

CURRENT ARBITRATION TRENDS IN LATIN AMERICA

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This article provides a descriptive, qualitative overview of recent developments and the social direction of arbitration as a legal institution in Latin America, together with a critical analysis of possible causes and effects of current trends in the key, defining aspects of this alternative dispute resolution mechanism. The seemingly rapid growth in the use of arbitration is examined in order to find common ground in issues like Kompetenz-Kompetenz and the autonomy of lex arbitri, to conclude that arbitration seems to be at a crossroad in which a desirable balance between autonomy and flexibility, one on hand, and the expansion of arbitrability in matters involving public policy (orden público) beyond strictly commercial matters, on the other hand, is trying to find legal and social footing. One of the conclusions is the emergence of a transnational lex arbitri, grounded in customary practices, which deals with and affects procedural and substantive legal issues.

I. Introduction

The general object of this article is to try to decipher and outline several fundamental principles or ideas which transcend territorial boundaries and influence legal minds in connection with arbitration in Latin America. The intent is not to make comparisons among countries or jurisdictions, but rather to make an effort to find points of coincidence or agreement in certain fundamental topics of arbitration, in order to reach definitions and elaborate concepts without legal extremes. In other words, deciphering what is known and followed by the majority of the transnational or regional legal community in arbitration proceedings is the focus of the article. Therefore, the author will seek to find minimum variations in common denominators and origins.¹ This article mentions domestic laws and treaties (formal legal rules) but with an approach influenced by a moderate ius-naturalism combined with historicism.² Attention is herein given not only to the formal sources or authorities of law for defining relevant principles, but also to their merits, i.e., the attributes which allow those sources and rules to have actual practical value.

Further, a detailed quantitative research at a regional level has not been performed, instead, several sources have been chosen based on their perceived qualitative relevance. Therefore, this article does not seek to make statistical projections, as no quantitative data sets have been analyzed for reaching inferences based on a calculation of legal probabilities.

From a regulatory standpoint, the instruments that have the greatest impact on arbitration trends in Latin America un-surprisingly include, in chronological order: the Convention on the Recognition

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¹ The perceptions and formulation of legal trends in this article may admittedly be impacted or prejudiced by the opinions of the author.

² To contextualize the definitions regarding ius-naturalism, positivism and formalism, see, María Luisa Tosta, *La Filosofía del Derecho y la doctrinavenezolana*, in ENSAYOS DE FILOSOFÍA DEL DERECHO 6, 22 (2005).

and Enforcement of Foreign Arbitral Awards (New York, 1958) [the “**New York Convention**”];³ the 1975 Inter-American Convention on International Commercial Arbitration [the “**Panama Convention**”];⁴ the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law [“**UNCITRAL**”, or “**CNUDMI**” for its acronym in Spanish] of 1985 and amended in 2006.⁵ A lot has been written about the coexistence of the New York Convention and the Panama Convention.⁶ There are however, important and positive differences among them.⁷ For instance, to apply the New York Convention, the award to be enforced needs to have been made in a country different from the country where enforcement is sought (even if the Convention does not contain a distinction between domestic and international arbitration), or as a minimum, the award must in some way be considered foreign. However, some countries do not make a legislative difference between domestic and foreign awards, possibly leaving it outside the umbrella of the New York Convention awards made in the same territory. The Panama Convention mentions in its own text that the arbitration must be international, but does not limit in any way the definition international arbitration. In this regard, the Panama Convention may refer to the diversity of parties, the diversity of applicable laws to the parties, the place of arbitration, or any of the concepts that have been used to define international arbitration. But it is in the author’s view clear that there does not need to be diversity of places of where the award is made and where enforcement is sought, for the Panama Convention to apply. That is a positive feature as the Panama Convention may be perceived as ample and broad in some aspects, or as a safety net in case the New York Convention does not apply to the arbitration. Reciprocity is not expressly mentioned in the Panama Convention, while it is suggested as a potential reservation in the New York Convention. Further, the New York Convention is only aimed at the enforcement and recognition of an arbitral awards, while the Panama Convention is broader and makes reference to the rules of the Inter-American Commercial Arbitration Commission, [“**IACAC**” or “**CIAC**” in Spanish] for

³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, June 10, 1958, 330 U.N.T.S. 38 [hereinafter the “New York Convention”].

⁴ Organization of American States, Inter-American Convention on International Commercial Arbitration of 1975, Jan. 30, 1975, OAS/SER A.20 (SEPEF), 14 I.L.M. 336, 1975 [hereinafter the “Panama Convention”]. The Panama Convention shows certain overlapping or common features with the New York Convention, and has been a significant driving force for Latin American countries to adhere to the New York Convention. The Panama Convention goes beyond the New York Convention, for instance, in creating an Inter-American Commercial Arbitration Commission, sponsored by the Organization of American States, whose arbitration rules and procedures are based on the Panama Convention.

⁵ United Nations Commission on International Trade Law [UNCITRAL], Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res 61/33 (Dec. 18, 2006) UN Doc A/RES/61/33 [hereinafter the “UNCITRAL Model Law”]. Costa Rica’s Ley 8937 de Internacional Comercial Arbitraje of 2011 expressly mentions the UNCITRAL Model Law.

⁶ See, e.g., Albert Jan van den Berg, *The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?*, 5(3) ARB. INT’L 214 (1989).

⁷ Both conventions are, in this author’s view, perfectly compatible. The existence of the Panama Convention will not in any way trump the benefits of the New York Convention. As a matter of fact, it has been said that the Panama Convention was conceived as a way to implement the New York Convention in the Americas. The grounds for non-recognition of arbitral awards, Article V or 5 of the conventions respectively, are almost perfectly identical. But there were, among others, geo-political or ideological reasons: Latin American countries wanted to have their own convention, not one imposed on them by the United Nations, where about five countries were perceived to have the power to decide everything. Latin Americans wanted to do implement the rules of the practice of arbitration on their own terms in the region.

when the parties to the arbitral agreements do not set the rules of procedure or specify an arbitration center.

Multiple countries in the Latin America have amended their domestic laws on arbitration to reflect or accommodate the principles reflected in these instruments. Most Latin American countries have consolidated their rules into a single arbitration statute,⁸ with the notable exception of Argentina, where the main positive sources of arbitration law are the procedural codes enacted by provinces.⁹ Certain countries in the region set forth differences based on a clear separation between international and domestic arbitration, including Bolivia,¹⁰ Chile,¹¹ Colombia,¹² Costa Rica,¹³ Nicaragua,¹⁴ and Panamá¹⁵. That is the case even though the New York Convention does not require for its applicability that the arbitration be international: pursuing or seeking enforcement of the award in a country other than the country of issue thereof is sufficient for the award to be protected or covered by the New York Convention.¹⁶ In this author's view of all Latin American countries, the statute that best reflects the proper and expansive operability of arbitration is the 2008 legislative decree governing arbitration (Decree 1071) in Peru. Such statute is modern in, among other things, explicitly defining the possibility of joinder of not-signatory parties to the arbitration agreement, the effects of partial annulments and the limited scope of judicial reviews, all the while referring to the principle of good faith as a guide in arbitration.

II. Legal nature of arbitration: From contractual into the jurisdictional and from equity into law

One of the main issues faced by arbitration as a legal institution in Latin America lies in defining its own legal nature. The debate involves two extreme positions, a contractualist and a jurisdictionalist position.

⁸ In Mexico, the primary rules have been set forth in the Código de Comercio [CCom] [Code of Commerce] (title fourth, art. 1415 and ff.) of 1993, following parameters provided by the UNCITRAL Model Law on arbitration.

⁹ In some countries, the special rules on arbitration are included in a broader code, although duly consolidated and systematized. *See, e.g.*, Law No. 15,982 of the General Procedural Code (Uruguay) of 1988 (amended in a limited manner by Law No. 16053 of 1989).

¹⁰ Ley 708 de Conciliación y Arbitraje, June 25, 2015 (Bolivia), <http://retro.kluwerarbitration.com/CommonUI/document.aspx?id=kli-ka-raci-1508307-n> [*hereinafter* "Law 708 on International Reconciliation and Arbitration (2015)"].

