. Or, in other words, the tribunal's ruling concerns a patrimonial relationship derived from a legal matter in which no interest transcending the particular interest of the contracting parties, susceptible of protection under the 'public policy' provision referred to in the New York (1958)

[13] The original decision of the Council of State, Reconocimiento de laudo arbitral internacional – radicación no. 11001-03-26-000-2019-00015-00 (63266), is also, https://bibliotecadigital.ccb.org.co/handle/11520/26436.

> and Panama (1975) Conventions, and the National and International Arbitration Law itself, can be seen to be compromised.

The concept of public policy applied in this case raises the question of what 'essential or fundamental values and principles of the State' mean. The sentence that follows seems to explain it by opposing public policy to 'particular interest of the contracting parties'. Does it mean that only awards that concern, for example, public infrastructure may affect public policy? While it seems that public policy can be breached by a broader range of arbitral decisions, nonetheless, the outcome of this particular case is certainly favourable for arbitration in general.

The second decision worth mentioning was issued by the Constitutional Court and addressed the possible applicability of the constitutional action of *tutela*. The case arose out of an Engineering, Procurement & Construction (EPC) contract for a thermoelectric plant entered into by public entities and foreign contractors. The seat of arbitration was Bogota. The arbitral tribunal rendered an award in favour of the EPC contractor. The state entities challenged the award, arguing that it was inconsistent with Colombia's international public policy. At the same time, they launched the action of *tutela* based on the alleged violation of their fundamental rights to due process and access to justice.[14]

The matter finally reached the Constitutional Court, which had to decide whether the *tutela* action against the award was admissible and well-founded. In its decision, the Court highlighted that arbitral awards were materially equated with judicial decisions:

> since both are the product of the exercise of a jurisdictional function and have the effects of res judicata. Therefore, the admissibility of this type of action is subject, prima facie, to the same procedural requirements, both general and specific, that the constitutional jurisprudence has developed with respect to judicial decisions.

The Court reasoned that, to decide whether the constitutional action against an award is admissible, its requirements need to be analysed in a more restricted manner. In its own words:

> the exceptional applicability of the *tutela* action against awards makes sense, on the one hand, in the protection of fundamental rights, given their transcendence in our constitutional order, which provides for *tutela* as the last alternative for the defense of these legal assets and, on the other hand, in that the arbitrators, notwithstanding their autonomy and independence, are also obliged to guarantee such rights.

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[14] *Generadora y Comercializadora de Energía del Caribe – GECELCA SA ESP & GECELCA 3 SAS ESP v. Tribunal Arbitral de la Cámara de Comercio de Bogotá*, Constitutional Court of Colombia, Sentencia T-354/19 Tutela (E. Zuleta, contribution by the ITA Board of Reporters, Kluwer Law International 6 Aug. 2019).

The Court followed two lines of reasoning. First, it reviewed the additional rules to which the constitutional judge must be subject when examining *tutela* actions against awards, endorsing their exceptional applicability. Second, the Court pointed out that Colombia has opted for the dualistic approach to commercial arbitration. This meant that, for international arbitration, its international nature and the need to promote uniformity in its application and the observance of good faith must be taken into account.

In the Court's view, within the rules governing arbitration, the following elements stand out: '(i) the express prohibition of judicial intervention; (ii) the freedom to choose the applicable rules of law; and (iii) the international grounds for annulment; which have an impact on the constitutional jurisprudence on the exceptional applicability of *tutela* against national awards'.

Moreover, the Court concluded that 'the applicability of the *tutela* action against international awards has a much more restrictive exceptional character than when it is a *tutela* action against domestic awards and, to that extent, the former is highly exceptional'. In line with the above:

> it is not proper for the *tutela* action to replace the ordinary or special processes provided for the protection of a right, nor to displace the competent judge, much less to serve as an additional instance to the existing ones, since the specific purpose of its consecration, given its subsidiary nature, is to provide the interested party with effective, current and supplementary protection, to guarantee fundamental rights.

The constitutional review of an arbitral award is not part of the system under the UNCITRAL Model Law and may come as a surprise to many. Nonetheless, in this particular case, the Constitutional Court finally decided that the *tutela* filed against the award was not admissible, as the requesting party had not exhausted the proceedings to set aside the award, which were still pending before the Council of State.

