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International Arbitration 2020

A practical cross-border insight into international arbitration work

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Latin America Overview: A Long Road Travelled; A Long Road to the Journey's End


Luis O'Naghten


Diego Durán de la Vega

Hughes Hubbard & Reed

I. Introduction

There is no doubt that Latin America has travelled a long way toward modernising the legal framework for international arbitration. As several commentators have noted, the countries that comprise Latin America have overcome many significant obstacles in this modernisation process: the lack of a regulatory framework that accepted arbitration (either in its domestic or international forms); a scepticism towards the benefits of arbitration; the lack of experience with arbitration; and a lack of understanding of the fundamental principles that underlie international arbitration and the modern trends in that field.

It is not surprising that Latin America has been able to overcome such structural impediments. As the region found its involvement in international commerce growing, it had to meet the needs of its commercial partners, including the vital role that arbitration plays in international commerce as a *neutral* forum to resolve disputes which also allows ease in *enforcing* its awards. There was also the promise that arbitration would be a flexible, quick and inexpensive mechanism to resolve disputes (whether this promise has been realised anywhere is a valid query). These factors gave rise to an evident change in Latin America's historically hostile attitude toward arbitration, as evinced by the almost complete abandonment of the region's acceptance of the Calvo Doctrine, the best-known symbol of the historic anti-arbitration sentiment in the region. To this end, the countries in the region have, almost universally, signed on to the major international arbitration treaties and have adopted modern arbitration statutes based on the UNCITRAL Model Law. Indeed, as the statistics of the International Chamber of Commerce ("ICC") bear out, the Latin American region is now one of the most active with respect to arbitrations. In 2019, ICC statistics show that:

- 386 parties from Latin America and the Caribbean participated in ICC cases (15.5% of all ICC parties);
- 73 States and State-owned parties come from the region, representing 19% of the total parties of the region and by far the region with the most State and State-owned parties (next closest was the Sub-Saharan Africa region with 31 such parties);
- the most common nationality of the parties included: 133 Brazilian; 51 Mexican; 27 Peruvian; 24 Venezuelan; 21 Colombian; 20 Argentinian; 19 Panamanian; and 12 Guatemalan;
- there were 178 Latin American arbitrators confirmed by the ICC in 2019, constituting 12.2% (62 Brazilian; 36 Mexican; 20 Argentinian; 14 Colombian; 10 Panamanian; 6 Peruvian, among others); and
- the most common places of arbitration in Latin America were: Brazil 24; Mexico 13; Panama 7; Peru 4; and Guatemala 3.

Nonetheless, as this chapter documents, the region still faces several challenges in bringing the regulatory framework in line with modern international arbitration practice: judicial intervention in arbitrations, including: appeals based on constitutional arguments (*amparos*); a lack of understanding of the practice of international arbitration; a lack of understanding on the part of the judiciary of the principles underlying international arbitration; and the selection of Latin American venues as seats of arbitrations.

II. Adoption of Arbitration Framework Throughout the Region

Adoption of international treaties and conventions

As is to be expected, a necessary first step in the creation of a modern arbitration culture and environment is the adoption of the international arbitration treaties and conventions. Until relatively recently, there were several unsuccessful attempts to have Latin American countries adopt international conventions dealing with arbitration. Among these we can mention the *Convención sobre Derecho Procesal Internacional* (signed by six countries in Montevideo, Uruguay in 1889), the *Acuerdo Boliviano sobre Ejecución de Actos Extranjeros* (signed by five countries in Caracas, Venezuela in 1911), and the *Convención de Derecho Internacional Privado* (signed in Havana, Cuba in 1928, which gave rise to the *Código de Derecho Internacional Privado*, known as the *Código Bustamante*). Although interesting in their own right, these conventions and treaties had little impact in terms of creating a positive culture for arbitration in the region in as much as the domestic laws were still highly antagonistic to arbitration (e.g. the Calvo Doctrine was still the rule in most of Latin America).

As with the rest of the world, dramatic changes occurred in 1958 with the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and in 1975 with its Latin American counterpart, the Inter-American Convention on International Commercial Arbitration ("Panama Convention"). The Panama Convention was the first signal of the region's acceptance of international commercial arbitration. Prior to 1975, few countries in the region had adopted the New York Convention. The drafting of the Panama Convention had as its primary objective to remedy the deficiencies in the internal arbitration laws of the individual Latin American countries by establishing the requirements for valid arbitration agreements, the procedure for the recognition and enforcement of arbitral awards, and other matters related to arbitral procedure. Thus, the Panama Convention can be considered the first step on the part of the Latin American nations in

the journey to a modern international arbitration legal framework. Chart 1 shows the overwhelming acceptance in the region of both the New York and Panama Conventions since 1975.

Chart 1 – Acceptance of the New York and Panama Conventions in Latin America

Country	New York Convention	Panama Convention	Washington Convention
Argentina	1989	1994	1991
Bolivia	1995	1998	Denounced the Convention in 2007
Brazil	2002	1995	Never adopted
Chile	1975	1976	1992
Colombia	1979	1986	1993
Costa Rica	1988	1978	1981
Cuba	1975	Never adopted	Never adopted
Ecuador	1962	1991	Denounced the Convention in 2009
El Salvador	1998	1980	1982
Guatemala	1984	1986	1995
Honduras	2001	1979	1986
Mexico	1971	1978	2018
Nicaragua	2003	2003	1994
Panama	1985	1975	1995
Paraguay	1998	1976	1981
Peru	1988	1989	1991
Dominican Republic	2002	2008	2000
Uruguay	1983	1977	1992
Venezuela	1995	1985	Denounced the Convention in 2012

As Chart 1 shows, only four of the 19 countries listed had not adopted the New York Convention by 2000. As a consequence, the countries in the region now had a positive legal framework that allowed for the efficient recognition of arbitral clauses and the enforcement of arbitral awards.

However, it is not only the New York and Panama Conventions that accelerated the region's acceptance of arbitration. By and large, the region also accepted the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("Washington Convention") (Brazil being a notable exception) which concerns investment disputes, as well as having entered into numerous Bilateral Investment Treaties and regional agreements (e.g. NAFTA, DR-CAFTA, *Acuerdo sobre Arbitraje Comercial Internacional del Mercosur* ("Mercosur") and Andean Pact agreements). Although there are clear legal distinctions between investment and commercial arbitration, entering into these arrangements created a culture of acceptance of the arbitral process.

Adoption of modern arbitration legislation

Traditionally, the countries in the Latin American region regulated arbitration within their procedural or commercial codes and were directed toward domestic arbitration, without any reference to international arbitration. Moreover, the legislation focused on the procedural aspects of arbitration and, as a result, did not provide the substantive law necessary for the proper understanding of international arbitration (e.g. principles of severability, *Komptenez-Komptenez*). Indeed, quite to the contrary, the regulatory framework contemplated extensive involvement of the judiciary in the arbitral process. Simply put, neither party autonomy, nor the capacity of an arbitral tribunal to conduct an arbitration, were respected under the traditional Latin American legal framework.

Adoption of the New York and Panama Conventions notwithstanding, more was required before the region could overcome the legal obstacles facing international arbitration and allow it to become an accepted mechanism for dispute resolution. In this regard, the adoption of a modern arbitration statute in each of the countries of the region was a prerequisite to counteracting the existent legal framework and the advancement of an international arbitration culture in the region.

It can happily be reported that the countries in the region have, indeed, been passing modern laws related to international arbitration. More than 15 countries have passed new arbitration laws over the past two decades. This occurrence has its genesis in the creation of the UNCITRAL Model Law of 1985 (the "Model Law"). The country that pioneered the adoption of the Model Law was Mexico, which in 1993 revised its existing law with respect to both domestic and international arbitration. As reflected in Chart 2, within 15 years of Mexico's new law, a majority of countries in Latin America followed Mexico's lead in adopting new arbitration laws, and the trend continues with Colombia having recently amended its 1996 law in 2012 based on the 2006 version of the Model Law.

Chart 2 – New Arbitration Laws Adopted in Latin America

Country	Date
Mexico	1993, 2011
Guatemala	1995
Brazil	1996
Peru	1996, 2008
Colombia	1996, 2012
Bolivia	1997
Ecuador	1997
Costa Rica	1997, 2011
Venezuela	1998
Panama	1999, 2013
Honduras	2000
Paraguay	2002
El Salvador	2002
Chile	2004
Nicaragua	2005
Cuba	2007
Dominican Republic	2008
Argentina	2018
Uruguay	2018

It is fair to say that most of these laws are based, in substantial part, on the Model Law. These laws reflect the concept of party autonomy in designing the arbitral process; the laws also reflect a desire to limit the role of the local courts to certain preliminary questions such as the naming and challenging of arbitrators, the adoption of preliminary measures, and review of arbitral awards.

The various laws enacted can be divided into two. First, countries that sought to specifically modernise arbitration, including: Brazil; Chile; Colombia; Cuba; the Dominican Republic; Guatemala; Mexico; Paraguay; Panama; Peru; and Venezuela. Another group of nations opted for more general legal reforms whose purpose was to implement modern procedures for alternative dispute resolution in an attempt to provide some degree

of relief to the overburdened judicial system (a chronic problem throughout Latin America). These countries include: Bolivia; Costa Rica; Ecuador; El Salvador; Honduras; and Nicaragua.

Further, a review of the new laws reflects that most countries have opted for a single regulatory framework that encompasses both domestic and international arbitration simultaneously. Countries in this category include: Bolivia; Brazil; the Dominican Republic; El Salvador; Guatemala; Mexico; Nicaragua; Panama; Peru; and Venezuela. Among the relatively few countries that treat international arbitration separately and apart from domestic arbitration are: Chile; Colombia; Costa Rica; Cuba; and Ecuador.

Latin America as the seat of arbitration

The growth of arbitration in Latin America is slowly resulting in arbitrations being seated in the region. In 2018, the University of Leicester in the UK and Gentium Law in Switzerland, supported by the ICC and the Organization of American States ("OAS"), published a survey of 509 arbitration practitioners in the Americas entitled "Arbitration in the Americas". An analysis of the results related to the most popular venues for seats for Latin American arbitrations reveals that, in general, practitioners still do not use Latin America as the seat for arbitration, but instead prefer the United States (specifically New York and Miami). However, the results vary slightly when the participants were limited to those from Central and South America and the Caribbean.