¹¹ Ley 19971 de Arbitraje Comercial Internacional, Sept. 10, 2004 (Chile), <http://www.minjusticia.cl/leyes/19971.pdf> [*hereinafter* "Law 19971 on International Commercial Arbitration (2004)"].

¹² Ley 1563/12, July 12, 2012 DIARIO OFICIAL [D.O.] (Colom.) [*hereinafter* "Law 1563 on National and International Arbitration Statute (2012)"].

¹³ Ley 8937 de Arbitraje Comercial Internacional, May. 25, 2011 (Costa Rica) [*hereinafter* "Law 8937 on International Commercial Arbitration (2011)"]; Ley 7727 de sobre Resolución Alternativa de Conflictos y Promoción de la Paz Social, Dec. 9, 1997 (Costa Rica) [*hereinafter* "Law 7727 on Alternate Dispute Resolution and Social Peace Promotion (1997)"].

¹⁴ Ley 540 la Mediación y el Arbitraje en Nicaragua, June 24, 2005 (Nicaragua) [*hereinafter* "Law 540 on Mediation and Arbitration (2005)"].

¹⁵ Ley 131 de Nacional y Internacional Arbitraje Comercial, Dec. 31, 2013 (published in 2014) (Panama) [*hereinafter* "Law 131 ruling the Domestic and International Commercial Arbitration (2013)"].

¹⁶ The New York Convention regulates "*the court recognition and enforcement of foreign and non-domestic arbitral awards. The term "non-domestic" may refer to awards which, although made in the state of enforcement, are treated as "foreign" under its law because of some foreign element in the proceedings, e.g. another State's procedural laws are applied*", *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

In the contractualist position, arbitration is a mechanism enabling contracting parties to include third parties in the contract (arbitrators, and sometimes an arbitration institution), by delegating their will or consent so that these third parties can intervene in the contract performance or termination. In cases solely related to extra-contractual liabilities, said third parties may only be brought to arbitration if they give their express consent after the dispute has arisen. Consistent with this view, arbitrators can have no bearing on any matter which parties cannot solve or settle on their own; the dispute must involve disposable or waivable rights, on matters legally available for settlement. Issues involving public policies (*orden público*) cannot be adjudicated in arbitration and arbitral tribunals have no authority to modify any solution coined by a legal rule of mandatory application or necessary applicability.¹⁷ In addition, parties always remain in control of the proceeding and they can (on agreement) remove all faculties or powers previously granted or delegated to the arbitrators.

Therefore, the contractualist position is somewhat consistent with the idea of deeming arbitration as a private service; *i.e.*, a human activity satisfying a social need, outside of the realm of government or state authorities. Up to the extent that parties can reach legal stability and tranquility between them, the service would attain its goal. Under this vision, the intervention from or by governmental or state entities, including courts must be limited, and the autonomy of the parties will always prevail.

On the other hand, the jurisdictionalist position perceives arbitration as a means to administer justice. Hence, arbitration is not strictly limited to the parties' will or consent, as its practical validity and effectiveness arises from laws, including in some cases, constitutional provisions.¹⁸ In this scenario, arbitration is not limited in scope to disposable or waivable rights, or the legal ability to settle, and is not incompatible with cases involving public policy (*orden público*) issues.¹⁹ Arbitrators, upon their appointment, acquire a position of power and supremacy over the parties and the dispute, and must enforce with scientific rigor (which does not mean inflexibility) legal rules or statutes of an imperative nature or necessary applicability.

The current trend in Latin America is to leave behind the purely contractualist view – including recognizing that the parties' consent is a crucial foundation for arbitration – and accept some implications or consequences of the jurisdictionalist position.²⁰ The state of legal discussion or dialogue however, does not seem about to reach a hybrid combining elements of a different nature,

¹⁷ An interesting juridical discussion could possibly arise in Brazil. In 2014 (w.e.f. 2015) Brazil's Arbitration Law 9307 of 1996 was amended. Article 25 was revoked. That article provides that "if during the course or any arbitral proceeding, a dispute would arise with regard to any right which is not disposable by a party, and the final decision could depend thereon, the arbitrator or the arbitral tribunal may refer the parties to a [judicial] court with jurisdiction on such matter, and order to suspend the arbitral proceeding" (translated from Portuguese by the author). However, the law still refers to "*direitos indisponíveis*" (unavailable or non-disposable rights) to define -and exclude- arbitrability. Another English translation of the provision cited is available at <http://cbar.org.br/site/eng/brazilian-legislation/law-9-307-96-english>.

¹⁸ See, e.g., Constitución Política de los Estados Unidos Mexicanos [C.P.] art. 17, DIARIO OFICIAL DE LA FEDERACION [DO], Febrero 5, 1917 as amended in 2008 (Mex.) [*hereinafter* "Political Constitution of the Mexican States (1917) (amended in 2008)"]; and Constitución de la República Bolivariana de Venezuela de 1999, art. 253 [*hereinafter* "Constitution of the Bolivarian Republic of Venezuela (1999)"], which refer to alternative justice mechanisms.

¹⁹ This was expressly acknowledged by a decision of the Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice (*see* Tribunal Supremo de Justicia (Sala Constitucional), Oct. 2008, Decision No. 1541, *Hildegard Rondon de Sansó et al.*).

²⁰ *Id.*

nor an eclecticism seeking an intermediary position. Rather, arbitration is beginning to be seen as having its own and particular features, neither based on nor defined by a strictly contractual or jurisdictional position. Once those features are combined, they bring (as an effect and not a cause) certain consequences likening arbitration to a contractual mechanism and others drawing it to a true jurisdictionalist position. In the author's opinion however, defining arbitration does not require taking either position.

Arbitration must be based on the parties' reciprocal consent set forth in an arbitration agreement. This feature makes it similar to a contractual institution. On the other hand, arbitration is not incompatible with public policy (*orden público*) matters, and gives rise or can give rise to juridical and legally binding decisions equivalent to or in some cases better (for purposes of transnational recognition and enforcement) than a court judgment.²¹ This makes arbitration similar to a jurisdictional mechanism.²² However, regardless of this, arbitration proceedings must be conducted and arbitral awards adopted with substantive and procedural flexibility. Arbitration must be, in essence, external to any governmental apparatus and must have sufficient operational autonomy. This differentiates arbitration from state courts and judicial proceedings.

Arbitration, as known today in Latin America, is a legal institution rooted in the political methods for dispute resolution historically used in disputes between merchants and traders, whereby a third party external to all government or state structures, was appointed as an authority upon the parties' consent, to resolve or settle disputes in a legally binding manner through the application (as opposed to the creation) of preexistent rules or principles. In such sense, arbitration is beginning to be seen as concurring with and complementing the jurisdiction of state courts; arbitration is not an exception to the jurisdiction of courts, nor is it hierarchically subordinated to the judiciary, or any other branch of the government. Arbitration in the region is striving to retain certain features which have historically characterized it and differentiated it from judicial proceedings: particularly legal flexibility in the construction and interpretation of laws both in substance and form including for instance, in the taking of evidence and assessment or analysis of proofs, and as well as generally, in legal reasoning.

Arbitration fosters the separation of public powers from private disputes by reducing the repercussions of the former on private parties and individual liberties, and lowering the number of cases heard by courts. Such circumstances provide, in the author's view, sufficient philosophical justification for deeming arbitration in the region as non-exceptional and instead expansive in

²¹ The growth in arbitration of international investment disputes (based on international treaties) has helped and permeated the contractual or commercial field of arbitration to overcome the bias regarding arbitration in sectors concerning public policies (*orden público*). However, such bias has not been totally eradicated. For instance, article 737 of the Argentina Code of Civil and Commercial Procedure sets forth, "no matter which may not be subject to [private] settlement can be submitted to arbitrators, under penalty of nullity".

²² Article 202 of the Constitución Política de la República de Panamá (as amended in 2004) [*hereinafter* "Political Constitution of the Republic of Panama (2004)"] is especially relevant here. It sets forth: "The Judicial Body shall comprise the Supreme Court of Justice, as well as those courts and tribunals the Law may provide for. The administration of justice may only be enforced by the arbitral jurisdiction, as the Law may determine. Arbitral tribunals will be able to hear and decide by themselves on their own jurisdiction." (Translated from Spanish by the author).

content and applicability. Therefore, when arbitration is referred to as an alternative mechanism, the term ‘alternative’ should not convey any opposition to usually accepted official or government models, but express an ability to alternate, concur with, and to complement the latter. Arbitration can, and should, have similar functions and social acceptance as official government models for the legal adjudication of disputes.