4 COSTA RICA

Costa Rica is another Latin American country that opted for a dualistic regulation of arbitration with two separate laws applicable to national and international arbitration. Law No. 8937 on International Commercial Arbitration, in effect since 25 May 2011, closely follows the UNCITRAL Model Law.

The right to submit asset-related disputes to arbitration is safeguarded in Article 43 of the Constitution.[15] The Supreme Court of Costa Rica has handed

[15] The original language: 'Toda persona tiene derecho a terminar sus diferencias patrimoniales por medio de árbitros, aun habiendo litigio pendiente'.

down a number of decisions on this constitutional and fundamental right, concluding that:

> the parties cannot be compelled to exercise this right, if they have not previously agreed to it. In addition to this, the jurisprudence has construed the content of this fundamental right, establishing that the arbitration process must guarantee due process, the right to apply to set aside the award in case of violation of due process, the right of defense, access to an impartial and independent arbitral tribunal, and the right to the recognition and execution of the arbitral awards.[16]

At the same time, the Constitutional Court determined that the legal action for the defense of constitutional rights known as *amparo* cannot be used to challenge the actions and decisions of arbitral tribunals. In that same vein, the awards cannot be challenged by bringing the legal action of unconstitutionality of legal provisions, known as *acción de inconstitucionalidad*.[17]

In a recent decision, the Supreme Court of Costa Rica recognized and ordered the enforcement of an ICC arbitral awards issued in Panama, rejecting all the grounds invoked by the opposing party, Saret de Costa Rica S.A.[18] The latter alleged: (1) an improper application of the arbitration clause to a non-signatory party; (2) its lack of consent to the arbitration agreement; (3) violation of due process and the right of defense; (4) improper constitution of the arbitral tribunal and the arbitration procedure; and (5) the existence in Costa Rica of a related proceeding pending resolution.

First, the Court affirmed that it lacked jurisdiction to reopen the discussion on the substance of the dispute previously adjudicated by a foreign arbitral tribunal.[19]

Regarding the first and the second grounds, the Court stated that 'the arbitral tribunal had already finally decided on the standing of Saret de Costa Rica S.A., confirming that the arbitration clause contained in the contract should be applied to Saret de Costa Rica S.A. Dissatisfied with the decision, Saret de Costa Rica S.A. filed a request for annulment of said award, raising the same arguments before the Fourth Chamber of General Business of the Supreme Court of Justice of Panama, which rejected the request for annulment and confirmed the partial award on jurisdiction in its entirety, stating that the arbitration clause does apply to Saret de Costa Rica S.A., so that such substantive matter was already dealt with and

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16 M. Filloy, *National Report for Costa Rica (2018-2021)* 1, 2 (Lise Bosman ed., ICCA & Kluwer Law International 2020).

17 *Ibid*.

18 Costa Rica No. 2021-1, *Hidroeléctrica San Lorenzo SA v. Saret de Costa Rica SA*, Corte Suprema de Justicia, First Chamber, No. 00160–2021 (Stephan W. Schill ed., ICCA & Kluwer Law International 28 Jan. 2021).

19 The original decision of the Supreme Court of Justice No. 18-000209-0004-AR is also, https://app.vlex.com/#vid/862803645.

resolved by the foreign judicial authorities and therefore it should be rejected in this process.

The Court followed the same reasoning to reject the third ground raised by the opposing party. The fourth ground was rejected as the opposing party did not explain how its rights were allegedly violated during the constitution of the arbitral tribunal.

The fifth ground of the challenge derived from Article 99.2.5 of the Code of Civil Procedure (CCP), which establishes as a condition for the recognition of foreign judgments and awards that '[t]here must not exist in Costa Rica a pending proceeding or judgment with res judicata authority'. The Court noted:

> [t]he civil lawsuit filed by the defendant before the Costa Rican courts was filed long after the request for exequatur was made … Even Saret de Costa Rica S.A. had already been notified of this process, it filed its lawsuit on the same day that it had to reply to the request for exequatur. Therefore, it cannot be considered that the existence of a process filed in a national court at the same moment that the exequatur is contested is a cause for its denial. If this practice is allowed, we would be approving an abusive exercise of the right, an act that goes against the general principle of good faith, the dignity of justice, the legal system and is in violation of Article 41 of the Political Constitution.