All Participants (509 Participants)	Participants from Central and South America and the Caribbean (250 Participants)
US (85%)	US (78%)
England and Wales (68%)	France (59%)
France (52%)	England and Wales (56.5%)
Switzerland (38%)	Spain (29%)
Canada (36%)	Chile (28%)
Singapore (19%)	Switzerland (28%)
Spain (17%)	Peru (21%)
Hong Kong (16%)	Colombia (19%)
Germany and Chile (15%)	Brazil (15%)
	Mexico (14%)

As the above results show, the US is far and away the most popular venue for arbitrations amongst Latin American practitioners. This fact is a significant departure from other global surveys as US seats are not typically the top rated. For example, in the recent White & Case/Queen Mary survey, New York (the most popular US venue) was no higher than the sixth-most-popular seat. However, when responses were limited to those practitioners from the region, some significant changes can be seen. Among the Latin American practitioners, the US maintains its status as the preferred venue, but Spain jumps to fourth place and Chile into fifth place. Significantly, Peru, Colombia, Brazil and Mexico make the top 10 list. Finally, when breaking down the most popular seats in the US, only two cities have a substantial traction: New York and Miami. New York is the most popular seat in the US, but Miami has gained notable support as it positions itself as a hub for Latin American arbitration. Support for Miami as a venue was particularly strong among Latin American practitioners.

ICC statistics bear out much of what was revealed in the "Arbitration in the Americas" survey. Not surprisingly, Brazil (with 28 arbitrations) and Mexico (with 18 arbitrations) lead the region as venues. These figures reflect that Brazil and Mexican parties are by far the largest users of ICC arbitration. After Brazil and Mexico, Miami and Peru each had six ICC arbitrations while Chile and Argentina had five arbitrations.

III. The Arbitral Clause

Traditionally, recognition of the arbitral clause caused significant problems in Latin America. The region recognised a distinction between the arbitral clause and the *compromiso*, an agreement after the dispute arose which permitted the dispute to be resolved by arbitration as provided for in the arbitration clause. Thus, although the arbitral clause reflected the parties' agreement to arbitrate, it was not self-executing. This dual requirement gave rise to numerous problems because if there was no express *compromiso*, there was no manner of supplying the necessary consent to arbitration. Simply put, the fact that a valid arbitral clause existed, did not in and of itself provide that the requisite authority appoint an arbitral tribunal, or compel arbitration. Instead, the judiciary deemed that it had jurisdiction over the dispute.

However, this issue no longer constitutes a real problem in the region, as the laws enacted by the Latin American nations have abolished the distinction between the arbitral clause and the *compromiso*, have simplified what is required of an arbitration clause, and the judiciary is now required to compel arbitrations where a valid arbitration clause exists.

Elements of a valid arbitral agreement

Historically, throughout Latin America there were many formalities required before an arbitration agreement would be recognised and enforced. The situation has changed dramatically for the better. The laws passed throughout the region follow the lead of the Model Law and recognise that a valid arbitral clause can be proved through any writing, including an exchange of letters or other written communication that establishes the existence of the arbitral agreement. Countries that follow this rule include: Bolivia; Chile; Colombia; Costa Rica; the Dominican Republic; El Salvador; Guatemala; Honduras; Mexico; Nicaragua; Panama; Paraguay; Peru; and Venezuela. Some countries even allow an arbitration agreement to be established by the filing of a demand for arbitration and an answer to the demand which does not dispute the validity of the arbitral clause: Chile; Colombia; Guatemala; Honduras; Mexico; Panama; Paraguay; and Peru. Perhaps surprisingly, the most liberal law regarding proof of the arbitral agreement is that of Cuba, in which a valid arbitration clause can be established merely by the parties' procedural conduct. In this regard, the demand for arbitration and the answer do not have to explicitly state the existence of an arbitral clause, but the mere procedural posture of the parties is sufficient to perfect a valid arbitral agreement.

Several of the modern statutes also recognise that an arbitral agreement can be contained in a stand-alone agreement, as well as accepting that the arbitration clause may be incorporated by reference; these include: Bolivia; Brazil; Chile; Colombia; Ecuador; El Salvador; Guatemala; Mexico; Nicaragua; Peru; Panama; Uruguay; and Venezuela. In addition, some laws also include an additional requirement contained in the Model Law that the principal contract (from which the arbitral clause is incorporated) must be in writing: Bolivia; Chile; Guatemala; Mexico; Paraguay; Portugal; and Venezuela. Colombia and Ecuador have added an additional requirement that the incorporation by reference should also include a specific reference to the parties of the principal contract.

The most recently adopted arbitration statutes, those of the Dominican Republic and Peru, have gone so far as to incorporate elements of the doctrine *in favorem validitatis*, which is a conflict of law principal that requires courts to apply the law that is most favourable to arbitration when considering the validity of an arbitration agreement. Possibly the best exemplar of the doctrine is contained in Spain's arbitration law, which states that the arbitral agreement must be found valid if it is supported by either (a) the law applicable to the clause, (b) the law applicable to the entire agreement, or (c) Spanish law.

Personal and subject matter jurisdiction

Most of the new laws mandate that only the parties who signed the arbitral agreement can be compelled to arbitrate. This, by necessity, limits the ability of compelling non-signatories to arbitrate (e.g. agents or their principals, alter-egos, etc.). A notable exception is Peru, whose legislation provides that the arbitral clause can be extended to those individuals whose agreement to arbitrate can be determined by principles of good faith. In this manner, parties who are actively part of negotiations, execution or termination of a contract may be compelled to arbitrate, although not explicitly a party to the arbitral agreement. Similarly, Colombian law allows non-signatories to be called as impleaders (*llamados en garantìa*). Those non-signatories may be called when they have warranted obligations under the agreement containing the arbitral clause. Article 37 of Law 1563 provides that the award will be binding for those impleaders.

As to subject matter jurisdiction, most of the new legislation allows both contractual and non-contractual disputes (e.g. torts) to be arbitrated: Bolivia; Colombia; Costa Rica; Ecuador; Guatemala; Honduras; Mexico; Panama; Paraguay; Peru; and Venezuela. In contrast stands the legislation of Brazil, which restricts arbitration to those that are related to economic rights over which the parties have a right to dispose.

Any discussion regarding subject matter jurisdiction in arbitration in Latin America, or arbitrability as that term is used in the United States, must deal with the dual concepts of *objective arbitrability* (which limits the types of disputes that may be submitted to arbitration) and *subjective arbitrability* (which limits the types of individuals or entities that may participate in an arbitration).

With respect to *objective arbitrability*, there exists a distinction between countries that follow the French custom of only allowing arbitration of freely arbitrable matters ("*materias de libre disposición*") or those that deal simply with "economic rights" ("*derechos patrimoniales*"). Those countries that adhere more closely to the former include: Bolivia; Colombia; Ecuador; the Dominican Republic; El Salvador; Guatemala; Honduras; Nicaragua; Panama; Peru; and Venezuela. On the other hand, those that utilise the concept of "economic rights" in defining what can be arbitrated are Brazil, Cuba and Costa Rica. Because Costa Rica has two arbitration laws, its definition for arbitrability is defined differently in each one. In the law for domestic arbitration, article 18 includes in its definition the two requirements of "freely arbitrable matters" and "economic rights". The international arbitration law, on the other hand, includes mention of arbitrability in article 2 but refers to it in a broad sense by indicating that "commercial" should be interpreted broadly so as to include all matters related to commercial relations. It goes on to include a non-exhaustive list of examples of commercial operations. Two countries, Chile and Mexico, include a specific definition of the matters that can be subjected to arbitration.

Regarding *subjective arbitrability*, most laws allow governmental entities (those that are owned in whole, or majority, by the government) to freely enter into arbitration agreements, so long as these agreements do not violate public policy. Certain countries, however, have added certain restrictions before a governmental entity can enter into an arbitration agreement, such as obtaining prior approval from a specific ministry. Colombia, Costa Rica, Ecuador, Mexico and Venezuela are among the countries that have added this type of restriction. In Brazil, it was debatable whether governmental entities were allowed to resolve disputes via arbitration without express legal authorisation, albeit arbitration was authorised by law in several instances, such as concession of public services, PPP and oil and gas contracts, and the case law is favourable to arbitrations involving State-owned companies. This incertitude was addressed in the amendments to the arbitration act enacted in 2015. The revised Brazilian arbitration act now contains language expressly authorising governmental entities to resort to arbitration, quenching all doubts as regards the subjective arbitrability of disputes relating to the public administration.

At the opposing end of the spectrum, both the Dominican Republic and Peru, as well as the new Colombian law, have adopted legislation that prohibits a sovereign or governmental entity from using its "internal law" (*subjective arbitrability* as discussed above) in order to avoid the obligations imposed by an arbitral agreement. This is a specific aspect of the doctrine of *in favorem validitatis* discussed above. It should also be noted that international arbitral tribunals have also used the concepts of good faith and estoppel to overcome jurisdiction-based defences on the invocation by a sovereign or a governmental entity of its "internal law" and the concept of *subjective arbitrability*.

Challenges to the arbitral award

As is to be expected, after the adoption of modern arbitration legislation and the New York Convention, the *ad hoc* and localised nature of the laws relating to challenges to arbitral awards have been minimised. Prior to the adoption of the new arbitration laws, numerous and diverse challenges to awards were recognised by the different countries. Of course, such diversity of possible objections served to impede the growth of arbitration in the region as parties had no certainty of the possible arguments that could be used to vacate an award. Although the adoption of the new arbitration laws has certainly helped this situation, regrettably it cannot be said that the desired uniformity within the region exists on this issue.

The basic principles contained in the Model Law regarding challenges to awards can be reduced to two: (i) a petition to vacate or annul an award is the exclusive means by which to challenge an award; and (ii) the basis for vacating/annulling an award are limited to those contained in article V of the New York Convention. Several countries in the region have accepted the first of these principles (petition to vacate as the exclusive method to challenge): Chile; Colombia (under its new arbitration law); Costa Rica (regarding international arbitral awards); the Dominican Republic; El Salvador; Guatemala; Mexico; Nicaragua; Panama; Paraguay; Peru; and Venezuela. However, Bolivia and Costa Rica (regarding domestic arbitral awards) allow alternate means to challenge an award.

There is a lamentable lack of uniformity regarding the grounds to challenge an award. Some countries have accepted the causes contained in the Model Law as the basis for challenges to arbitral awards: Bolivia (with the minor addition of an additional cause: issuance of an award outside the prescribed timeframe); Chile; Colombia (under its new arbitration law); the Dominican Republic; Guatemala (although its law provides an additional prerequisite that the cause for the challenge must have been subject to an objection during the arbitral proceeding); Mexico; Nicaragua; Panama; Paraguay; and Peru.

Other countries have deviated from the Model Law either by omitting specific causes contemplated by the Model Law, adding additional causes to those in the Model Law, or using local terms that deviate from the Model Law. These countries include: Brazil; Costa Rica; Ecuador; El Salvador; Honduras; and Venezuela.