The definition for arbitration the author has proposed, the understanding that arbitration is neither limited to contractual issues nor based solely on notions of such nature, has driven a trend towards the increased prominence of law based arbitration and has simultaneously caused the decline of equity based arbitration (where arbitrators decide *ex aequo et bono* or as *amiable compositeurs*).²³ Arbitration was, in one way or another, born in the equity arena of commerce, but nowadays equity arbitration is not broadly used and has in practice become an exception. This has led some jurisdictions to require parties to be represented in domestic arbitration proceedings by lawyers licensed to practice law, or for arbitrators to be authorized to practice the law applicable to the merits of the dispute.²⁴

The change in Bolivia’s regulatory conception of the nature of arbitration merits special mention here. After having a modern arbitration law for more than 17 years (Law 1770 on Arbitration and Conciliation from 1997, mainly based on the UNCITRAL model law), it was substituted in 2015 for Law 708 on International Conciliation and Arbitration, which generally intended to foster particular governmental views and positions on arbitration with state entities. This change was based on an extreme conception of sovereignty that led to its withdrawal from the ICSID Convention and the denunciation of bilateral investment treaties by Bolivia, and which implicitly suggests that only Bolivian courts can properly adjudge Bolivian state entities.²⁵

²³ In Peru, for instance, up to 2008 the law prioritized arbitration based on conscience (*arbitraje de conciencia*, in which arbitrators decide *ex aequo et bono*), providing that in case parties fail to expressly agree on an arbitration based on law, they should be deemed as agreeing on an arbitration based on conscience (Ley no. 26572, General Arbitration Law, art. 3 (1996)). This principle was changed or reversed by the Legislative Decree 1071 Regulating Arbitration (2008), which substituted the General Arbitration Law (Law 26572). In Argentina, article 766 of the Code of Civil and Commercial Procedure sets forth, with regard to the amicable and voluntary arbitration referred to as *juicio de amigables componedores*, that if parties fail to expressly set forth in the agreement whether the arbitration shall be based on laws or an amicable and voluntary arbitration, or if the agreement authorizes arbitrators to settle the dispute based on conscience, such would be deemed to be an amicable and voluntary arbitration (*ex aequo et bono*) (translated by the author from Spanish).

²⁴ In Colombia, Law 1563 on National and International Arbitration Statute (2012), provides in article 7 for certain professional and citizenship requirements for arbitrators in domestic arbitration proceedings. In Ecuador, article 3 of the Law on Arbitration and Mediation of 1997 (codified in 2006) requires that all arbitrators in any arbitration based on law must be lawyers, though it does not mention arbitration under a non-Ecuadorian substantive law. In the author’s opinion, this requirement is understandable, but, in general, is flawed conceptually, even for domestic arbitration. In any case, this limitation or requirement must be expressly and specifically stated in the law, and may not be presumed or included by analogy or imported from judicial proceedings. Should the law fail to do so, arbitrators and counsel for lawyers should not be required to be licensed attorneys, even in domestic arbitrations based on law.

²⁵ Doctor Héctor Arce, Honourable Attorney General of the Plurinational State of Bolivia, Keynote Address, Bolivian Ministry of Justice, “Former law 1770 failed to provide for any regulation on disputes where the State would be a party, it was a law framed within the liberal ideology. In the international context, the State was always fighting a losing battle, as it was subject to the famous bilateral investment treaties, from which the Plurinational State of Bolivia has now withdrawn pursuant to the mandate set forth in the Ninth Temporary Provision of the State’s Political Constitution”. See *Aprueban la Ley de Conciliación y Arbitraje*, CORREO DEL SUR (May

III. Autonomy of arbitration law

The particularities and defining traits of arbitration law (including the combination of procedural and substantive issues) require or imply that arbitration as a scientific discipline must be studied and approached as an autonomous area of law. In the past, arbitration law was deemed to be a part of, or studied under, civil procedures law or mercantile (commerce) law. In the past, university courses on arbitration were presented, at best, as seminars or optional and secondary subjects, usually combined with the study of negotiation, mediation, and conciliation. However, nowadays arbitration law is increasingly studied independently of other subject matters or legal disciplines.²⁶

Another manifestation of greater recognition of such autonomy is that the arbitration agreement, although deemed as contractual, is described, interpreted and constructed under a set of criteria usually differing from those relevant to contracts under the strictly civil or traditional contract law. The formation of an arbitration agreement, its transfer, assignment and content, as well as issues relating to the effectiveness of the agreement (the parties' authority or capacity and valid consent, be it express or tacit) are quite specific.²⁷ Rules for the enforcement and applicability of an arbitration agreement, determination of its validity and effectiveness, and for deeming an individual or entity as being bound or covered thereunder, are somewhat broader and less stringent than those usually applicable to ordinary contracts. Such is the case even when dealing with state entities or entities governed by or subject to public law, notwithstanding that there may be special bureaucratic authorizations which may statutorily be required for the formation of an arbitration agreement.

It is particularly illustrative that an individual or entity may not be deemed to be bound by a contract, but may still be bound by the arbitration agreement contained therein. Besides, the substantive law applicable to the merits of a case or the underlying contract may differ from the law applicable to the arbitration agreement, not only as to the origin (if it is a national law enacted by a State) of the source, but also as to the fundamental principles of such law.²⁸ With few exceptions, affirmative challenges against arbitral awards must, or at least may, be brought before a court of law with territorial jurisdiction in the place of arbitration, and the said court will usually abide, and consider itself naturally bound, by the laws of its place or seat.

The separation or potential split between the law governing the main contract (*lex contractus*) and the *lex arbitri* has led to the study of the latter under principles that tend to transcend geographical barriers throughout in Latin America, disregarding territorially-driven differences more typical of

22, 2015), <http://www.correodelsur.com/20150522/politica/aprueban-la-ley--de-conciliacion--y-arbitraje> (Translated from Spanish by the author).

²⁶ See e.g., the CENTRAL UNIVERSITY OF VENEZUELA, <http://www.postgradofcjp.net.ve/docs/programas/2012-2/0404014/arbitraje.pdf>; As for Spain, see *Curso Superior Universitario en Arbitraje (Formación Inicial)*, CÁTEDRA LEGÁLITAS, INSTITUTO DE DERECHO PÚBLICO, UNIVERSIDAD REY JUAN CARLOS, <http://www.catedralegalitas.es/curso-superior-universitario-en-arbitraje-formacion-inicial/>.

²⁷ See Alejandro Follonier, *La formación del convenio arbitral internacional en América Latina y en Suiza*, (5) LIMA ARB. 110 (2012-2013), <http://www.limaarbitration.net/LAR5/Alejandro-Follonier-Ayala.pdf>.

²⁸ Parties may expressly select the law governing the arbitration agreement in itself; although this choice is seldom stated in practice.

civil law.²⁹ It may be plausible to start a dialogue about a transnational or at least regional arbitral *lex mercatoria* (the law of the market, so to speak). That is the case, even acknowledging the importance of substantive civil or commercial laws that may be applicable to the parties (and their influence with regard to their consent as requirement for the arbitration agreement) and the difference between the inherent validity or effectiveness of the arbitration agreement and the formal validity or effectiveness thereof (ruled by the laws of the country where the agreement is entered into).

Some notable theories claim that arbitration awards are inherently transnational or a-national, meaning they are not included in any country's particular legal framework, but rather find their juridical grounds in a transnational *lex mercatoria*, thus contributing to the uniformity across substantive laws.³⁰ The countries' 'internal' legal frameworks are relevant under such a perspective only when an interested party brings the award to a court for recognition or enforcement. Yet, until this point of view on the a-national nature of arbitral awards becomes generally accepted in the region, the substantive law applicable to the merits of an arbitration or award may actually present a challenge for enforcing the award due to issues involving, for instance, diversity of nationality or origin of laws. This can happen when a court is required to enforce an award based on a law other than the one formally enacted and in force in the territory of that court or when the award is based on principles that the court may find unfamiliar.