Two brief conclusions follow from this review. The courts have adopted a pro-arbitration stance and show the required deference towards the decisions of the arbitral tribunals. At the same time, constitutional actions, as well as arguments based on constitutional principles and provisions, arise frequently in Costa Rican arbitration practice.

5 CHILE

Chile has also adopted a dualistic approach to the regulation of arbitration. Domestic arbitration is regulated by the Judicial Organic Code as well as by the CCP. Law No. 19.971 on International Commercial Arbitration, an almost verbatim version of the UNCITRAL Model Law, has been in force since 29 September 2004.

Although the case law has not been especially voluminous, it illustrates a generally positive attitude of the judiciary towards international arbitration.[20] No international arbitral award issued in Chile has been annulled to date.

In more recent jurisprudence, the Supreme Court of Chile granted recognition of an arbitral award rendered by the Arbitral Tribunal of the Registered Association Waren-Vereins der Hamburger Börse e.V.[21] The decision was

[20] In general, *see* A. Jana L., *National Report for Chile (2018-2021)* in *ICCA International Handbook on Commercial Arbitration* (Lise Bosman ed., ICCA & Kluwer Law International 2020).

[21] Supreme Court of Justice, Case No. 104.262-2020, 19 Jul. 2021.

welcomed by the arbitration community for several reasons, the most relevant of which are outlined below.

First, the Court confirmed that the provisions of Law No. 19.971 prevail over the more antique provisions of the CCP that regulate the recognition and enforcement of decisions rendered by foreign courts and arbitral tribunals. The judgment determined that Articles 35 and 36 of Law No. 19.971 are:

> special rules that take precedence over the general rules and whose precepts are similar to those established in the provisions of the New York Convention and in which the former, moreover, was inspired for its dictation, so much so, that they are the reflection of Article IV and V of this Convention, respectively.

Second, the Chilean party opposing the exequatur invoked the lack of reciprocity between Chile and Germany, a factor that potentially could have been taken into account if CCP dispositions were to be applied. The Supreme Court rejected this argument:

> since the special provisions contained in Law No. 19.971 apply to the case in consideration of the international nature of the arbitration agreed upon, pursuant to Article 1 Nos 1 and 3 of the aforementioned law. Consequently, regardless of the country in which the award was rendered, it is recognized as binding in Chile if it complies with the requirements set forth in Articles 35 and 36 of that Law, which, moreover, constitute a repetition of the relevant provisions of the New York Convention and, in harmony with it, constitute a more flexible internal regulation.

In this matter, the Court seemed to be willing to apply the principle of the most favourable domestic legislation underlying Article VII of the New York Convention.

Third, the Court confirmed the effectiveness of an arbitration agreement which was not signed by the Chilean respondent. It applied Article 7 of Law No. 19.971 and accepted the existence of the arbitration agreement composed of a purchase order signed only by one of the parties and accepted by the other through emails.

Fourth, the Court confirmed that it was not appropriate to require the notice of arbitration to be served upon the respondent personally, which is a mandatory requirement in the domestic arbitration. Instead, communication by courier services where it is possible to establish the receipt thereof, offered sufficient evidence that the standard of 'due notice' was met.

Fifth, the Court held that the party's failure to participate in the arbitration could not be seen as a lack of opportunity to assert its rights. The judgment states that 'the reasons that have prevented a party from asserting its rights cannot emanate from its simple will to remain in default but must be based on circumstances that seriously hinder such right'.

Sixth, the Chilean party opposing the exequatur argued that the award breached Chilean public policy, as the arbitral tribunal applied a rule of German law, which allows the annulment of the sale contract when there is a loss of value of more than 10% of the market price of the goods. In its view, that legal solution created a hypothesis of nullity of the contract not provided for under Chilean law. The Supreme Court rejected the argument of the Chilean party as it was an issue of substance of the dispute which it was not appropriate to address within the exequatur proceedings.