The rise of Latin American arbitral institutions

Along with the development and modernisation of the legal framework that governs arbitration, Latin America has also experienced growth with respect to local arbitral institutions. In 2011, the Institute for Transnational Arbitration ("ITA") completed its *Inaugural Survey of Latin American Arbitral Institutions* ("*Survey*") and identified 165 local arbitral institutions and surveyed 35 of the most important of these. The local arbitral institutions have played a key role in the development of arbitration in their jurisdiction by organising seminars, and publications in arbitration journals, and by connecting leading international arbitration specialists with local practitioners. These local arbitration institutions continue to develop and forge alliances with the more established institutions. For example, the *Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá* is the representative for the ICC Colombian National Committee and has an institutional arrangement with the International Centre for Settlement of Investment Disputes ("ICSID"), but in 2014 added a cooperation agreement with the *Permanent Court of Arbitration*, as did the *Centro de Arbitragem e Mediação da Câmara de Comércio Brasil-Canadá*. These last two arbitral institutions, along with the Mediation and Arbitration Center of the Mexico City National Chamber of Commerce and the *Cámara de Comercio de Caracas*, also are members of the International Federation of Commercial Arbitration Institutions.

In addition to the local arbitral institutions, the ICC has established national committees in 14 countries in the region and has created the *Grupo Latinoamericano de Arbitraje de la CCI*, which brings together some of the most distinguished international arbitration practitioners in Latin America to discuss arbitration issues relevant to the region. The International Centre for Dispute Resolution ("ICDR") has set up an office in Mexico and is affiliated with arbitral institutions throughout the region. Finally, local institutions from Latin America form part of the Inter-American Commercial Arbitration Commission ("IACAC"). The proliferation of arbitral institutions and the choices they offer to those in the region provides further evidence, if any is truly needed, of how extensively the legal and business environment in Latin America has accepted arbitration as a means of dispute resolution.

The *Survey* revealed five key findings. First, the majority of the arbitral institutions were established sometime after 1990, during and after the changes discussed above in the legal environment. The statistics show that over 69% of those surveyed have existed for over 10 years; 23% have existed for between five and 10 years; while 8% have only existed for between two and five years. In Brazil, the majority of the leading arbitral institutions were established after 2000, owing to the delay in the development of the legal framework discussed below.

Second, although most disputes involve domestic parties (including subsidiaries of international companies), a significant and increasing percentage also involve foreign parties. Moreover, some local arbitral institutions handle a significant amount of international cases. For example, the *Survey* highlights that 60% of the cases administered by the *Câmara de Arbitragem do Mercado*, Brazil, involved foreign parties; 40% of the cases administered by CICA, Costa Rica, involved foreign parties; and 29% of the cases administered by American Chamber of Commerce of Peru ("AmCham"), Peru, involved foreign parties. Overall, the *Survey* found that the cases handled by Latin American arbitral institutions involved 88% local parties and 12% foreign parties.

Third, while most cases involve private entities, an increasing percentage of cases involve public entities. The statistics show that currently 95% of the parties that utilise the local arbitral institutions are private parties, while only 5% are public parties. However, there is a clear trend in which public institutions are increasing their utilisation of arbitration. For example, 40% of the cases administered by the *Câmara de Arbitragem do Mercado, Brazil*, involve public entities. In addition, 19% of cases administered by both the Arbitration and Mediation Center of the Ecuadorian American Chamber of Commerce and the CAC-CCB Colombia involved public entities.

Fourth, the majority of the arbitrations involve only two parties. However, as disputes become more complex, more cases involve multiple parties. Already 22% of cases administered by the institutions surveyed involved more than two parties. Some institutions have a significant portion of their case-load involving cases with multiple parties. For instance, at the *Câmara de Arbitragem do Mercado*, Brazil, 80% of the cases involve more than two parties; 42% of the cases administered by CAM-Mexico involve more than two parties; while 40% of the cases administered by both the CAC-CCB, Colombia, and the CCA-CCCR, Costa Rica, involved more than two parties.

Fifth, the vast majority of jurisdictions apply one or fewer requirements for choosing an arbitrator, such as: requiring the arbitrator to be a national of the country where the institution is located; be a certified, licensed attorney in that jurisdiction; or be chosen from a roster vetted by the arbitral institution. The statistics show that: 77% of institutions have one or no requirements for selecting an arbitrator; 42% of institutions follow requirements that arbitrators be on a roster; 27% of institutions require that arbitrators be nationals of the country of the local institution; and 24% of institutions follow requirements that arbitrators be licensed attorneys. This issue is of great importance as it reflects party autonomy which is the foundation upon which international arbitration has been built.

VI. Trends in 10 Latin American Countries

Argentina

Argentina recently entered into what seems to be a promising starting point towards the enactment of modern arbitration law, contemplating international arbitration. For many years, Argentina did not have federal legislation specifically dealing with general regulations about international arbitration. Instead, domestic arbitration has been regulated by the country's civil procedure codes. The National Code of Civil and Commercial Procedure ("CPCCN") applies to the City of Buenos Aires, and in each federal court across the country. As a general comment, the arbitration chapter of the CPCCN provides for an antiquated procedure, which in many ways contradicts the modern trends in areas such as the default provision in the absence of a party's consent as regards to arbitration "*de iure*" or by "*amiable compositeurs*" (being the default provision arbitration by "*amiable compositeurs*"), that the parties maintain all legal remedies to challenge the award that were not expressly waived in the arbitration agreement and the need for the parties to ratify the arbitration agreement once the dispute arose (the "*compromiso arbitral*").

Despite the above, Argentina is a party to several treaties that recognise the validity and enforceability of international arbitration agreements, e.g. the Panama Convention, New York

Convention and Mercosur issued in Buenos Aires on July 23, 1998 ("Buenos Aires Convention"), to which Brazil, Uruguay, Paraguay, Bolivia and Chile are also parties.

The Buenos Aires Convention applies to disputes between parties that, at the time of the execution of their agreement: (i) have their domiciles in signatory countries to the convention; (ii) have contact with at least one signatory party of the convention; or (iii) have chosen the seat of the arbitration in one signatory party to the convention. Contrary to the CPCCN, the Buenos Aires Convention is in line with most of the relevant international arbitration statutes. However, it will only apply to the specific situations set forth therein, and not to any other arbitration agreement not covered by such Convention.

However, Argentina has recently enacted a joint Civil and Commercial Code ("CCC"), which came into force in August 2015. The CCC constitutes federal legislation and applies throughout the country. Further, as this code constitutes substantive rather than procedural legislation, the CCC will supersede the provisions of the CPCCN and/or any other provincial code regarding arbitration, in all matters specifically covered by the CCC. The CCC has a specific chapter regulating arbitration contracts (Sections 1649 to 1665). Such qualification emphasises the contractual aspect of arbitration (thus relativising its jurisdictional side). Nevertheless, while this initiative provides for several well-known and useful arbitration principles, it also includes at least two potentially major problematic provisions.

Among the favourable notions, the CCC includes: (i) the principles of *Kompetenz-Kompetenz*; (ii) separability of arbitration agreements; (iii) the tribunal's power to render interim measures; (iv) exclusion of judiciary jurisdiction when an arbitration agreement exists; (v) presumption in favour of arbitrability in the event doubt exists as to its scope; and (vi) the obligations of arbitrators to be available and to disclose any matter that might affect their impartiality and independence. Even though several of these principles were already being applied by the local judiciary, the explicit inclusion into the Argentine legal system is a welcome development.

However, there are other provisions which are of concern. Particularly, the vague and ambiguous wording of the provisions that deal with (i) the non-arbitrability of disputes where public policy is compromised (article 1649), and (ii) the specific mention that parties cannot waive their right to challenge an award in court ("*impugnación judicial*") when such award is contrary to the Argentine legal provisions ("*ordenamiento jurídico*") (article 1656).

As to the former, a proper interpretation should require construing very narrowly what constitutes public policy for purposes of arbitrability. Otherwise, it will provide an easy avenue for defendants wishing to challenge the tribunal's jurisdiction, by simply contending that the dispute is not arbitrable for public policy reasons.

Furthermore, the Congress has explained that the addition of the non-arbitrability of disputes, where public policy is compromised, is aimed at forbidding the State or any State entity from arbitrating their disputes. Thus, where a mandatory rule of law does not relate to public policy, or its purpose is the protection of private rights and interests, there would be no justification to conclude that the subject matter of the dispute is not arbitrable.

However, in connection with this point it is important to mention that Argentina has recently submitted the approval of a new legal framework for Public-Private Partnerships ("PPP"). In this regard, this law provides the possibility that the national State, in its capacity as contractor, can execute arbitration agreements with private companies. Therefore, all disputes that may arise as a result of the execution, application and/or interpretation of contracts celebrated under the regime established by this law may determine the possibility of establishing arbitration as an alternative method of conflict resolution.

Regarding the latter (article 1656), this provision precluding parties from waiving their right "to appeal" awards would go against (i) the CPCCN, which allows parties to waive their right to appeal awards, and (ii) the international principle of finality of arbitral awards. The last sentence of this provision should be understood as only referring to the parties' right to (a) challenge the validity of the award, or (b) ask for clarifications concerning awards; but not to revise the merits of those decisions.

Otherwise, allowing courts to revise every arbitration award on the grounds that it goes against Argentine legislation would lead to the absurd result that every dispute would eventually be subject to the scrutiny of the Court of Appeals. Furthermore, it would go against federal legislation currently in force (Mercosur), which provides that, unless agreed otherwise, the only available remedy would be the annulment request in an international arbitration award where such legislation is applicable. A potential interpretation of this provision might be that an award would be subject to judiciary review in Argentina only when it goes against the basic fundamental principles of Argentine law (due process, right to defend and/or present the case, etc.).

Overall, the CCC incorporates many useful and well-accepted international principles of arbitration. However, to the extent that the above problematic provisions are not interpreted correctly in future judiciary decisions, the new federal legislation could impede the future development of arbitration in Argentina, the exact opposite of its intended effect.

Finally, another important point to highlight in connection with arbitration in Argentina is that in November 2016, the Federal Executive Branch submitted to Congress a draft bill regulating International Commercial Arbitration, based on the UNCITRAL Model Law on International Commercial Arbitration ("CNUDMI"). This project was passed by the Senate on September 7, 2017 and is currently under parliamentary debate in the Chamber of Representatives; it is foreseen that the bill will be passed in the following months.

The project to adopt the UNCITRAL Model Law is aimed to cover international arbitration issues only, and will not affect Argentina's internal legal framework. However, there is another bill under consideration, related to the modification of the heavily criticised articles of the CCC mentioned above, that would indeed impact domestic arbitration as well.

Regarding recent case law, on March 28, 2018, the Commercial Chamber of Appeals decided that an arbitration agreement contained in what it deemed a consumer's contract was null and void according to article 1651 (b) of the CCC in the case *Altalef, Hugo Victor c/ Hope Funds S.A.*

At last, it is remarkable that in the last two years under the administration of President Macri, Argentina has settled several ICSID and UNCITRAL claims with foreign investors, such as *BG Group*, *El Paso Energy Company*, *Total S.A.*, and the *Abaclat* case, *Électricité de France* and *Suez*. The new administration has been very interested in settling arbitration disputes to promote a sense of legal certainty amongst investors.