The autonomy of arbitration law seems to lead to a consensus that arbitration proceedings should not be too similar to judicial proceedings in its operational, substantive, and procedural aspects.³¹ In addition, differences between arbitration proceedings and judicial proceedings must be attentively honored, accepted and considered by the courts whenever an arbitral award is brought to the latter, for enforcement, recognition or potential annulment.

IV. *Kompetenz-Kompetenz* and the severability of arbitration agreements

The *Kompetenz-Kompetenz* principle provides for the power (faculty or jurisdiction) of arbitral tribunals to establish and resolve their own jurisdiction.³² This principle requires that when facing a *prima facie*

²⁹ The following merit special mention: Law 131 ruling the Domestic and International Commercial Arbitration, art. 6, Dec. 31, 2013 (published in 2014) (Panama), Law 1563, National and International Arbitration Statute, art. 64, July 12, 2012 DIARIO OFICIAL [D.O.] (Colom.); and Law 8937 on International Commercial Arbitration, art. 2A(I), May 25, 2011 (Costa Rica). These articles provide that, when construing the arbitration law "its international [origin][nature] must be taken into account, as well as the need to promote uniformity in its enforcement and the observance of good faith." (translated by the author from Spanish.)

³⁰ J.C. Fernández Rozas, *El arbitraje comercial internacional entre la autonomía, la anacionalidad y la deslocalización*, LVII REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 605 (2005).

³¹ The author believes that articles 1 through 58 of Law 1563 whereby the National and International Arbitration Statute of 2012 (Colombia) was issued makes national or domestic arbitrations very similar to judicial proceedings. Those articles demand that parties be counselled by lawyers, rule disciplinary sanctions for arbitrators, set forth a regulated capacity for the arbitral tribunal secretary, and regulate other procedural matters with undesirable accuracy. On the other hand, articles under that same law related to international arbitration are quite positive and to a great extent follow outlines of the UNCITRAL Model Law on arbitration. It seems Colombia reached a legislative compromise on the flexibility of arbitration proceedings.

³² Here we must take into account that, in the arbitral system, certain traditional procedural law concepts, such as jurisdiction and competence, do not have the same definition or practical content. For arbitration, the difference between jurisdiction and competence, if any, is irrelevant in most cases. Likewise, the difference among jurisdiction, action, and procedure, as well as the isolated analysis on matters such as the parties' qualification or standing, can be of

arbitration agreement, i.e., one passing a minimum or superficial scrutiny for validity and effectiveness (not a final and irrevocably binding pronouncement), such agreement shall be submitted to the arbitral tribunal's decision, thus allowing the arbitral tribunal to be the first to issue a binding pronouncement on the validity and effectiveness thereof. The arbitral tribunal is therefore empowered to analyze its own jurisdiction and whenever asserting the same, it can exclude courts from hearing the matter or dispute. This does not mean that an arbitral tribunal would be the only body to analyze the validity and effectiveness of an arbitration agreement, as courts may review those issues upon receiving any arbitration award for its potential enforcement, recognition or potential annulment.³³

This question of competence may arise when an issue or dispute potentially covered by an arbitration agreement is first brought to a court of law. In such a case, the court shall consider the existence of an arbitration agreement (or motion to stay the judicial proceeding), whenever raised as defense by a party. Under certain circumstances, the court may forward the matter to arbitration in its own initiative, either by declaring its own lack of jurisdiction or on any other procedural cause.

Courts in Latin America are progressively favouring a less intrusive or disruptive approach with regard to the *Kompetenz-Kompetenz* principle when a *prima facie* arbitration agreement exists.³⁴ However, in the author's view, courts have not even now been sufficiently deferential or respectful of the *Kompetenz-Kompetenz* principle. In practice, many courts tend to impose or apply their own criteria regarding the validity of an arbitration agreement.³⁵ That is so even where the severability and autonomy of the arbitration agreement is recognized.³⁶ Full recognition of *Kompetenz-Kompetenz* is needed to ensure the severability of the arbitration agreement. Such severability or autonomy entails that any invalidity or alleged invalidity of the main contract shall not imply (in part because of the scientific autonomy of arbitration law) the invalidity of the arbitration agreement. Otherwise, it

little importance for arbitration, as ultimately all issues are related to or focused on the validity and extent – both material and subjective – of the arbitration agreement. Any arbitration entails a proceeding, but not necessarily an action or procedure (in the strict procedural sense).

³³ See, e.g., article V(1)(a) of the New York Convention, pursuant to which a judge may consider that the arbitration agreement “[...]is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”. Similarly, under article V(2)(a) of the Convention, a judge may review whether “the subject matter of the difference is not capable of settlement by arbitration under the law of that country”.

³⁴ In Venezuela, see, e.g., the decision of the Constitutional Chamber of the Supreme Tribunal of Justice in Tribunal Supremo de Justicia (Sala Constitucional), 2010, Decisión No. 1067, *Astivenca et al.* In this case, the validity of an arbitration agreement was upheld, even though the parties had approached the judiciary for some aspects of the same dispute.

³⁵ In Venezuela, some examples of undue intrusion by courts against *Kompetenz-Kompetenz* include the following cases: Tribunal Supremo de Justicia (Sala Político Administrativa), Feb. 13, 2007 (*published on* Feb. 14, 2007), Decision No. 0259; Tribunal Supremo de Justicia (Sala Político Administrativa), Aug. 2, 2005 (*published on* Aug. 03, 2005), Decision No. 5249, *Urbanizadora Sebucán, C.A. v. Junta de Administración del Centro Comercial Los Chaguaramos*; Tribunal Supremo de Justicia (Sala Político Administrativa), Feb. 1, 2006, Decision No. 0188, *Seforex v. Fibranova, C.A.*; Tribunal Supremo de Justicia (Sala Político Administrativa), Mar. 7, 2006, Decision No. 0585, *Hesperia Enterprise Sucursal Venezuela, C.A. v. Corporación Hotelera Hemesa, S.A.*; Tribunal Supremo de Justicia (Sala Político Administrativa), Mar. 3, 2006, *Angelita Jardim Figueria v. Company BX2 Franquicias C.A.*

³⁶ The author has not come across any source of law or authority in Latin America disavowing the severability and autonomy of the arbitration agreement.

would be unduly easy to obstruct any arbitration proceeding by alleging the invalidity of the main contract.

V. Arbitrability

Arbitrability, or the availability of a dispute or legal issues to be resolved in arbitration, in its substance, has shown a gradual but constant growth and expansion in Latin America.³⁷ Throughout the second half of the 20th century, as still reflected in many statutes currently in force, arbitrability was limited to disposable rights and commercial issues which could be privately settled and were not related to public policy (*orden público*).³⁸ However, arbitrability has been expanded to include, in law based arbitration (as opposed to those in which arbitrators decide *ex aequo et bono*), matters which are not merely commercial or which can be privately settled by the parties.³⁹ This expansion or growth in arbitrability has primarily been through case-law, rather than through statutes or regulations.⁴⁰ A current dilemma faced by some countries in the region is how to reconcile a more inclusive acceptance of arbitration reflected in their constitutions with the older arbitration statutes which seem more restrictive of arbitrability.⁴¹

The growth or expansion of arbitrability may be partially attributed to the increased use of investment arbitration (as based on international treaties), which permits the involvement of state

³⁷ See, e.g., in Peru, article 40 of Legislative Decree No. 1017, Law for the State Contracting and Acquisitions, (*see* DIARIO OFICIAL EL PERUANO, June 4, 2008, “Article 40.- Mandatory clauses for contracts. Contracts governed by this rule shall necessarily and responsibly include clauses referring to: [...] c) Dispute Resolution: all and any dispute arisen during the contract performance stage shall be settled through conciliation or arbitration. Should the bases or contract fail to include the relevant clause, the model clause set forth in the Regulation shall be deemed as included as a matter of law.”) (Translated from Spanish by the author).

³⁸ Art. 3, Ley 489-08 de Comercial Arbitraje le Dominican Republica, (2008) [*hereinafter* “Law 489-08 on Commercial Arbitration of Dominican Republic (2008)”] excludes “cases related to public policy (*orden público*)” from arbitration proceedings. We think that references to available rights and public policy (*orden público*) are just traces currently applicable to equity arbitration only...” (translated from Spanish by the author).