Finally, the Chilean party alleged that the arbitral award had not been approved by a higher court of the state where the arbitration was held, thereby breaching Article 245 No. 4 of the CCP and Article 423 No. 4 of the Code of Private International Law ('Bustamante Code') that require the enforceable condition of the award to be confirmed by such an approval.

Although the condition of 'double exequatur' should be considered to have been eradicated under the New York Convention, the previous jurisprudence of the Chilean Supreme Court left some room for doubt about the position of the Court. On this occasion, the highest court clarified that proof of the enforceable condition of the award was not necessary, being sufficient to accompany the original of the award or an authorized copy thereof.

Like many of the jurisdictions that follow the dualistic approach to arbitration, Chilean courts were faced with the need to distinguish which regulation to apply to a specific case. While at least one decision could be subject to criticism for accepting that the parties could opt out of Law No. 19.971,[22] once the courts reach clarity on the nature of the arbitration before them, they tend to adopt the required pro-arbitration stance.[23]

6 DOMINICAN REPUBLIC

On 19 December 2008, the Dominican Republic enacted Law No. 489-08 on Commercial Arbitration. The law replaces the provisions of the Dominican CCP on arbitration. Law No. 489-08, largely inspired by the UNCITRAL Model Law, applies to domestic and international arbitration. Some provisions include specific solutions regarding international arbitration. It also addresses certain matters that the UNCITRAL Model Law omits because of its universal nature.[24] In general terms, the Law was deemed an

[22] Supreme Court of Justice, Case No. 19568-2020, 14 Sep. 2020.
[23] Court of Appeals of Santiago, Case No. 13472-2015, 20 Jul. 2017.
[24] For example, Art. 2 determines what matters can be submitted to arbitration, in particular when the State is one of the parties; Art. 5 addresses the representation of the State; Art. 40 establishes the procedure to follow in the setting-aside proceedings.

effective tool for facilitating the use of arbitration in the Dominican Republic, with the expectation that the judiciary and local lawyers would seek to enhance its practical application.[25]

Early in 2021, the Supreme Court upheld the decision of the Court of Appeals ruling that a party may not appeal a first instance judgment, which referred the parties to arbitration. The Court of Appeals relied on Article 12 of Law No. 489-08, which is mostly inspired by Article 8 of the UNCITRAL Model Law. However, Article 12 provides expressly that jurisdictional decisions made by first instance tribunals are not subject to appeal.[26] The Supreme Court contended that this conclusion followed from the mere reading of the legal provision.

The Supreme Court also highlighted that the ordinary tribunals should show respect towards arbitration, preferably by following the example of:

> the Supreme Court of the United States in the decision *Henry Schein, Inc. et al. v. Archer White Sales, Inc.*, reasoned by Judge Brett Kavanaugh, in which he established that a court of law cannot disregard the arbitration clause, even when it considers that the claim is totally unfounded, having – on the contrary – the duty to enforce the arbitration agreement according to its terms. This is because an arbitrator may retain a different view of the arbitration issue, even in cases where the substantive jurisdiction finds an obvious answer. Therefore, it is a greater guarantee for the parties involved in the process that both substantive and incidental issues not expressly recognized as being within the jurisdiction of the courts are settled in arbitration, and not in court.

Another recent case involves a dispute arising out of lease agreement entered into by a private company and the State Council for Sugar (Consejo Estatal del Azúcar del Estado Dominicano or 'CEA'), a State entity. After an arbitral award and various proceedings before national courts, the matter reached the Constitutional Court of the Dominican Republic, with public policy being one of main arguments raised by the CEA to challenge the award.[27]

The CEA administers sugar factories owned by the State. The Preamble to the Law that regulates its activities states that such activities are of public interest and are crucial for the Dominican economy. The CEA argued before the Constitutional Court that the matter concerned economic public policy and therefore could not be submitted to arbitration.

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[25] S. Adell, *La nouvelle loi dominicaine sur l'arbitrage commercial du 19 décembre 2008*, 3 Revue de l'Arbitrage (2009).