Bolivia

In June 2015, Congress passed the second Arbitration Law ("Law No. 708") in Bolivian history. The new Arbitration Law No. 708, following the path of the preceding Arbitration Law, is based on the UNCITRAL Model Law's general principles and guidelines on Arbitration.

From a general perspective, Law No. 708 is a modern piece of legislation that allows the adequate development of arbitration in Bolivia. It provides well-organised proceeding rules and equitable treatment to private parties, providing them with security and protection of their rights and interests.

The former Arbitration Law was enacted thinking ahead and, as Law No. 708, abided to the doctrines of international arbitration; consequently, it permitted the execution of efficient and effective arbitration proceedings.

One of the main controversial subjects in Law No. 708 is the exclusion from arbitration of "administrative contracts", which are understood as those executed by private parties with the Bolivian State, its entities and companies. As background to this broad restriction, due to provisions contained in the 2009 Bolivian Constitution, foreign companies engaged in hydrocarbon activities can neither solve nor submit their controversies to international arbitration or diplomatic instances. At present, expanding such constitutional restriction to new fields, Law No. 708 expressly excludes from its application range labour controversies, commercial and integration agreements between States, external financing contracts in favour of the Bolivian State executed with international organisations and administrative contracts, among others.

In practice, the exclusion of administrative contracts from arbitration implies that Bolivian State entities are no longer authorised to enter into arbitration clauses, making it unviable that a private party could reach for arbitration arising from contractual claims.

Notwithstanding the aforementioned, Law No. 708 has authorised, on a transitory basis, some public companies to continue including arbitration clauses in their administrative contracts while these finalise their adaptation process to the Public Company Law ("Law No. 466") enacted on December 26, 2013. The arbitration in these cases would be conditioned to having the seat in Bolivia and being subject to Bolivian laws.

Furthermore, Bolivian current arbitration law has established particular regimes for controversies related to investments (local and foreign), testaments and amicable resolutions related to the Inter-American Human Rights System. Arbitration for foreign investments must be subject to Bolivian legislation; whilst arbitration for testaments should abide to the particular previsions contained in the testament, if not included, the proceeding must comply with the characteristics described in Law No. 708.

A further issue to consider regarding investment arbitration is that Bolivia denounced the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") in 2007, closing the opportunity for investors to settle their future disputes through this mechanism. Subsequently, between 2006 and 2013, Bolivia denounced a total of 22 Bilateral Investment Treaties that were subscribed between the Bolivian State and Belgium, Luxembourg, Ecuador, Peru, Chile, France, Romania, Germany, Argentina, China, Denmark, Great Britain, Mexico, the United States, the Netherlands and others. Another particular aspect of investment arbitration according to Law No. 708 is that it establishes a staggered mechanism, which means that a conciliation stage must be exhausted before submitting disputes to arbitration.

Despite the arbitration regime for foreign investments established in Law No. 708, the action of denouncing the treaties and excluding administrative contracts from the new Arbitration Law has converged in an unbalanced controversy resolution practice in cases where one of the parties is the Bolivian State, for controversies can only be solved by local laws in local judicial courts. In a nutshell, under the current arbitration legal regime, Bolivian courts have the final word in investments and administrative contractual disputes involving the Bolivian State and its entities.

With regard to the procedural matters provided under Law No. 708, which as previously established is based on UNCITRAL Arbitration Model Law, language is not particularly restrictive; the parties are able to choose the applicable language, and if they fail to do so, the language would be Spanish.

Moreover, the current law recognises institutional and *ad hoc* arbitration proceedings, dividing it into either arbitration in law, which compels arbitrators to solve a controversy strictly based on positive legislation, and arbitration in equity, which centres the resolution of a controversy on the arbitrators' general knowledge and their natural sense of justice. If the parties do not choose arbitration in law or in equity, the first would be applicable by default.

From a procedural perspective, in accordance to the aforementioned law, the stages of arbitration are the following: initial stage; merits; drafting and issuance of the arbitration award; and appeal stage. The proceeding can have their seat in Bolivia or abroad, and the parties are allowed to choose the seat of the arbitration as well as the place where the meetings or hearings are to be held and the number of arbitrators, which by default should be three.

One new feature of Law No. 708 is the inclusion of an Emergency Arbitrator, whose participation is enabled through agreement between the parties (opt-in). The Emergency Arbitrator can take decisions before the appointment of the Sole Arbitrator or the arbitration tribunal, so as to arrange for precautionary or preparatory measures.

Law No. 708 follows very simple criteria to distinguish local from international arbitration. Arbitration with the seat in Bolivia is considered to be local arbitration subject to Bolivian laws and regulations; however, the parties are also permitted to agree to hold meetings and hearings abroad. On the other hand, international arbitration is also contemplated by Law No. 708, which, as established above, allows the parties to determine a seat for the arbitration abroad and choose a different law to be subject to, as long as it does not infringe the Bolivian Constitution.

Another aspect worth mentioning is that, taking into account the interest of the parties in brief and efficient arbitration proceedings, the former Bolivian Arbitration Law established a six-month total term for the issuance of an arbitration award since the appointment acceptance date by the arbitrator; said term could be extended for a maximum of 60 days.

However, at present, the local arbitration terms considered by Law No. 708 have been extended with no explicit justification or logic; as a result, each arbitration stage has a different term allowing the probability of longer arbitration proceedings. The merits' stage alone could last 270 working days, a term that could be extended to 365 working days; the drafting and issuance of the arbitration award stage has an additional term of 30 working days extendable to another 30 working days. Nevertheless, again, due to the parties' interest in shorter proceedings, arbitration nowadays could last an average of six calendar months.

Despite the maximum terms authorised under Law No. 708, most arbitrations administered by Bolivian arbitration centres, privileging the interest of private parties involved in arbitration, usually last around six months from the installation of the arbitration tribunal.

In addition, the current situation unleashed by the outbreak of COVID-19 promotes the use of electronic means to carry out arbitration procedures. Although Law No. 708 establishes positive provisions related to online arbitration, certain restrictions hampered the continuity of arbitrations in Bolivia. Within this framework, Law No. 708 recognises the validity of arbitration agreements concluded by electronic means. Moreover, the aforementioned law establishes that notifications may be performed through email, except in the notification of the lawsuit or the award. Regarding virtual hearings, there is no express prohibition; indeed, Law No. 708 provides that hearings related to

declaration of witnesses or experts could be held through any communication means.

Finally, as a final consideration, Bolivia has recently updated its arbitration law, which, in general terms, is a modern piece of legislation that abides to current international practices and principles. However, arbitration related to administrative contracts entered into with State-owned companies as well as investment arbitration are pending tasks that need to be addressed, in order to reestablish the balance between the State and private parties, ensuring real and effective protection of the interests of the latter.

Brazil

During the 20th century, Brazil was known as the "Black Sheep" of Latin America as it lagged behind the rest of the region in relation to advances in international arbitration. Indeed, Brazil's institutional hostility towards international arbitration was not overcome until 2001 when it adopted the New York Convention, and its Supreme Court ("STF") issued a ruling that declared its arbitration law constitutional. Since 2001, Brazil has created a very favourable environment for international arbitration, and has become a shining star in the arbitration constellation, being the third-largest user of ICC arbitrations.

On September 23, 1996, Brazil enacted the Brazilian Arbitration Act (Federal Law No. 9,307 of 1996 – "BAA") which was inspired by the Model Law, Spanish legislation on arbitration and the New York Convention, but also retained specific elements of Brazilian legal culture. It was expected that the adoption of the BAA would make arbitration a viable dispute resolution alternative, but constitutional challenges delayed this outcome. Although article 7 of the law called for national courts to compel specific performance of an arbitration clause, it was questionable whether or not this provision violated the Brazilian Federal Constitution's guaranteed right of access to State courts. Finally, in December 2001, the STF issued its ruling in *MBV Commercial and Export Management Establishment v. Resil Industria e Comercial Ltda.*, in which it found the Brazilian Arbitration Law constitutional.

Almost immediately thereafter, the Brazilian Congress ratified the New York Convention, which became effective on July 24, 2002. Brazil had already adopted the Panama Convention in 1995 and in 1997 the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards ("Montevideo Convention").

Brazil is no longer hostile to arbitration. With respect to arbitrability, article 1 of the BAA states that persons capable of entering into contracts can avail themselves of arbitration in order to resolve disputes relating to freely transferable economic rights. Under article 2, parties have the autonomy to agree on the substantive and procedural rules that govern the arbitration, the only limitation being that the law chosen cannot violate public policy or accepted customs. As to the role of the courts, the BAA prescribes three stages in which the courts could intervene: at the beginning of the arbitral process to enforce the arbitration clause; during the arbitral process if the courts were called upon to compel witnesses to testify or to provide any similar assistance, such as the enforcement of an injunctive relief granted by the arbitrators; and, finally, at the conclusion of the process where a party seeks to set aside an arbitral award.

In recent years, there has been some development in terms of statutory modifications.

On May 26, 2015, the Brazilian Congress amended the BAA. Although there were some vetoes preventing consumer and employment relations disputes to be resolved by arbitration, the modifications brought to the BAA include significant improvements and an expansion of the current legal framework regarding the arbitrability of disputes relating to public entities, in addition to some "fine tuning" in other elements such as injunctions and interim measures, selection of arbitrators, and most noticeably, the arbitrability of corporate matters, subject to certain provisions.

Maybe the most important development among the amendments to the BAA was the inclusion of a broad authorisation for public entities to resort to arbitration, since there was considerable argument relating to the need of statutory approval for a public entity to participate in an arbitral proceeding. In accordance with article 37 of the Federal Constitution of Brazil, which is the basis of the principle of strict legality that pervades the organisation of the public administration, many commentators posited that the public administration was only allowed to resort to arbitration in case there was a specific statutory authorisation allowing that party to enter into an arbitration agreement. Even if, in the previous context, several laws expressly authorised arbitration, such as the: Public Services Permission and Concession Law 1995; Telecommunication Law 1997; Petroleum Law 1997; Water and Land Transport Law 2001; and Brazilian Private-Public Partnership Law 2004, there were still many grey areas where the validity of public bodies' reference to arbitration without authorisation could have been challenged. The new First Paragraph added to article 1 of the BAA states that "the direct and indirect public administration may resort to arbitration to resolve disputes relating to waivable economic rights", and this wording is considered as a broad statutory authorisation for public bodies to arbitrate their disputes. As a matter of consequence, the subjective arbitrability of disputes relating to the public administration is clearly admitted in the BAA, and this confines the discussion only to issues of objective arbitrability, which may still give rise to controversy insofar as the definition of those "waivable economic rights" can be arbitrated by public bodies under Brazilian law.