³⁹ In Uruguay, article 472 of Law 15.982 of the General Procedural Law (1988) (revised in 1989 by Law 16053) includes a praiseworthy and broad provision, which fails to mention public policy (*orden público*) and the settleable requirement as limiting factors for arbitrability - Any and all dispute, either individual or collective, may be submitted by parties to resolution by an arbitral tribunal, except when any legal provision would expressly state otherwise. (translated by author from Spanish).

⁴⁰ See, e.g., Judgment of the Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice (Tribunal Supremo de Justicia (Sala Constitucional), Oct. 17, 2008 (*published on* Nov. 10, 2008), Decision No. 1541) referring to the interpretation of article 258 of Venezuela’s 1999 Constitution, set forth that if “a matter must be governed by public policy (*orden público*), alternative dispute resolution methods including, among others, arbitration shall not be excluded *per se*, as the statute’s public policy (*orden público*) declaration with regard to a specific matter means it shall be impossible for parties to depart or mitigate the conclusion, precautions or protections afforded by statute to the weak party, which are of a substantive nature; [...] [because] the free and agreed provision allowing an alternative mechanism - arbitration, mediation, or reconciliation, among others- [...] [is predominantly of a] procedural nature. In order to determine whether a topic under a given legal relationship can be submitted to arbitration or not, it shall be enough to discern if a judge can adjudicate such issue, and if such is the case, there will be no doubt that the issue shall also be arbitrable upon an agreement made at the parties’ consent. In contraposition, the scope exclusively reserved to administrative authorities (Executive Branch of the government), cannot be adjudicated by the arbitrators or the judge.” (translated from Spanish by the author).

⁴¹ In some countries, this dilemma is set forth in the Constitution. For instance, in Ecuador, the 2008 Constitution (Constitución de la Republica del Ecuador 2008), in article 190, acknowledges arbitration also providing that using such proceeding shall be justified on public contracting matters (which fail to show any, or very limited, potential for reaching a settlement), although noting in the heading that such matters shall be limited to those enabling a settlement due to their nature.

entities governed by public law and dealing with matters related to public policy (*orden público*).⁴² It may also be attributed to the increased social confidence and institutional trust in arbitration as a legal institution. With regard to a formalistic conception, the denomination of “commercial” has now been made obsolete as a qualifier in the definition of arbitration. The term commercial was derived from historic use of arbitration in the region, but nowadays fails to be appropriate, and is insufficient to encompass all arbitrations based on contracts or private arbitration agreements. It is the opinion of the author that the term “ordinary arbitration”, in place of commercial arbitration has become more accurate and comprehensive, since arbitration is now being used, for instance, to handle administrative law and public service disputes, which in essence are non-commercial.⁴³ This is particularly evident in international investment arbitration, which normally implies the arbitral review and control over the actions of sovereign States and government entities. This is also evident in domestic arbitrations dealing with government entities in general, because in Latin America those entities are often governed by, or subject to, public law (including administrative law) statutes which are considered to prevail over private law.

The test for determining material arbitrability is no longer whether a dispute involves or is related to public policies (*orden público*) or whether it goes beyond the disposable or waivable rights. When public policy issues and rules of imperative nature or necessary applicability are relevant in arbitration, arbitrators must simply follow and apply them. Should they deviate from such rules, the court may void or annul the award due to an inexcusable error, finding a serious and obvious breach, or manifest disregard of the applicable substantive law. An incipient trend is to establish arbitrability using a so-called protective principle (“*principio tuitivo*”) which, with certain dynamism (though subject to evolution), serves to determine whether there is enough social trust and institutional confidence in arbitration at a given time to handle an area of law or type of dispute. This is established in part, albeit indirectly, by analyzing whether there are legally weak or disadvantaged parties who may be directly or indirectly affected and hence deserve special protection, or third-party or social interests or collective issues, in which cases tutelage of permanent judges trained and supervised under the government apparatus would be required.⁴⁴ This means that certain subject matters may be excluded by law (be it statutes or case-law) from arbitrability because of a social or political conviction that, at a given time, the participation of a specially trained and appointed judge is desirable or required. Such may be the case in socially sensitive areas of law, like the ones regarding the dissolution of marriage, the recognition of nationality, paternity rights, or

⁴² Many laws on arbitration, when determining whether matters or issues are arbitrable, do so notwithstanding the provisions set forth in international treaties currently in force or applicable to the relevant country. Investment arbitration shows clear differences with ordinary arbitration (mainly referred to as commercial arbitration) although they impact each other reciprocally and share certain common elements.

⁴³ Amendment made in 2014 to Brazil’s Arbitration Law 9307 of 1996 (Lei No. 9307, de 23 de setembro de 1996, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 24.09.06) discusses arbitration by State entities. Specifically, articles 1 and 2 of this law provides, *inter alia*, that arbitration involving public administration (government entities) must be “at law” (as opposed to *ex aequo et bono*).

⁴⁴ The legislative process held in Brazil in 2014 for amending Arbitration Law 9307 of 1996 was completed in 2015, and in effect exemplified the protective principle. This amendment process expressly approved corporate arbitration. On the other hand, arbitration on matters related to consumers or consumer protection was approved by the legislative body and then vetoed by the Vice-President of the Federative Republic of Brazil.

consumer protection matters. However, no broad or generic exclusions of arbitrability can be articulated solely on the mere existence of imperative or public policy laws.

VI. Precautionary or Interim Measures

Arbitration in Latin America has traditionally implied, although maybe failing to specifically articulate the legal basis thereof, the arbitrators' ability to issue precautionary or preventative measures, sometimes referred to as temporary, interim or provisional measures. In a sense, it is a given that whoever can issue the most significant decisions (resolving the dispute on merits), can issue the less significant ones (to ensure that a potential decision on merits can truly be effective in practice).⁴⁵ Costa Rica and Panama are jurisdictions with more detailed regulations on precautionary measures and preliminary orders in arbitration proceedings.⁴⁶

However, over time a practical challenge arose, because of the steps normally required to constitute arbitral tribunals, regarding the need for precautionary measures to be effective. Arbitral practice has begun to acknowledge that such measures must oftentimes be issued promptly and with no hearing or prior notice to the opposing party (*ex parte* or *in audita alteram partem*). In order to address this issue, two alternatives have been considered. The first one is allowing courts to issue such measures, somewhat in advance of or in preparation for, the arbitration proceeding, *i.e.* as pre-arbitral measures, providing that no such use of the judiciary can be deemed a waiver of arbitration.⁴⁷ The second one is to appoint or constitute emergency arbitrators or tribunals.⁴⁸

Provisions for appointment of emergency arbitrators have been adopted by many arbitration rules.⁴⁹ Under such provisions, the arbitral institutions can designate an *ad-hoc* or special arbitrator, in an expedited manner, who is frequently empowered to act without prior notice to the opposing party,⁵⁰ solely to decide on the request for precautionary measures. Typically, the decision on such measures is not referred to as an award (in spite of inherently being one), maybe to limit – in form – any judicial remedy against it, or avoid time consuming scrutiny. Such decision may be reviewed (ratified,

⁴⁵ For instance, in Argentina, article 753 of the Code of Civil and Commercial Procedure (CODIGO PROCESAL CIVIL Y COMERCIAL DE LA NACION) sets forth that “Arbitrators may not issue any compulsory measure, or enforcement measure, they shall request such from a judge who shall help them within his/her jurisdiction for attaining the fastest and most efficient substantiation of the arbitration proceeding”. This has been construed as circumscribing this limitation to the use of public force and law enforcement officers. (Translated from Spanish by the author).

⁴⁶ See Law 131 ruling the Domestic and International Commercial Arbitration, arts. 33-44, Dec. 31, 2013 (published in 2014) (Panama); Law 8937 on International Commercial Arbitration, arts.17-17G, 2011 (Costa Rica).

⁴⁷ See, *e.g.*, Law 540 on Mediation and Arbitration, art. 29, June 24, 2005 (Nicaragua); and Law 131 ruling the Domestic and International Commercial Arbitration, art.18, Dec. 31, 2013 (published in 2014) (Panama).