[26] Article 12.1: 'La autoridad judicial que sea apoderada de una controversia sujeta a convenio arbitral debe declararse incompetente cuando se lo solicite la parte judicialmente demandada. En este caso, dicha parte puede oponer la excepción de incompetencia fundamentada en el convenio arbitral, la cual debe ser resuelta de forma preliminar y sin lugar a recurso alguno contra la decisión'.

[27] *Consejo Estatal del Azúcar del Estado Dominicano v. Azucarera Porvenir*, Supreme Court of Justice of the Dominican Republic, Decision No. TC/0607/2019, 26 Dec. 2019 (S. Adell, contribution by the ITA Board of Reporters, Kluwer Law International).

The Court determined that the arbitration concerned the lease of property owned by the State and the CEA. Thus, being a matter of commerce, any dispute arising out of that contract could, in principle, be resolved through arbitration. The Court emphasized that disputes on matters of free disposal and subject to a possible settlement by the parties may be submitted to arbitration in accordance with the applicable civil and commercial provisions, including when the State is one of the parties.[28]

The Court also stated:

> In the case of economic public order, the doctrine has held that matters with economic content, which are relevant or sensitive to the economy or the national interest, are also arbitrable, in which case the arbitration award will be subject to the scrutiny of the courts, who will have the obligation to determine whether or not the alleged public order has been violated, a matter that did not occur in this case, which is inferred from the grounds of the judgment under constitutional review and the considerations set forth in this decision.

The Constitutional Court finally confirmed the decision issued by the Supreme Court, which had upheld the arbitral award.

Here, once again, the matter was finally resolved by the Constitutional Court. The Court's reasoning is appealing as it manages to separate allegations related to public policy from the arbitrability argument, which was, in its essence, the challenge brought by the CEA.

7 MEXICO

Unlike other countries addressed above, Mexican arbitration law provides for a single regime governing domestic and international arbitration, following the so-called monistic approach. The arbitration regulation is contained in Articles 1415 to 1480 of the Commercial Code and 'is a (virtually) verbatim copy of the UNCITRAL Model Law'.[29] In 2011 it was amended to include a new chapter on Judicial Assistance in Commercial Settlement and Arbitration, alongside other updates.[30]

When analysing arbitration in Mexico, the phenomenon of *amparo* recourse needs to be taken into consideration. *Amparo* is a special remedy available to private persons (individuals and entities) for challenging most types of governmental

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[28] The original decision of the Constitutional Tribunal TC/0607/19 is also, www.tribunalconstitucional.gob.do/consultas/secretar%C3%ADa/sentencias/tc060719/.

[29] F. González de Cossío, *National Report for Mexico (2021)*, in *ICCA International Handbook on Commercial Arbitration* 1 (Lise Bosman ed., ICCA & Kluwer Law International 2021).

[30] *Ibid*., at 39.

conduct and legislation, by subjecting such conduct or legislation to a review of its constitutionality.[31]

The dominant position in Mexico is that *amparo* is unavailable or inadmissible to challenge decisions issued by arbitral tribunals, even though litigators have unsuccessfully attempted to use it in arbitration. However, once setting aside or enforcement proceedings are brought before the national courts, the remedy of *amparo* becomes available as the judicial decision falls within the category of acts challengeable by way of *amparo*.[32]

Mexican courts have generated a significant volume of arbitration decisions, of which only a very small number can be discussed here.

In an arbitration involving a private electricity producer and a state entity, the final award was issued. The state entity filed to set aside the arbitral award before the Eleventh Civil District Judge in Mexico City. In turn, the private company filed for enforcement of the award. The state entity later filed an *amparo* before the Twelfth Civil Collegiate Court of the First Circuit to challenge the decision issued by the Eleventh District Judge. In view of the significance of the case, the Mexican Supreme Court of Justice called in the case for its direct decision.[33]

The state entity raised a number of issues, one of them being the possible impact of the tribunal's decision on the public distribution of electric energy. The Supreme Court based its decision on the following grounds.

First:

> the decision of the Federal Public Administration to obtain the generation of electric energy through an external producer, through a public bidding process, and the execution of the respective contract, and the agreement to submit that disputes arising from the contract to arbitration, must be qualified as a public policy decision that from its original design encloses the possibility of private arbitrators to resolve contractual issues regarding the terms, conditions and, in general, all aspects of the production of electric energy under the contract, without the intervention of the State courts.