In addition, a new Civil Procedure Code ("NCPC") entered into force on March 18, 2016, with considerable improvements for arbitration. Besides providing for new methods of international cooperation among courts and bolstering the policy support for alternative dispute resolution mechanisms (including arbitration and mediation), the NCPC supplies a dire demand for a reliable medium of cooperation between arbitrators and State courts by creating the "arbitral letter". In a procedure akin to the compliance with a rogatory letter, the arbitrators are henceforth entitled to relay arbitral letters requesting court assistance, such as the calling of witnesses and the enforcement of injunctions granted by the arbitral tribunal.

In 2017, Brazil amended its labour law to allow arbitration of individual labour disputes, provided that: (i) the employees' total monthly compensation is higher than a certain threshold (which nowadays is equal to approximately US$3,000); and (ii) the employees expressly agree with the choice of arbitration venue. In the past, there have been precedents against the arbitrability of individual labour rights.

Chile

Since the 1990s, the Chilean model of progress has been founded in the principles of steady democracy and open markets. This sound path of progress enabled the country to become a member of the OECD in 2010 and create a broad network of economic partnerships and complementation agreements with several other countries and regions across the world.

The cornerstone of this longstanding confidence in the country is legal certainty. In this regard, it is important to highlight that Chile has a vast tradition in commercial arbitration, and that some of the most relevant commercial disputes in the country have been settled through arbitration.

Chile has a dual arbitration system. Domestic commercial arbitration is governed by the provisions contained in the Organic Code of the Judiciary, of 1943, and in the Code of Civil Procedure, of 1902. Despite the antiquity of those rules, domestic arbitration in Chile works remarkably well. Local courts have recognised internationally agreed principles, such as the principle of autonomy of the arbitration provision and the principle of *Kompetenz-Kompetenz*, among others.

On the other hand, international arbitration is governed by the International Commercial Arbitration Act enacted in 2004 (hereinafter referred to as the "ICA Act"), which is mostly a replica of the UNCITRAL Model Law.

The most significant difference between domestic and international commercial arbitration is the extent of the challenges available against an arbitral award, which are far more significant against domestic arbitration awards, since they are treated as judgments issued by a Chilean court of justice, and thus are reviewable on their merits. The extent of challenges against domestic arbitral awards may be significantly restricted by the parties waiving the right to challenge the domestic arbitral award, which is common practice in Chile. Besides, Chilean courts are quite deferential to local arbitrators and rarely change the decisions contained in domestic arbitral awards.

By contrast, the only recourse available to challenge an International Commercial Award is the Application for Setting Aside set forth in the ICA Act. Thus far, the ICA Act has been applied in a sound manner and local courts have been very supportive of international commercial arbitration. As a matter of fact, Chilean higher courts have constantly dismissed all recourses filed against such awards.

Some of the recent trends observed in international commercial arbitration are: (i) that the ICA Act applies *in actum* when its application requirements are met, regardless of the date on which the arbitration agreement was entered into by the parties; (ii) that local courts compel arbitration when the agreement contains an arbitration provision that has not been challenged by the parties (except in those cases where the same arbitration clause provides for particular exceptions); (iii) that local courts may grant injunctive relief in support of an international arbitration seated abroad; (iv) that the extremely limited challenges against the arbitral awards contained in the ICA Act are the only ones that may be brought against them, and that the courts have rejected all recourses against international arbitral awards since the ICA Act was enacted; (v) that the only grounds to set aside an arbitral award are the ones contained in the ICA Act, of strict construction, thereby not allowing the local courts to enter into the merits of the case; (vi) that it is possible to enforce an arbitral award in Chile regardless of the existence of a pending challenge to set aside the arbitral award at the seat of the arbitration (the latter does not include sentences that have been provisionally suspended); (vii) the recognition of the principle of separability to challenge an arbitral clause; and that (viii) the signature of the ICC's Secretary-General provides sufficient authenticity for the arbitral award to be enforced in Chile.

The development of an international arbitration culture in Chile is also related to the rise of institutional arbitration. The most relevant actor in this regard is the Arbitration and Mediation Center ("CAM"), a non-profit institution founded in 1992 at the Santiago Chamber of Commerce ("CSS").

CAM offers the services of national (1992) and international (2006) arbitration, mediation (1998) and Dispute Boards (2015) for the resolution of disputes, thus providing reliable and efficient solutions to the business and legal communities. Having managed more than 4,500 arbitration and mediation cases, the institution has become the undisputed benchmark arbitral and mediation institution in Chile.

CAM has published more than 240 arbitral awards anonymously in seven books (1994 to 2016), and one publication on arbitration in the jurisprudence of the Superior Courts of Justice of Chile.

CAM has undertaken numerous projects and activities aimed at disseminating, investigating, and perfecting the appropriate methods of peaceful conflict resolution. In addition to the organisation of activities related to the academy, the Centre has published an anonymous selection of arbitral awards since 1994. Furthermore, since 2013, it has a modern digital platform for arbitration and mediation processes (E–CAM Santiago) and in 2017 it signed an interconnection agreement with the Judiciary System of the Republic of Chile.

Internationally, the CSS is part of the national headquarters of the ICC through ICC Chile. In turn, CAM Santiago is the Chilean Section of the Inter-American Commercial Arbitration Commission.

As part of a steady strengthening of its institutional presence, CAM has been working since late 2018 on the development of the APEC Collaborative Framework for Online Dispute Resolution and on the implementation of the future ODR CAM platform. The CAM has its own Rules of Procedure applicable to international commercial arbitration, and most of their arbitrators are noted law professors and practitioners.

As an attractive seat of arbitration, Chile also provides quick air connectivity, modern public premises and some of the finest accommodation facilities in Latin America.

It is also important to note that in 2016, the Apostille Convention published in 2014 (commonly known as the "Hague Apostille") has entered into force. As a result of this, legalisation of foreign documents is now faster and less expensive.

In light of the above, Chile should be considered as a reputable, reliable and comfortable seat for international commercial arbitration.

Colombia

In July 2012, the Colombian Congress approved a new *Ley de Arbitraje Nacional e Internacional, Law 1563 of 2012* (the "Law"). The Law will apply only to arbitrations commenced after its effective date, which is October 2012. The Law clearly places Colombia at the forefront of Latin America with one of the most modern international arbitration statutes in the region, alongside Peru and the Dominican Republic.

The new Law separately regulates domestic and international arbitration. This dual system was viewed as necessary by local practitioners because there was significant resistance to subjecting domestic arbitration to modern international arbitration practice. As a result, domestic arbitration retains certain norms that are considered unusual to the practice of arbitration in the international context. For example, arbitrators in domestic arbitrations are required to fulfil several of the same requirements as judges; they must be Colombian born and lawyers, while in international arbitrations there are no such requirements (thus allowing non-lawyers to act as arbitrators). Likewise, arbitrators in domestic arbitrations are limited to participation in a maximum of five arbitrations in which a governmental entity is a party, a limitation that does not exist for international arbitrations.

The Law is an important advancement over the 1996 law as it relates to international arbitration. The Law incorporates, almost in its totality, the Model Law (of 2006), as well as certain aspects of the Peruvian arbitration law, thus bringing Colombia in line with the most modern of legal frameworks as it relates to matters such as challenges to arbitrators, the ability to issue preliminary

measures, and the role of the judiciary in supporting international arbitral tribunals.

The Law specifies when the parties can submit a dispute to international arbitration. The elements of such a dispute are: (a) the parties' domicile is located in different countries at the time of signing the arbitration agreement; (b) the place of performance of a substantial part of the obligations or the place with which the subject matter of the dispute is most related is a country that differs from the domicile of the parties; or (c) the dispute submitted to arbitration affects the interests of international commerce.

Among the very modern elements contained in the Law borrowed from Peru is the fact that it prohibits a sovereign or a governmental entity from using its "internal law" in order to avoid the obligations imposed by an arbitral agreement to which it is a party. Also, the Law adopted, as criteria for interpretation, its international nature and the need to promote its uniform application in accordance with such an international nature, which includes the concept of good faith as a guiding principle. In this regard, the Law does not prohibit Colombian State entities from entering into international arbitration agreements, as long as the agreements fulfil the requirement of being "international" and certain other requisites that have been recently enacted for specific state entities and to state contracts. Further, the Law allows for electronic notification and allows judges to execute provisional measures issued by arbitral tribunals that are seated outside of Colombia.

The Law also explicitly states that challenges to arbitral awards can only be brought as petitions for annulment and the basis for annulment are those contained in article V of the New York Convention. Further, the Law expressly states that in reviewing arbitral awards, the judiciary is prohibited from reviewing the merits of the dispute or the motivations of the arbitral tribunal in issuing its award. Citing this last express provision, among other reasons, the Colombian *Consejo de Estado* recently annulled an international CCB award issued on a case concerning a state-owned entity, based on the ground foreseen in article 108.1.d of Law 1563, which reflects Section V.1.d of the New York Convention. The *Consejo de Estado* annulled the award because it found that the arbitral tribunal had breached the proceeding agreed by the parties – by not allowing one of the parties to present an additional expert report to contradict the one filed by its counterparty, and by allowing the latter to file an expert report with "clarifications" after the termination of the written memorial's stage – regardless of the arbitral panel's motivations or the impact of the mentioned breach on the merits of the final award. Finally, borrowing from Swiss law, the Law contemplates the possibility of waiving the ability to seek an annulment from the Colombian courts, when neither of the parties are residents of Colombia. The Law expressly provides that, in such circumstances, an award by an international arbitral tribunal whose seat is in Colombia has the character of a national award, so it is not necessary to exhaust the recognition procedure in order to execute on the award, unless the party has waived the action for annulment.

Recently, Colombia has seen an increase in the number of arbitration proceedings related to important infrastructure projects in the country. The government is currently considering amendments to the Arbitration Statute. In 2013, the Colombian Congress passed Bill 1682 by which the contracts for infrastructure projects in the transportation sector were regulated. Regarding arbitration, the law provides that disputes arising from such contracts may be submitted to arbitration but they may only be adjudicated under the rule of law and not *ex aequo et bono*.

Law 1682 establishes that the process to appoint arbitrators should be governed by Law 1563 and that State entities should establish in the tender specifications the profile of the arbitrators to make sure that their personal and professional qualifications are suitable for the object of the contract and the activities to be executed by the parties. Law 1682 also establishes that an arbitrator cannot be appointed in more than three arbitration proceedings where a State entity is a party. State entities shall establish in the arbitration agreement a cap on arbitrators' fees but, in any case, contracts may contain a formula to readjust such fees. Due to the public nature of State entities, the arbitrators' fees and the costs of arbitration must be included in the budget of the State-owned company.