⁴⁸ The author is of the opinion that the term ‘emergency’ is not an ideal one, as all precautionary or preventative measures are inherently urgent or entail an emergency, regardless of whether they are issued by the same tribunal constituted to resolve the merits, or previously by another tribunal. Such terms as precautionary arbitrators and preparatory tribunal seem more appropriate, but have not been adopted in the terminology.

⁴⁹ At an international level, article 29 of the ICC Rules of Arbitration, 2017 deserves a special mention on this topic. As further reference, in Venezuela, the two most prestigious arbitration centres include emergency arbitrator provisions in their rules (*see*, CENTRO DE ARBITRAJE DE LA CÁMARA DE COMERCIO DE CARACAS, www.arbitrajec.org and CENTRO EMPRESARIAL DE CONCILIACIÓN Y ARBITRAJE, www.cedca.org.ve).

⁵⁰ In principle, this is not a standard practice in the International Court of Arbitration of the International Chamber of Commerce (ICC).

amended, or revoked) *ex post* by the arbitral tribunal subsequently constituted to resolve the merits of the dispute.

VII. Procedural and substantive flexibility

A basic feature of arbitration, based on its place out of the state mechanisms, and indeed as alternative thereto, is its procedural and substantive flexibility.⁵¹ A procedure with stringent terms or strict formal or external requirements is not arbitration, even if nominally called one. Arbitration must keep its constructive differences with judicial proceedings, which although do not make arbitration better or worse, make it inherently distinct. Obviously, this flexibility should not lead to disorder, or to consequences incomprehensible to human reasoning. All arbitration proceedings must ensure balance and equilibrium among parties, so that anyone of reasonable judgment analyzing an arbitral award can understand its contents or purposes, as well as its cause. In arbitration, formalities cannot be deemed as ends in and of themselves.

Such flexibility also has consequences on substantive matters. Arbitrators must take into account and analyze the substantive sources of law, including relevant and persuasive judicial decisions or precedents, and must not ignore them on pretext of their autonomy. Notwithstanding that, arbitrators must have a margin for their substantive performance or discretion allowing them to make legal interpretations and constructions. They must be rigorous and deep in their analysis and application of legal techniques and methods, but never rigid or strictly exegetic.

Flexibility on substantive matters can lead to concerns or resistance when the matter adjudged in arbitration relate to public policy (*orden público*) issues or involve rules of necessary applicability. These should not be ignored by arbitrators. But we must realize that not all cases are 'easy' in this regard. For easy cases, meaning those which can be solved merely on formal reasoning, arbitrators must adhere to such methodology. On the other hand, in matters of legal complexity, even rules of necessary applicability may provide more than one correct answer. Cases of such kind raise the need for harmonizing values or principles in conflict,⁵² and therefore may have several acceptable solutions from a juridical standpoint. Further, in these difficult cases, it should not be assumed that positions or decisions of judges are better than or should prevail over criteria set forth in arbitration awards.

For courts, differences in criteria set forth by several courts are usually mitigated by superior or Supreme Courts having jurisdiction over several lower courts. Usually, in arbitration proceedings, there are and there should not be, any appeal⁵³ or unifying superior courts, a condition that naturally

⁵¹ For Nicaragua, Law 540 on Mediation and Arbitration (2005) expressly refers to the procedural informality and flexibility principle and the pro-arbitration principle. Article 3 of this law states, "The guiding principles of this Law are: pre-eminence of the autonomy of the will of the parties, equality of the parties, confidentiality, privacy, informality and flexibility of procedure, celerity, concentration, immediacy of the evidence, good faith, pro-arbitration principle, due process and right of defence." (Translated from Spanish by the author).

⁵² MANUEL ATIENZA, *TRAS LA JUSTICIA* 177 (5th ed. 1993).

⁵³ An exception can be seen in optional appellate arbitration rules of the American Arbitration Association [AAA]. Such rules are not generally applicable, nor applicable by default, instead are only applicable when parties expressly adopt them by consent. *See* Optional Appellate Arbitration Rules (2013), <https://www.adr.org/sites/default/files/AAA%20ICDR%20Optional%20Appellate%20Arbitration%20Rules.pdf>.

leads to the coexistence of diverse criteria, promoting flexibility in substantive matters, which in turn is, to some extent, offset by the courts' potential ability to annul arbitration awards when these reflect truly inexcusable errors or manifest disregard of applicable laws.

A field of particular importance for arbitral flexibility, involving both substantive and procedural laws, is the one related to evidence or proofs. In an arbitration, the repertoire of available proofs or evidence method, their legal assessment and value, the burden of proof, and in general the transfer or incorporation of facts from the tangible, real world to the arbitral award, are not and should not be stringent, static, rigid or predetermined.⁵⁴ As long as arbitrators respect the right to defense of the parties and substantive due process, they must not be tied down by restrictions or prescriptions inherent to, for instance, codes of civil procedure. However, no divorce between the tangible truth and the truth reflected in the award shall be allowed. In this area, arbitration tends to assimilate administrative proceedings, showing dynamism even in connection with the burden of proof.

VIII. Non-signatory parties and third-party interveners

The development of theories or legal approaches differentiating the formation, content and transfer of arbitration agreements from other types of contracts has been gradual but persistent. Significant progress can be seen in legal treatises, although a less significant one in judicial decisions and legislation. The trend shows that, for arbitration agreements, rules and principles are more extensive, expansive and dynamic than those of traditional civil or contract law.

Parties or individuals not bound by a typical mercantile law contract under certain circumstances can be bound or covered by an arbitration agreement in the same or very similar circumstances.⁵⁵ This may be caused partly by the recognition of jurisdictional effects on arbitration and the need for arbitration to be truly effective and efficient for administering integral justice and resolving disputes, so that parties are not allowed to evade adjudication through mere formalities. In Peru, for instance, the law expressly provides that the arbitration agreement extends to those whose consent to submit to arbitration, in good faith, is determined by their active and decisive participation in the negotiation, conclusion, performance or termination of the contract that includes the arbitration agreement or to which the agreement is related, it extends also to those who claim to derive rights or benefits from the contract, according to its terms.⁵⁶

Undoubtedly, the current trend in Latin America suggests that a determination of which parties are covered or bound by an arbitration agreement cannot be limited to checking who has executed (expressly signed or subscribed to) the arbitration agreement with sufficient authority, or who was

⁵⁴ Luis Alberto Petit Guerra, *El sistema de pruebas en el arbitraje desde la asunción del debido proceso como derecho fundamental* BOLETÍN DE LA ACADEMIA DE CIENCIAS POLÍTICAS Y SOCIALES, CARACAS (2011).

⁵⁵ See e.g., Cristián Roos & René Cruz, *La Extensión del Acuerdo Arbitral a Partes no Signatarias en la ley de Arbitraje Peruana: Algunas Lecciones del Derecho Comparado*, (5) LIMA ARB. (2012-2013), http://limaarbitration.net/LAR5/Cristian_Conejero_Roos_Rene_Irra_de_la_Cruz.pdf; and Hugo García Larriva, *Partes no Signatarias del Convenio Arbitral: entre la Realidad Económica y la Ficción Jurídica*, 15 IURIS DICTIO (2013), http://www.usfq.edu.ec/publicaciones/iurisDictio/archivo_de_contenidos/Documents/IurisDictio_15/iurisdictio_015_009.pdf.

⁵⁶ Legislative Decree 1071 Regulating Arbitration, art. 14 (2008) (Peru).

expressly or nominally mentioned therein, but rather should be done by taking a negative premise as a basis i.e., who should not be allowed to elude or evade the arbitration agreement as per the principles of good faith, fair reciprocity and substantive justice.⁵⁷

An arbitration agreement must be deemed to cover and bind “*those whose consent in submitting to arbitration is determined, under the principle of good faith, by their active and significant involvement in the negotiation, execution, performance or termination of the contract including the arbitration agreement or the contract to which the arbitration agreement is referred. The arbitration agreement shall also bind those seeking to derive rights or benefits from the contract, under its terms.*”⁵⁸

Theories and legal approaches on how to extend an arbitration agreement to non-signatory parties are diverse, reflecting each jurisdiction’s legal and historic background. The theories or approaches include lifting the corporate veil of legal entities in cases related to an abuse of legal structures or personalities by a group of companies or economic units, the factual and practical proximity, knowledge and benefits obtained from the main contract or from underlying relationship, agency or representation issues, implicit or tacit consent, estoppel, and the loosening of internal requirements of corporate governance.⁵⁹ Situations in civil law referred to as quasi-contracts (such as the one of implicit agents – *gestor de negocios* – and unjust enrichment) present some similarities – although not complete accord – with the extension and expansion of arbitration agreements. Under such quasi-contracts, liability arises even in the absence of perfectly entwined or stated consent. Similarly in arbitration agreements, individuals who have not stated their consent in a traditional contractual manner may also be drawn and bound thereby.