Second:

> by deciding that disputes over public contracts should be resolved through arbitrators, the Public Administration could have reasonably anticipated that the semantic indeterminacies of the contract and the resolution of the interpretative questions about the application of the clauses to each specific case by the arbitrators would have an impact, in one way or another, on the operation of electric power generation.

Third, the argument of the petitioner:

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31 *Ibid.*

32 *Ibid.*, at 40.

33 Cecilia Flores Rueda, *The Mexican Supreme Court of Justice Examines the Implications of the Constitutional Status of Arbitration (Standard of Court Review), Supreme Court of Justice of Mexico, Amparo Directo 71/2014* (contribution by the ITA Board of Reporters, Kluwer Law International 18 May 2019).

> in its essence, is limited to conclude that the determination of the arbitrators creates an impact over the conditions of generation of electric energy … This is inevitable when it is decided to deposit in arbitrators the power to resolve disputes over the terms of a public contract, which, like any legal text, contains terms and obligations with a certain degree of semantic indeterminacy.

Fourth:

> [w]hen a violation of public policy is alleged, judges must assess whether the arbitrators have disregarded fundamental rules or principles of law, not in the abstract, but in the specific case, by issuing a decision that, without any doubt, can be presumed to be excluded from the scope of the arbitrators' decision. The purpose of the judicial review is to prevent the parties from escaping the application of certain rules that cannot be disregarded. However, the matters that allow for the annulment of the awards are very limited and of exceptional application, of which judges should consider themselves guardians. A clear example would be the nullity of an award, the execution of which would imply the commission of a crime or an unlawful act under prohibitive laws.

Fifth:

> the judicial authority must evaluate the type of public interest involved in the assessment of the arbitral award, determine its specific weight in the specific case, and contrast it with the specific weight of the interest, also constitutionally protected through Article 17, of preserving arbitration as a method of extra-judicial conflict resolution.

In the Court's view, the judge must balance the type of public interest confronted by the arbitrators' decision against the greatest possible effectiveness of arbitration as a definitive method of conflict resolution, which aspires to replace a judicial process. Thus:

> when the friction between the award and an interest protected by public policy is minor, the principle of promoting arbitration must prevail, since as long as the parties agreed on arbitration, the arbitrators' decision must be accepted, including any possible deficiencies in the interpretation of the law, unless it is blatantly unfair or incorrect.

Once again, the review of the grounds of annulment of arbitral awards is being conducted by the Constitutional Court. The Court seems to differentiate clearly between matters of public policy and matters of national interest. In addition, the Court relies on constitutional dispositions to promote a general pro-arbitration policy that should be followed by ordinary tribunals when reviewing the awards.

In another recent decision, the Second District Court in Mexico City addressed the public policy concept and ordered the recognition and enforcement of an arbitral award involving a non-signatory party.

The Court first reminded that the ordinary tribunals are not allowed to reopen matters in dispute disposed of by the arbitral tribunal. Because the arbitral tribunal

assessed and confirmed the non-signatory's right to participate in the arbitration, the Court saw no room for review.

The Court then analysed whether the award was issued against public policy.[34] It concluded that:

> [a]n arbitral award is contrary to public policy when the issue resolved therein is placed beyond the limits of that public policy, that is, beyond the legal institutions of the State, the principles, rules and institutions that make them up and that transcend the community, due to the severity and seriousness of the error committed in the decision.
>
> Therefore,
>
> neither the award itself, nor the intended enforcement are contrary to public policy. This is so because the decision made therein does not transcend society, inasmuch as it does not transgress principles or norms that make up the legal institutions of the State, that is, it does not deprive the collectivity of a benefit granted to it by the laws, as would be the case – by way of example – when the award itself or its enforcement could imply the commission of an unlawful act under the prohibitive laws, all of which in the specific case does not occur, since its enforcement lies in requiring the defendants to comply with the obligations specified in the arbitration award.

Here again, we encounter a public policy notion that comprises principles and norms which, if breached, would deprive the collectivity of certain benefits. This is opposed to the award at hand, which only affects the parties of the contract.