Law 1682 also echoes previous jurisprudence by establishing that the arbitral tribunal does not have jurisdiction to decide upon the legality of any administrative act issued by a State-owned company or a public entity when exercising exceptional powers (e.g. unilateral termination, interpretation or modification of the contract). Therefore, the arbitration tribunal may only decide upon the economic effects of such administrative acts. Additionally, having recourse to arbitration does not immediately impede the State-owned company or public entity from performing exceptional powers inherent to such type of legal entities unless interim relief has been granted.

The Colombian National Agency of Infrastructure (*Agencia Nacional de Infraestructura* – "ANI") has a few model concession contracts that contain a clause to regulate the dispute resolution mechanisms applicable to such contracts. Although the model dispute resolution clause is not identical in every model concession contract, there are certain common features to highlight. Regarding international arbitration cases, the concession contracts provide that the proceedings could be administered either by the ICDR or the ICC. The arbitral tribunal will be seated in Bogotá and the merits of the case will be decided under Colombian law.

Recently, the Central Government issued a policy applicable to its entities for entering into arbitration agreements. The latest policy is included in Presidential Guideline No. 4 of May 2018, which addresses, *inter alia*, issues regarding requirements and authorisations for entering into domestic and international arbitration agreements, designation of arbitrators, and the management of a conflict-check software system to prevent conflict of interest of potential arbitrators.

Costa Rica

In 2011, Costa Rica enacted its International Commercial Arbitration Law (Law 8937 of 2011, "*Ley sobre Arbitraje Comercial Internacional*" (hereinafter the "LACI")) based on the UNCITRAL Model Law, becoming the 12th country in the world to adopt the UNCITRAL Model Law, including its 2006 amendments.

Enacting the LACI was an indispensable part of bringing Costa Rica into the modern international arbitration legal framework. Prior to its enactment, international arbitrations suffered from significant limitations, including: arbitrations had to be in Spanish; the law of Costa Rica would apply to the arbitration automatically in the event the parties failed to select the applicable law; and arbitrators had to be members of the Costa Rican Bar in arbitrations based on law (as opposed to equitable arbitrations, or where the tribunal is expressly granted the powers of an *amiable compositeur* or to decide *ex aequo et bono*).

Differences with the Model Law. Costa Rica chose to implement a dual system whereby Law 7727 of December 1997 ("*Ley de Resolución Alterna de Conflictos y Promoción de la Paz Social*", hereinafter "Law RAC") applies to domestic arbitrations, while the LACI applies to international arbitration cases. Although the LACI is closely based on the 2006 UNCITRAL Model Law, it is important to note the following differences with the Model Law:

1. Article 1(5) establishes that the LACI does not apply to investor-state disputes regulated in international agreements.
2. Footnote 2 of the Model Law regarding the definition of the term "commercial" is included as part of the text of article 2(g).
3. The LACI adopts Option I of article 7 in the 2006 Model Law. Thus, Costa Rica's new law requires that all arbitration agreements shall be in writing, although this requirement can be met in a flexible manner, provided that the content of the arbitration agreement is recorded in any form, including electronic.
4. In article 10(2), in contrast to the Model Law, where there is no agreement between the parties, the default rule opts for one arbitrator instead of three.
5. The LACI deviates from the text of 17 of the Model Law (one of UNCITRAL's main 2006 amendments) with respect to the form of the interim measure, which is not required to take the form of an award, but is required to be reasoned.
6. Two additional articles are included in the LACI regarding: matters that can be subject to arbitration (matters that under Costa Rica's civil and commercial law the parties are free to agree); and the confidentiality of the arbitral proceedings.

The LACI selected the First Chamber of the Supreme Court of Justice to resolve issues regarding arbitration, enhancing predictability in the resolution of issues. This court will decide issues regarding: the selection of arbitrators (in the absence of party agreement or designation); disputes relating to challenges to arbitrators; jurisdictional disputes; as well as actions to set aside the arbitral award.

Significantly, the courts in Costa Rica have limited the ability of parties to use *amparos* (appeals based on rights established in the Constitution that are directed to the Constitutional Chamber of the court) in order to attack arbitral decisions. However, the Constitutional Chamber has ruled that parties may not use an *amparo* as a vehicle to review the actions of arbitrators and arbitrations.

As a result of the passing of the LACI, Costa Rica is positioned as an arbitration-friendly forum for international arbitration and ends – in the case of an international arbitration – the legal obstacle that banned foreign arbitrators and legal counsel from acting in international commercial arbitration cases seated in Costa Rica. The new legislation also provides a clearer legal framework for the recognition and enforcement of foreign awards and the application of the 1958 New York and Panama Conventions.

Mexico

With the adoption in 1993 of the UNCITRAL Model Law, Mexico started a gradual and progressive move towards becoming an arbitration-friendly jurisdiction. Additionally, since the adoption of the UNCITRAL Model Law in Mexico, a growing number of judicial decisions have confirmed the judiciary's pro-arbitration position.

In 2011, Mexico amended its arbitration statute to minimise judicial intervention in arbitral proceedings. The statute now limits the role of courts before, during and after the proceedings, following the provisions of the UNCITRAL Model Law.

In 2011, Mexico amended its Amparo Law in a way that may increase judicial intervention in arbitral proceedings. The new Amparo Law provides that actions by individuals or corporations that are "equivalent" to that of a governmental entity (e.g. rendering a binding decision to solve a dispute) may be subject to judicial review via *amparo* proceedings. Until April 2012, only the actions of governmental authorities were subject to judicial review in *amparo* proceedings. Some disgruntled parties have taken advantage of this amendment and have (unsuccessfully) tried to challenge arbitral awards through *amparo* proceedings, arguing that an award of an arbitration tribunal was equivalent to governmental action and it had transgressed their constitutional rights. Fortunately, in 2015, federal courts dismissed these claims in several *amparo* proceedings, reaffirming the private nature of arbitration.

Another recent and important development is Mexico's becoming a party to the ICSID Convention. Mexico signed on January 11, 2018 and ratified it on July 27, 2018. The ICSID Convention entered into force in Mexico on August 26, 2018, with Mexico the 154th country to adopt it.

Mexico has been a party to a number of investment disputes under various investment treaties (e.g. the North American Free Trade Agreement, "NAFTA"), which provide for international arbitration to settle disputes between foreign investors and Mexico. These arbitrations were held under the UNCITRAL Arbitration Rules or the ICSID Additional Facility Rules, because Mexico was not a party to the ICSID Convention. Now that Mexico is a party to the ICSID Convention, foreign investors have the option to submit their disputes with Mexico to arbitration under the rules of the Convention. Furthermore, this places ICSID Convention awards outside the review of national courts (parties can only seek annulment through proceedings at the centre), increases the certainty regarding enforcement of awards, and improves Mexico's attractiveness for foreign investments, among other benefits.

In 2013, Mexico amended its Constitution to allow private and foreign investment in the energy sector (the "Energy Reform"). As a consequence, Mexico enacted a number of statutes to regulate investments in the energy sector. These statutes consider arbitration between private investors and government entities in some cases and with certain restrictions.

On November 30, 2018, Mexico, the United States and Canada reached an agreement on a draft treaty that intends to replace NAFTA (United States-Mexico-Canada Agreement, the "USMCA"). The USMCA entered into force on July 1, 2020, after all three parties ratified it.

One of the biggest changes of the USMCA is that it will displace and significantly alter the former NAFTA Chapter 11 – the investor-state dispute settlement ("ISDS") system between the parties. The USMCA essentially erases ISDS as between Canada and the US, curbs ISDS as between Mexico and the US, and leaves Canada and Mexico to the ISDS system in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP").

Panama

As part of the amendments to the Panamanian Constitution in 2004, article 202 was modified to include arbitration to administer justice. Furthermore, article 202 granted arbitration panels the constitutional prerogative to rule over their own jurisdiction. This prerogative is known as *Kompetenz-Kompetenz*. Article 202 states: "*The Judicial Branch is made up of the Supreme Court of Justice, the tribunals and the courts which the Law may establish.* ***The administration of justice may also be exercised by the arbitral jurisdiction*** *as the Law may determine. The* ***arbitral tribunals may hear and decide on their own regarding their own jurisdiction***." (Emphasis added.)

In this regard, in a ruling dated February 14, 2005 involving private parties styled *Greenhow Associates v. Refinería Panamá*, the Supreme Court of Panama interpreted article 202 as follows:

> "Accordingly, ***arbitrators are turned into judges*** at law and their decisions have coercive force in front of the rest of the judicial and administrative community, giving the parties increased security that their claims, recognized in the arbitral awards shall be respected." (Emphasis added.)

Thus, under the current state of the law and doctrine, arbitral tribunals have the status of a court of law, including the constitutional right to rule on their own jurisdiction and arbitrators are considered, at least by the Supreme Court, as equals to judges. Notwithstanding the above, in a series of more recent rulings by the Supreme Court, it was held that Commercial Courts with jurisdiction over consumer protection matters may exercise their own jurisdiction even in cases where the specific contract has an arbitration clause. The reasoning for such rulings is that consumers are afforded special protections by the Constitution and their status as (constitutionally protected) consumers allows Commercial Courts to preempt the exercise of the arbitral forum's *Kompetenz-Kompetenz* prerogative.

Law Decree No. 5 (July 8, 1999) was the first comprehensive alternative dispute resolution regime put in place in Panama. It "*was enacted to promote the private resolution of disputes without the need to resort to the overburdened judicial system*". *Id.* The arbitration provisions found in Title I of Law Decree No. 5 were superseded by Law No. 131 (December 31, 2013) which: "*regulates national and international commercial arbitration in Panama…*". Law No. 131 closely follows the UNCITRAL Model rules as well as the arbitration rules of the ICC.

Law No. 131 follows the most modern trend in international commercial arbitration and aims to make Panama an important centre for the resolution of international commercial disputes.

An important aspect of Law No. 131 relates to the wide availability of protective provisional measures. The law grants arbitrators wide powers to preserve the *status quo*, which to some extent exceed the measures which can be granted by ordinary courts of law. The law recognises, however, that ordinary courts of law have concurrent jurisdiction with that of the arbitration panels with regards to such measures.

In a ruling dated September 30, 2015, the full Supreme Court of Panama undertook a thorough analysis of Law No. 131. In that ruling, the Court unanimously refused to hear a collateral constitutional challenge (*amparo*) against an order issued by an arbitration panel, stating that the only way to judicially review such orders was via the "*recurso de anulación*" or nullity action which may be filed with the Fourth Chamber of the Court as provided for in Law No. 131.

In a ruling dated September 20, 2017, the Court of Administrative Appeals (which is not part of the Judiciary and rules mostly on government contract disputes) held as follows:

> "[The above] Notwithstanding, having seen that the arbitral jurisdiction is recognized by the Constitution and by the Law; and that the State may submit its controversies with private or third parties to such jurisdiction, it results in the obligatory compliance of the arbitration clause found in the Agreement which is integrated into the contract signed between the challenged entity and the claimant company; and that there is a clear mandate of the law to all state entities to decide controversy[ies], to withdraw from taking jurisdiction over a matter when confronted with an arbitration agreement, this administrative tribunal invested with jurisdiction and competence to decide conflicts arising due to public contracting, must proceed accordingly."