IX. Remedies against the arbitral award: The constitutional protection issue

A predominant perception in Latin America is that the request for annulment is the sole ordinary legal remedy available against arbitral awards and that such a request is not meant to review the merits of the dispute. Technically, a request for annulment is not seen as an appeal as such. The request for annulment is normally heard by a court from the same place or seat of arbitration, even though in some jurisdictions such as Argentina⁶⁰ and Bolivia,⁶¹ the law provides that such request shall be submitted to arbitrators, before the court, so that arbitrators may carry out a formal or preliminary review on the *in limine* admissibility thereof. In Argentina, there is also an appeal remedy

⁵⁷ See generally, Jorge Santistevan de Noriega, *Extensión del convenio arbitral a partes no signatarias: expresión de la inevitabilidad del arbitraje*, 8 REVISTA PERUANA DE ARBITRAJE 44 and nn. (2009).

⁵⁸ Translated by the author from the Spanish version of article 14 of the Legislative Decree 1071 Regulating Arbitration (2008) in Peru.

⁵⁹ See literature cited *supra* nn. 55 & 57.

⁶⁰ Articles 758 and 759 of the Code of Civil and Commercial Procedure, the Argentinean legislation deals with appeal proceedings.

⁶¹ Article 64 of Bolivian Law 1770 on Arbitration and Conciliation (Ley 1770 de Marzo de Arbitraje y Conciliación Mar. 10, 1997), provided, “The request for annulment shall be brought to the arbitral tribunal issuing the award serving as basis to the damage suffered, within a ten (10) days term following the date of the notice of the award or, in its case, the date of the notice with the amendment, complement, or clarification.” Law 1770 was replaced in 2015 with Law 708 on International Conciliation and Arbitration (2015). (Translated from Spanish by the author).

differentiated from the request for annulment,⁶² which opens a window that the author deems inappropriate due to its amplitude, for judges to review the merits of an arbitral award.

Grounds for the annulment of an arbitral award are set forth in arbitration law and tend to be specific and exceptional. In practice, the judicial proceeding for annulling awards is neither an appeal nor a second instance for a brief review of the matter considered by the award. The award must be treated objectively and the judge must be uninterested and impartial and proceed as if the award exists and stands by itself, disregarding the parties thereto. An award may not be annulled just because the arbitrators' reasoning was unfamiliar or different or because proven facts were arrived at using methods or standards other than the ones a judge would have used, except when the award breaches public policy (*orden público*).⁶³

In general, grounds for annulling an award do not its mere formal aspects.⁶⁴ Further, the court cannot, in principle, analyze substantive matters of contract or civil law, and can only review whether the award incurred on a ground for annulment specifically provided in the relevant arbitration statute.⁶⁵ An apparent issue that may arise here is with regard to grounds for annulment of an award, as this has failed to receive a uniform treatment in Latin America. This tension may be due to certain jurisdictions favouring the jurisdictional approach while others prefer to treat arbitration as a contractual mechanism. An important question is how an award that breaches public policies (*orden público*) or any substantive legal rule of necessary applicability will be treated, if in principle, the award cannot be annulled on merit.

⁶² Article 758 of Argentina's Code of Civil and Commercial Procedure sets forth, "those remedies admissible with respect to judgment (decision)s from judges may be brought against the arbitration award, if not waived under the commitment." (Translated from Spanish by the author).

⁶³ See, e.g., the decision of the Constitutional Chamber of the Supreme Tribunal of Justice of Venezuela in, Tribunal Supremo de Justicia (Sala Constitucional), 2010, Decision No. 462, *Gustavo Yélamo et al.* which expressly stated as much.

⁶⁴ Article 32(VII) of Brazil's Arbitration Law 9307 of 1996 (amended in 2014) seems problematic, as it provides that an award issued out of the appropriate term shall be void. In the author's opinion, this is a rare and inconvenient provision. Sometimes it may be better to wait for a delayed arbitral award than commence a new proceeding, either judicial or arbitral.

⁶⁵ See, e.g., article 63 of the 2008 Peruvian Arbitration Law (Legislative Decree 1071 Regulating Arbitration (2008)), which, following the 2006 UNCITRAL Model Law, provides a limited number of reasons based on which an arbitral award can be annulled:

- I. The award may be annulled only if the party requesting the annulment claims and proves:
 - A. That the arbitration agreement is non-existent, null, void, invalid or ineffective.
 - B. That one of the parties has not been duly notified of the appointment of an arbitrator or of arbitration proceedings, or has not been able to enforce its rights for any other reason
 - C. That the composition of the arbitral tribunal or the arbitral proceedings have not been adjusted to the agreement between the parties or to the applicable arbitration regulation, unless such agreement or provision conflicts with a provision of this Legislative Decree from which the parties cannot depart, Or, in the absence of such agreement or regulation, which have not complied with the provisions of this Legislative Decree.
 - D. That the arbitral tribunal has adjudged on matters not subject to its decision; and
 - E. That the arbitral tribunal has settled on matters that, according to law, are manifestly not susceptible to arbitration, in the case of a national arbitration.
 - F. That according to the laws of the Republic, the object of the controversy is not susceptible of arbitration or the award is contrary to the international public order, in the case of international arbitration.
 - G. That the dispute has been decided outside the period agreed by the parties, provided for in the applicable arbitration regulation or established by the arbitral tribunal. (Translated from Spanish by the author).

One natural, plausible consequence of such breach is that the award might be unenforceable and consequently a court may deny enforcement thereof. On the one hand, proposing that the court hearing the annulment request must tolerate such substantive illegality in the award is not compatible with the acknowledgement of the jurisdictional effects of arbitration.⁶⁶ On the other hand, allowing an extensive review on the merits or of the substantive heart of disputes in order to annul arbitral awards would not, in the author's view, favour the promotion of arbitration.

In the author's view, acceptance of the proposition that matters involving public policies (*orden público*) can be bindingly adjudged in arbitration should imply that courts shall be allowed to annul the arbitral award (and not only deny enforcement or recognition thereof) when the award reflects an inexcusable error, or manifest disregard of applicable laws.⁶⁷ Not annulling an award which incurred an inexcusable error would be contrary to public policy (*orden público*).⁶⁸

An award may be deemed unenforceable when, for instance, the tribunal has mistakenly applied in a flagrant manner, a rule of imperative nature or necessary applicability.⁶⁹ In such a case, the award would be, in and of itself, contrary to public policy (*orden público*). An award rendered defective by an inexcusable error is by itself unenforceable. However, courts must not impose their own legal interpretation over that set forth in the arbitral award, or make pristine or *de novo* findings on matters adjudged or solved in arbitration. The courts should be deferential to arbitral awards, save in very limited cases. The court hearing a request for annulment shall not be required to agree with the decision set forth in the award. While arbitral awards should take into account judicial precedents, they should not have to adopt all the substantive jurisprudence in order for the award to be deemed valid and binding.

A notable aspect is that a declaration of annulment on an award was earlier deemed, in principle, *erga omnes* (universal or absolute), if issued by a competent court. The denial of enforcement or recognition, on the other hand, always has been taken to have relative binding nature, limited to the territorial jurisdiction of the issuing court. Certain cases and doctrines which have recently emerged

⁶⁶ See generally Maria C. Domínguez, *La inmotivación y la indefensión como causa de nulidad del laudo arbitral en el Derecho Venezolano*, (31) REVISTA DE DERECHO PRIVADO 229 (Julio-Diciembre, 2016), www.uexternado.edu.co/derechoprivado.