8 PERU

Legislative Decree (LD) No. 1071 of 27 June 2008 enacted the new arbitration regulation based on the UNCITRAL Model Law as amended in 2006. LD No. 1071 applies to both domestic and international arbitration. However, within that seemingly uniform regulation of domestic and international arbitration, some provisions apply to international arbitration only.[35]

Domestic or national arbitration has been widely used in Peru, mainly because the law makes it mandatory in all contracts entered into by the State. It is estimated that the Peruvian State enters into more than 7,000 contracts per year in which a mandatory arbitration clause is compulsorily incorporated.[36]

Within the abundant Peruvian jurisprudence, one of the aspects that has made the development of arbitration complex is a possible review of an arbitral award in

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[34] Cecilia Flores Rueda, *Special Trial on Commercial Transactions and Arbitration: Recognition and Enforcement of Arbitral Award 351/2019-II, Second District Court in Civil Matters of the Federal District, 351/2019* (contribution by the ITA Board of Reporters, Kluwer Law International 1 Jun. 2020).

[35] F. Cantuarias, *National Report for Peru (2018-2021)*, in *ICCA International Handbook on Commercial Arbitration* (Lise Bosman ed., ICCA & Kluwer Law International 2020).

[36] A. J. Montezuma, *Diez años de activa vigencia de la Ley de arbitraje peruana. Decreto Legislativo Nº 1071*, 11 Arbitraje: Revista de Arbitraje Comercial y de Inversiones (2018).

terms of its motivation. Of the 821 requests for annulment of awards filed over a period of seven years, 485 were filed alleging defects in the awards' reasoning (motivation) and 65 of them were set aside for that reason.[37]

The following is one example of the how the argument of lack of or defective motivation is used by the parties. In an arbitration between the Ministry of Transportation and Communications and a private company, the Ministry invoked as ground for annulment of the award the grounds set forth in Article 63(1)(b) of LD No. 1071, according to which the award may only be annulled when the party requesting annulment alleges and proves 'that one of the parties has not been duly notified of the appointment of an arbitrator or of the arbitration proceedings, or has been unable, for any other reason, to assert its rights'.[38] The State entity claimed that the motivation of the award was flawed, which allegedly violated its right to due process.

The Commercial Chamber of the Superior Court of Justice of Lima stated:

> that on many occasions the challenges to the arbitral award are presented under subterfuges of alleged lack of motivation or a defective motivation, when what the party is really questioning is the substance of the arbitral tribunal's decisions … Consequently, when the request for annulment challenges the intrinsic reasoning of the decision on the merits of the dispute, such request shall be declared unfounded, since in the judicial annulment proceedings there is no room for ruling on the merits of the controversy or on the content of the award, as well as to review the criteria or motivations of the arbitrators recorded in the arbitral award.

The Superior Commercial Court performed a detailed analysis of the claims of the parties and of the reasoning of the arbitral tribunal. Based on the foregoing, it concluded:

> from the review of the award, a sequence of concatenated ideas can be observed that make up the comprehensive reasoning of the arbitral tribunal on the facts … and it is only up to that limit that this court can appreciate the reasoning of the award, since it is not acting as an instance of review of the merits of the matter submitted to arbitration.

The Court stressed that it was legally prohibited from issuing a judicial decision on the merits of the dispute, and whether it agreed or not 'with the reasoning, criteria, legal position or concepts used by the arbitral tribunal, it cannot review them, other than in the strictly formal way, since – as indicated – it is an independent jurisdiction, which must be respected'.

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[37] G. Rivas, *La motivación de las decisiones arbitrales* (Estudio Mario Castillo Freyre 2017).

[38] Commercial Chamber of the Superior Court of Justice of Lima, Case No. 639-2019-0-1817-SP-CO-02 (30 Nov. 2020).

Finally, the Court confirmed that there was no violation of the due process and due motivation:

> since apart from the appraisals or conclusions on the controversy, there is evidence of a logical legal reasoning subjacent to the decision, which provides a due motivation, in compliance with the statement of the reasons and grounds that supported its decision, as established in paragraph 5) of Article 139° of the Political Constitution of Peru.[39] Therefore, the fact that this is contrary to the interests of the petitioner does not imply a violation of the right to motivation.