According to the cited ruling, that Administrative Court (or at least the Panel involved) would appear to stand for the principle that the administrative adjudicatory authorities lack jurisdiction to resolve disputes arising from public contracts which contain an arbitration clause. This appears to be a departure from prior situations where the administrative authorities asserted their jurisdiction concurrently with the arbitral jurisdictions in cases where the public procurement contracts incorporated arbitration clauses.

More recently, in a ruling dated August 28, 2018, the Third (Administrative Disputes) Chamber of the Supreme Court of Panama upheld a contractor's right to claim against a Municipality via an arbitration proceeding, stating the following:

> "…***public servants*** partaking in contractor selection procedures and in contracts are ***bound*** to procure compliance with the aims of public contracting, ***to guard the correct execution of the contract's purpose***; and thus, there being the object of disconformity by the appellant…***this Court estimates that said topic must be submitted to arbitration***….so that the Municipality of Santiago must undertake the pertinent actions so that ***the opposition by the company…..shall be remitted to the Center of Conciliation and Arbitration of Panama***." (Emphasis added.)

Peru

The Peruvian Arbitration Law (Legislative Decree No. 1071) enacted in 2008 follows the same set of principles as the 2006 UNCITRAL Model Law, accepted in most of the world as the trusted international standards. The Peruvian Arbitration Act unifies the regulations for local and international arbitration, both ruled by the same legal dispositions that, as we said, follow the principles of the UNCITRAL Model Law; of course, there are some very specific issues that only apply for international arbitration.

According to the Peruvian Arbitration Act, the Chambers of Commerce of the seat of the arbitration have assumed an important role – that, in the past, was reserved to the Judiciary – which is the appointment of arbitrators if any party refuses to do so, or if the arbitrators appointed by the parties cannot agree on the appointment of the President (Chairman) of the Arbitration Panel. In this case, the recusal of the arbitrator will also be decided by the Chambers of Commerce, until the Panel is duly conformed. In addition, the arbitrators can grant and enforce precautionary measures (unless it is necessary to use public force) and can modify precautionary measures granted by the Judiciary before the arbitrators are appointed. Also, an arbitration award can be executed directly by the arbitrator if both parties agree, unless public force is necessary. A challenge of the arbitration award claiming its annulment does not suspend its enforcement, unless a guarantee (letter of credit) is provided covering the amount ordered in the arbitral decision.

According to the Peruvian Arbitration Act, the parties can decide between an institutional or an *ad hoc* arbitration. However, institutional arbitration brings more confidence and predictability. The most important arbitrations institutions in Peru are the: (i) Arbitration Center of the Lima Chamber of Commerce ("ACL"), which has handled more than 3,000 cases since its creation; (ii) Center for Analysis and Resolution of Conflicts of the Pontifical Catholic University of Peru ("PUCP"), which has handled more than 2,000 cases since its creation; and (iii) Arbitration Center of the American Chamber of Commerce of Peru ("AmCham") which has handled more than 60 cases since its creation.

In Peru, arbitration is now the preferred method for conflict resolution. Some aspects that contribute to consolidate arbitration in Peru are:

(i) one of the most important reasons is that, according to the Peruvian Procurement Act, an arbitration clause is mandatory in all contracts (goods, services and construction) executed with the State, and all controversies in connection to public procurement agreements must be resolved in arbitration;

(ii) the role of the Judiciary in relation to arbitration has changed. According to the Arbitration Law, the participation of the Judiciary is absolutely limited to specific cases set forth in the Law: the enforcement of precautionary measures; and enforcement of awards, to rule about the validity of the arbitration award when a party challenges the decision claiming its annulment. It is important to bear in mind that the award could only be annulled for very specific reasons connected to formal issues: due process of law; the existence of an arbitration agreement; the appointment of an arbitrator; or formal issues in general. The Judiciary is prohibited from analysing the main decision, its grounds or justice. The Judicial Branch – after a long training process – has finally assumed its role as a facilitator of arbitration, to make it efficient; and

(iii) for the recognition and enforcement of foreign arbitration awards, the New York Convention, the Panama Convention, and any other treaty connected to this matter will apply. According to Peruvian Law, the trend must be in favour of recognising and enforcing foreign awards.

Peru did make changes via Legislative Decree 020-2020, which came about during the interregnum in which it had special powers to legislate after Congress was dissolved in September 2019. Consequently, as of January 2020, the State no longer has "the same rights and duties" of a private party. Under the new provisions, when the State is a party to an arbitration, no provisional measure may be imposed if the opposing party does not provide a guarantee with a value not inferior to that of the contract's guarantee of performance. This is different in arbitrations between private parties, where the guarantee to be provided by the party seeking the provisional measure may be any that the tribunal deems appropriate. Furthermore, the State cannot be subject to any sanctions (such as "judicial penalties") that are different to the award on costs. Although sanctions are not regulated by the Peruvian Arbitration Act, they are not prohibited for arbitrations between private parties if they so agree.

As a result of the growth of Peruvian parties in ICC arbitrations, Peru has already conformed to the ICC National Committee. In this regard, in September 2017, the first ICC Peruvian Arbitration Day was organised. The second Peruvian Arbitration Day took place on October 2018, and the third was held on September 2019. As a result of COVID-19, no date has been set for 2020. The Peruvian ICC Commission on Arbitration is comprised by the most distinguished lawyers in the field, and it has the goal of promoting international arbitration standards in national arbitration. With regards to international investment arbitration, Law No. 28933, adopted on December 2006, created the State's System for Coordination and Response on International Investment Disputes, which functions through a Special Commission conformed by different State entities. This Special Commission has the role of representing the State in these types of cases. The Special Commission is the one in charge of, among other things, hiring the law firms that will represent the State. Peru, as a Member State of the ICSID Convention since 1993, has been involved in various ICSID arbitrations involving different industries, such as highways, electricity, ports, mining, banking, hydrocarbons, among others. Up to July 2020, Peru has participated in 19 concluded investment cases. Out of these, the State lost three and won 11 (most recently in the *Lidercon* case). The other five were concluded by agreement between the parties (most recently in the *DP World* case). Also, Peru has already been able to solve some investment disputes through the Direct Negotiation Phase avoiding the initiation of arbitration. In addition, Peru currently has nine ICSID pending cases.

Venezuela

On April 7, 1998, Venezuela enacted the Commercial Arbitration Law (*Ley de Arbitraje Comercial* – "LAC"), which is based on the UNCITRAL Model Law. The LAC governs domestic commercial arbitration and the recognition and enforcement in the country of foreign awards without the need for an *exequatur*. Article 3 of the LAC, however, allows for neither arbitration for disputes on matters contrary to public policy (a restriction that case law has relaxed), nor related to crimes or offences and matters concerning sovereign activities or functions of the State or public entities.

For arbitration clauses included in agreements in which one of the parties is a public entity controlled by the Republic, the States, Municipalities or Autonomous Institutes with a participation equal to or higher than 50%, article 4 of the LAC requires the approval of the corresponding corporate body as well as the written authorisation of the Minister in the area of such public entity.

The 1999 Constitution includes the alternative means of dispute resolution as part of the justice system (article 253). The Constitution ordered the Law to promote arbitration, conciliation, mediation and other alternative means of dispute resolution (article 258).

Now, after 21 years of the LAC being in effect in Venezuela, and with several judicial precedents from the Constitutional Chamber of the Supreme Court, arbitration has become an effective means to resolve commercial disputes in the country. In spite of such support from the Constitutional Chamber, there is still a trend from the government to exclude some other matters from commercial arbitration with the argument that public policy issues are involved. Notwithstanding this governmental trend, a recent decision of the Constitutional Chamber again backed up arbitration and declared unconstitutional a prohibition to resort to arbitration in respect of commercial lease agreements which was contained in Presidential Decree No. 929 with the Rank, Value and Force of Law to Govern Real Estate Leasing for Commercial Use, published in Official Gazette No. 40.418 of May 23, 2014), and thus upheld an award which had considered this prohibition to violate article 258 of the Constitution which orders the promotion of arbitration and other ADR mechanisms by law.

Venezuela is a party to the following treaties relating to arbitration: the New York Convention; the Montevideo Convention; and the Panama Convention.

On August 12, 2012, Venezuela became a member of Mercosur. On July 30, 2012, the National Assembly passed the Law Approving the Amendment of the Los Olivos Protocol for the Settlement of Disputes signed in Brasilia on January 19, 2007 (the "Protocol"). According to the provisions of the Protocol, Venezuela and its citizens, through the procedures established, can access this mechanism for the settlement of disputes arising with other signatories of the Protocol in connection with the interpretation and application of the Mercosur rules.

Concerning investment arbitration, Venezuela was a party to the Washington Convention, but withdrew from such convention effective on July 24, 2012. ICSID arbitration (under the Rules of the additional facility) is still applicable for: (a) those contracts in which the parties expressly agreed to that remedy; and (b) specific cases protected by BITs that establish the additional facility for the resolution of the corresponding investment disputes. Venezuela is still a party to 26 BITs. Some of them establish ICSID as an arbitration remedy to resolve investment disputes and others establish other international arbitration rules such as those of UNCITRAL.

Notwithstanding the above, there is a current trend of the Venezuelan government to reconsider international legislation adopted by the country for resolving investment disputes and to consider new rules or different arbitration centres for resolving disputes when Venezuela is involved (see, for example, article 6 of the Constitutional Law on Productive Foreign Investment, published in Official Gazette No. 41.310, of December 29, 2017). In this regard, the government promotes that only when domestic remedies have been exhausted and if previously agreed upon, Venezuela may resort to other ADR mechanisms created within the framework of the integration of Latin American countries, especially those of *Alianza Bolivariana para los Pueblos de Nuestra América – Tratado de Comercio de los Pueblos* ("ALBA") and Union of South American Countries ("UNASUR"), and consider the creation of such regional centres with their own rules. ALBA is composed of Antigua and Barbuda, Bolivia, Cuba, Dominica, Ecuador, Grenada, Nicaragua, Saint Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, and Venezuela. The members of UNASUR are Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

VII. Challenges Facing International Arbitration in Latin America

The advances described above by no means constitute the end of the journey. To the contrary, Latin America must continue on this same path and improve the legal culture that surrounds arbitration if it is to fulfil the promise of international arbitration as an effective and efficient method of dispute resolution which provides greater certainty for those entering into economic and business arrangements in the region and, thus, fostering economic growth of the region. In this regard, the region's judiciary must learn to resist the temptation to interfere in the arbitral process and must guard against the current trend of focusing on the "constitutionalisation" of arbitration.

The lingering judicial interference in arbitration

As discussed, the legislation of the majority of the countries in Latin America have accepted the basic principles of the Model Law. One of the significant principles of the Model Law is embodied in article 5, which provides that: "*In matters governed by this Law, no court shall intervene except where so provided in this Law.*" Legislatures were thus encouraged to specify exactly when the judiciary should intervene (e.g. the appointment of arbitrators), thereby providing parties predictability as to when they could expect judicial intervention. Ideally then, the judiciary should intervene in the arbitral process only in limited and very circumscribed circumstances.

Despite the importance of the principle of limited interference by the judiciary, not all countries in Latin America have adopted article 5 in its entirety. Those that have adopted the principles of article 5 include: Bolivia; Chile; Colombia (in its new arbitration law); the Dominican Republic; Guatemala; Honduras; Mexico; Paraguay; and Peru. Other counties have specifically not recognised this limiting principle: Brazil; Costa Rica; Ecuador; Panama; and Venezuela.

Given the historical antagonism to arbitration in the region, the failure to expressly adopt such a measure is counterproductive to the advancement of a positive arbitration culture. As a result, there have been instances where the judiciary continues to intervene in arbitral proceedings in circumstances where the judiciary has not been specifically authorised to do so. For example, in the case of *Companhia Paranense de Energia (Copel) v. UEG Araucaria Ltda*, the trial court in Brazil ordered an anti-arbitration injunction based on the concept that because one of the parties was a Brazilian State entity, the matter was not one susceptible to arbitration. In other cases, the judiciary has annulled final awards by taking a very expansive view of the grounds for annulment, such as in the case of *Venezolana de Televisión CA v. Electrónica Industriales SPA* which annulled an award based on the theory that the contract at issue was one of public interest and that the Venezuelan judiciary had exclusive jurisdiction over such disputes. Thus, these cases demonstrate the disregard for the fundamental principle of *Kompetenz-Kompetenz*.

In another series of cases, arbitrators are subject to the same types of limitations imposed on judges. For example, in Argentina the judiciary has sought to enjoin arbitrators from presiding over arbitrations due to prescriptions attributable to judges. *Chile*, one of the best exemplars of arbitral practice in the region, allows disciplinary action against arbitrators that could result in the annulment of an award based on the concept that the arbitrator has committed gross negligence in rendering the award ("*una falta o abuso grave*"). In this regard, arbitrators are considered part of the "judicial branch" and, as such, subject to disciplinary measures to be taken by the Supreme Court. Thus, even though Chile's arbitration law adopted in 2004 provided that an annulment proceeding was the sole basis to attack an arbitral award, the law made a specific reservation of the disciplinary proceedings provided to the Supreme Court under the Chilean Constitution, which is interpreted as allowing disciplinary proceedings against arbitrators as members of a tribunal established by law. More recently, a court in Venezuela decided to vacate an award rendered in an international arbitration held in Miami under the auspices of the ICDR arguing public policy violations. This decision calls into question the stability of the arbitration culture in the country and in the region where we have often witnessed international arbitral awards being vacated under the argument of local public policy, in complete disregard of International Conventions such as the New York Convention and the Panama Convention. In particular, and more surprisingly, the Venezuelan Court vacated the award following a *writ of amparo* or constitutional emergency recourse, diverting from the recent trends found in other Latin American countries and even other decisions by the Venezuelan Supreme Court.

Continuing with this trend is Judgment No. 42 of 20 February 2020 by the Constitutional Chamber of the Supreme Tribunal of Justice, regarding an application for "*avocamiento*" by Alimentos Polar Comercial, C.A. (Case No. 20-0106). The case involves an arbitration under the rules of the Business Center for Conciliation and Arbitration ("CEDCA") seated in Caracas; in accordance with the CEDCA rules, the arbitral tribunal issued a draft of the arbitral award with an invitation to the parties to submit observations on the draft before the award was finalised. However, before the arbitral tribunal could finalise the award, one of the parties applied to the Constitutional Chamber of the Supreme Court of Justice to request an *avocamiento* – an exceptional remedy that allows the Supreme Court of Justice to intervene in a pending court litigation affected by serious procedural irregularities and to decide the case on the merits where deemed appropriate. The Constitutional Chamber has decided to suspend the arbitration before issuing a final decision on the *avocamiento* application.

The constitutionalisation of arbitration in Latin America

In recent years, there has been an academic inquiry into the constitutional aspects of arbitration. This academic inquiry may be traced to a conference on the "Constitutionalisation of Private Law" ("*La Constitucionalización del Derecho Privado*") that occurred

in September 2006 at the *III Congreso Internacional de la Asociación Andrés Bello de juristas franco-latino-americanos* where the impact of constitutional law on private commercial law was discussed. The conference addressed both the benefits of the constitutionalisation of arbitration, and the obstacles that such a process created. This issue of constitutionalisation has been continuously addressed since that time.

The issue of the constitutionalisation of arbitration does not refer to the supposed resurgence of the Calvo Doctrine in Latin America. That issue is limited mostly to the area of investment disputes and not commercial international arbitration. What is here referred to as the "constitutionalisation" of arbitration relates to a cultural and philosophical clash arising from Latin American legal scholars analysing the source of an arbitral tribunal's authority. The issue could be analysed through the following questions:

- Does the authority/power of arbitrators in international commercial arbitration flow from a specific constitutional delegation or does it emanate solely from the will of the parties?
- Is international commercial arbitration a creation of the State or is it simply the creation of a community of international businesses?
- Is international commercial arbitration a creature of the judicial powers conferred by constitutions, or is it a transnational judicial order specific to international commercial interests?

These issues of the constitutionalisation of arbitration have a special resonance in Latin America, both in what regards the application of the law on the merits of the case and the conduct of the arbitration proceeding.

The constitutionalisation of private law first affects the application of the law on the merits of the cases. There is a trend in Latin America to interpret the blackletter provisions of agreements and statutes in light of constitutional principles and provisions. That is particularly relevant in Brazil, where judges and arbitrators tend to construe contract and statute provisions in accordance with broad principles and general clauses, both constitutional and legal. This may affect the predictability of the outcome of a case decided by local arbitrators and upon such laws, and is certainly a relevant issue to consider when drafting arbitration clauses and contracts in general.

Second, with regard to procedure, several Latin American constitutions explicitly refer to arbitration. Some constitutions, particularly those in South America, refer to arbitration within the "judicial power" conferred by the constitution: Colombia; Ecuador; and Paraguay. Other countries, predominantly from Central America, provide for arbitration as a fundamental right: Costa Rica; El Salvador; and Honduras.

It has been argued by some commentators that the constitutionalisation of arbitration has resulted from a lack of familiarity with the fundamental principles that form arbitration. When local practitioners attempt to regulate the arbitral process, but lack an understanding of international commercial arbitration principles, such practitioners reach for that which is most known to them, the law of the forum; and, within that law, the supreme law of the land, the constitution. It is from here that one sees "constitutional injunctions" (*amparos*) which interfere with proper arbitral process. There is a growing concern among practitioners that the use of these constitutional injunctions or *amparos* will undermine the existing culture of international arbitration in the region. It is common to see in different countries in the region how local practitioners use these judicial recourses to vacate international arbitration awards, creating two noticeable problems. First, by upholding the "constitutional injunctions" against arbitral awards, courts are overreaching with respect to the intended effects of the *amparo*, designed to protect individuals from violations of constitutional rights, by using the argument that access to arbitration as a means to dispute resolution is a fundamental constitutional right. *Amparos* are typically emergency measures and cannot be viewed as a means to set aside an award. A case in point of this issue is the recent decision adopted by a Venezuelan court vacating an award rendered in an international arbitration procedure held in Miami, by means of a *writ of amparo*, and not by means of the mechanisms included in local laws and the New York Convention. Luckily, local courts in other countries such as Peru, Mexico, and Costa Rica have ruled against the use of a *writ of amparo* to vacate arbitral awards, basically stating that there are no constitutional elements at issue that would require an *amparo* to determine the annulment of an international arbitration award. Second, the use of *amparos* against and towards arbitrators reveals a confusion as to the authority of arbitrators. Arbitrators are not public servants, and thus not subject to *amparos*. In a recent ruling, the Colombian Constitutional Court confirmed that – considering the express legal prohibition of judicial intervention in international arbitration, the parties' liberty to choose the applicable law and the limited annulment grounds – the *amparo* is admissible against international arbitration awards, but only under very exceptional circumstances.

As the commentators have noted, the use of constitutional rights and protections applied to the arbitral process has the effect of undermining a certain constitutional principle: specifically, the right of parties to freely enter into arbitral agreements of their own choosing. As a consequence, the issue of the constitutionalisation of arbitration is something that must be viewed with a degree of scepticism within the framework of the advances of international arbitration in Latin America.

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Luis O'Naghten is a partner in Hughes Hubbard's Miami office. He has more than 30 years of experience in international arbitration and commercial litigation, with a practice that focuses on international investment, financial fraud, energy, construction, telecommunication, and corporate commercial disputes. He represents sovereigns and parties adverse to sovereigns, and provides advice to major international banks, multinational corporations, energy companies, and companies involved in maritime disputes. He represents parties in disputes before United States courts and international arbitration panels (under ICC, AAA/ICDR, ICSID and UNCITRAL rules). Luis is a member of the ICC Commission on Arbitration, the ICC Task Force for the Revision of the ICC Rules, and Chair of the Miami International Arbitration Society (MIAS). He regularly teaches courses in arbitration at the University of Miami School of Law and Universidad Panamericana in Mexico City and Guadalajara. He possesses native fluency in Spanish and handles arbitrations in both Spanish and English with equal agility.

Hughes Hubbard & Reed
201 South Biscayne Boulevard
Miami, Florida 33131-4332
USA

Tel: +1 305 379 7230
Email: luis.onaghten@hugheshubbard.com
URL: www.hugheshubbard.com

Diego Durán de la Vega is a partner in the Hughes Hubbard office in Washington, D.C. and Co-Director of the Latin American Dispute Practice Group. His practice focuses on international disputes, including international commercial and investor-state arbitrations. He also advises and represents clients in criminal matters, internal investigations and commercial litigation. He has represented several investors against Mexico in investor-state arbitrations, as well as private entities in international commercial arbitration. Diego has appeared before the courts of the United States and all levels of the Mexican judiciary, including the Supreme Court of Mexico, and has participated in cases before the Inter-American Commission on Human Rights and its Court of Justice. Diego, a native Spanish speaker, is licensed to practise law both in the U.S. and Mexico.

Hughes Hubbard & Reed
1775 I Street, N.W.
Washington, D.C., 20006-2401
USA

Tel: +1 202 741 4938
Email: diego.duran@hugheshubbard.com
URL: www.hugheshubbard.com

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