While arguments regarding awards' lack of motivation continue to be a source of concern for the Peruvian arbitration community,[40] the case above illustrates a solid pro-arbitration stance of the Commercial Chamber of the Superior Court of Justice of Lima which hopefully would prevail.

Finally, in 2011, the Peruvian Constitutional Tribunal ruled that the *amparo* action was inadmissible against arbitral awards. However, such action could be filed against the decision of the ordinary court once the setting aside proceedings were concluded.[41]

In 2021, the Constitutional Tribunal partially accepted an *amparo* action filed against a decision of the Commercial Chamber of the Superior Court of Justice of Lima which had rejected a request to set aside an award. It ruled that the Court had upheld an award which included inconsistent arguments, and, therefore, lacked motivation. The Constitutional Tribunal annulled the decision of the Superior Court and ordered it to decide de novo according to the reasoning conveyed by the Tribunal.[42]

Peru has one of the most progressive arbitration laws, and a remarkable number of awards are voluntarily complied with or confirmed by ordinary courts. It is certainly one of the most successful country-users of arbitration within Latin America. The two selected cases illustrate how the introduction of arguments which are extrinsic to the acceptable standard of review may endanger the stability of the system.

9 CONCLUSIONS

The qualitative sampling analysis in this article provides us with the following insights.

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[39] Article 139.5 provides: 'The following are principles and rights of the jurisdictional function: … 5. the written motivation of judicial decisions in all instances, except for mere procedural decrees, with express mention of the applicable law and the factual grounds on which they are based'. In Spanish: 'Son principios y derechos de la función jurisdiccional: … 5. a motivación escrita de las resoluciones judiciales en todas las instancias, excepto los decretos de mero trámite, con mención expresa de la ley aplicable y de los fundamentos de hecho en que se sustentan'.

[40] R. León Pastor, *¿Puede anularse un laudo por defecto de motivación?*, 7 Arbitraje PUCP, https://revistas.pucp.edu.pe/index.php/arbitrajepucp/article/view/18070 (accessed 20 Nov. 2021).

[41] Constitutional Tribunal, Case No. 00142-2011-PA/TC, 21 Sep. 2011.

[42] Constitutional Tribunal, Case No. 03416-2017-PA/TC, Consorcio CHT–SIGMA, 20 Apr. 2021.

The ordinary courts have embraced arbitration legislation sanctioned over the past two decades. Almost all recent decisions in the sample show ordinary courts' deference towards arbitration. As long as the courts operate within the framework established by the UNCITRAL Model Law or the New York Convention, arbitral awards enjoy a high level of autonomy and protection against unjustified attacks. Indeed, when reviewing awards, the courts of the seven jurisdictions in this analysis overwhelmingly reached results fully consistent with the UNCITRAL Model Law and the New York Convention provisions, that is, requests for annulment were mostly rejected and recognition and enforcement were mostly granted. These encouraging results were what prompted the title of this article.

Despite these positive results, in some cases, the analysis methods and the rationale of the decisions raise concerns. For example, how far can the courts go in adjusting an award to public policy requirements to allow for its recognition and enforcement? Is it appropriate to define public policy through reference to the institutions of the State and national interests? Is it correct that only an arbitral award that concerns the public interest can be against public policy but not when the dispute arises solely amongst private parties?

But beyond stimulating conceptual considerations, it emerges from the research that in almost all jurisdictions included in the sample, Constitutional Courts and Tribunals and constitutional actions for protection of fundamental rights play an extremely – indeed excessively – relevant role. Admittedly, these constitutional actions have been mainly unsuccessful and have not led to amendments of arbitral awards. On the contrary, constitutional review has offered the competent Courts or Tribunals an appropriate setting to reassert their commitment towards arbitration.

Nonetheless, constitutional actions remain available and are being resorted to by parties dissatisfied with the outcome of arbitral proceedings, which generates legal uncertainty and undermines the reliability and the value of arbitration as a mechanism of dispute resolution. It seems to be the last hurdle that Latin American countries will have to overcome before they are considered safe and appealing seats for international arbitration.