⁶⁷ An inexcusable error is understood as one that cannot be justified by reasonable criteria, seriously damaging the juridical conscience as evidencing gross ignorance or absolute negligence. An inexcusable error is a manifest error. Such has been described as “an undetermined or undefined juridical concept, consequently, the attitude of an average judge must be weighed in each particular case, and in accordance with the above and those features inherent to the country's juridical culture, determine the inexcusable nature of the judicial officer's performance. A gross error shall be inexcusable when evidencing, with no particular difficulty, a lack of the essential juridical training as to perform the high function of judging in a suitable way” (see, summary of the jurisprudential treatment on the concept of inexcusable error, in judgment (decision) of Tribunal Supremo de Justicia (Sala de Casación Penal), May 22, 2006, Decision No. 203 *Juan Bautista Fernández et al.*) (Translated from Spanish by author).

⁶⁸ Among others, Law 131 ruling the Domestic and International Commercial Arbitration (2013) art. 66, Dec. 31, 2013 (Panama); Código de Comercio, art. 1457(II) (Mex.) [*hereinafter* “Mexican Code of Commerce”]; and Ley de Comercial Arbitraje, art. 44(f) (1998) (Venezuela) [*hereinafter* “Law on Commercial Arbitration (1998)”], (the last one with rather unfortunate wording) mentions a breach of public policy (*orden público*) as cause for annulling an award.

⁶⁹ This issue has been extensively discussed in the United States as the doctrine of manifest disregard of applicable law in arbitration. See Jason P. Steed, *Appealing Arbitration Awards and the Circuit Split over “Manifest Disregard of the Law”*, AM. BAR ASSOC. (May 10, 2016), <http://apps.americanbar.org/litigation/committees/appellate/articles/spring2016-0516-appealing-arbitration-awards-circuit-split-manifest-disregard-law.html>.

however, have minimized the importance of an award annulment, by allowing the enforcement of annulled awards in jurisdictions other than the one of the annulment court.⁷⁰

Further, in Latin America, the co-existence of a constitutional protection remedy (*amparo*) and other extraordinary remedies with the request for annulment has been a controversial issue. *Amparo* is a special, expedited request for a judicial injunction against the direct violation of constitutional provisions; an *amparo* order is a judgment ordering the cease and desist of the violation. Extraordinary remedies may include, in the case of Venezuela, constitutional revision as per article 336 of the Venezuelan Constitution of 1999, cassation recourse, or appeal⁷¹ against judicial decisions adjudicating a request for annulment of an arbitral award.

The constitutional protection remedy (*amparo*) was originally conceived to oppose any abuse from state authorities. Even if the arbitrators' relationship with the parties is essentially seen as contractual (particularly in commercial arbitration), no one can question the fact that once an arbitral tribunal is constituted, arbitrators rise to a position of authority with jurisdiction over the parties thereto. In addition to, and notwithstanding the above, legal jurisprudence has somewhat regularized the protection remedy making it applicable to relationships between private individuals or entities with no *ius imperium*, and even to contractual relations, thus providing support to the opinion that arbitration awards, in some cases, may be subject to constitutional protection remedies.⁷²

Legal jurisprudence tends to point out that arbitral clauses or arbitration agreements do not necessarily exclude constitutional protection absolutely, when a violation of constitutional rights or guarantees arises within the context of the relationship between parties, or whenever an arbitral tribunal infringes a constitutional right or warranty.⁷³ However, constitutional protections should not be, (though in reality they have been), abused or distorted for ultimately securing an amendment, extension, or maintenance of contractual relationships to the detriment of proper legal actions (lawsuits) related to contract performance or termination. A request for constitutional protection should not be a substitute for the ordinary remedy against an arbitration award, *i.e.*, the annulment request. The admissibility of constitutional protection actions against arbitral awards, or any other act or omission of the arbitral tribunal, cannot become a normal standard, let alone be abused. The

⁷⁰ See the judgment of the US District Court for the Southern District of New York, on August 27, 2013, in case *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (Commisa) v. Pemex Exploración y Producción*, 10 Civ. 206 (AKH) (S.D.N.Y., 2013). In this case, enforcement and immediate applicability nature in the United States was recognized (and confirmed on appeal) for an arbitral award previously annulled in Mexico, issued under Mexican substantive law, and in an arbitration proceeding conducted in Mexico City.

⁷¹ A cassation recourse or appeal is high instance, technical or specialized appeal that exists in many Latin American legal systems. Pursuant to this type of recourse or appeal, a higher (usually, Supreme) court does not re-examine the facts of a case, but only interprets the relevant law in order to exercise an objective control against a judicial decision.

⁷² See generally Edgardo Londoño y Gustavo Ortiz: *Los laudos arbitrales como sentencias judiciales frente a la acción de tutela en Colombia*, UNIVERSIDAD ICESI, 2011, https://bibliotecadigital.icesi.edu.co/biblioteca_digital/bitstream/10906/72764/1/laudos_arbitrales_sentencias.pdf; Jaime Abanto, *El arbitraje en las sentencias del tribunal constitucional y la procedencia del recurso de amparo contra laudos arbitrales*, (3) REVISTA PERUANA DE ARBITRAJE, 147 and nn. (2006).

⁷³ As for Argentina, see Julio César Rivera, *Recursos contra laudos arbitrales*, http://www.rivera.com.ar/sites/default/files/rivera_recursos_contra_el_laudo_arbitral2.pdf.

request for constitutional protection has been, and should continue to be, truly exceptional and limited in arbitration.

Another issue relating, albeit indirectly, with regard to remedies against arbitration awards, is the challenge to judicial decisions or judgments on annulment requests. In such a case, the formal focus or direct object of the remedy or challenge is not the arbitral award itself, but the judgment of a court. In some countries, such differentiation has allowed lengthening litigation up to, for instance, the cassation recourse.⁷⁴ However, the current trend is to limit judicial remedies even when their direct formal object is not an arbitration award. Peru shows a positive example on this issue: cassation recourse is allowed when the arbitration award is annulled, but not when the relevant request for annulling the award is dismissed.⁷⁵ In Venezuela, since an issue of different criteria (about the admissibility of the cassation recourse) arose between the Civil Cassation Chamber and the Constitutional Chamber of the Supreme Tribunal of Justice, the resolution has moved towards deeming the cassation recourse as non-admissible.⁷⁶

X. Immediate enforceability of the arbitral award

In general, the annulment recourse against an arbitral award does not suspend enforcement or the binding effect of the award, unless a judge issues an express pronouncement to this effect. In principle, arbitration awards can be enforced, even if a request for annulment has been submitted and the relevant decision thereon is still pending.⁷⁷

Whenever a governmental authority (in the broadest sense) is called to enforce or recognize within its territory, an award issued under the substantive law of another jurisdiction, it is necessary to review the compatibility of the legal effects of the enforcement with the public policy (*orden público*) in the place of enforcement. It is also important to note that the effects of an arbitral award requiring recognition by or affecting third parties, including government entities which did not participate in the arbitration proceeding, may present practical difficulties. Government agencies or authorities may deem problematic or unnatural the binding effects of arbitral awards based on laws or treaties not being (from a formal perspective) the domestic law in their own jurisdiction. This issue may be tackled by recognising that entering into treaties for the recognition or enforcement of foreign arbitral awards entails accepting the substantive law on which the award is based in so much

⁷⁴ See *supra* note 71.

⁷⁵ Article 64(5) of Legislative Decree 1071 Regulating Arbitration (2008) (Peru) states, “against any resolution from a Superior Court [on a request for annulment] the only available action is a cassation recourse (request for constitutional protection) to be brought to the Civil Chamber of the Supreme Court, whenever the award has been totally or partially annulled.” (Translated from Spanish by the author).

⁷⁶ The Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice has set forth a criterion, self-proclaimed as binding and with broad effects, that judgment (decision)s from superior judicial courts resolving on requests for annulments against arbitration awards are not subject to the cassation recourse (*see* Tribunal Supremo de Justicia (Sala Constitucional), Nov. 30, 2011, Decision No. 1773, *Van Raalte de Venezuela C.A.*; Tribunal Supremo de Justicia (Sala Constitucional), Decision No. 95, Feb. 17, 2012, *Hernando Díaz Candia and Bernardo Weininger*).

⁷⁷ In Venezuela, the second part of article 43 of the Law on Commercial Arbitration (1998) sets forth, “the fact that a request for annulment has been brought shall not suspend enforcement of any provision in the arbitration award unless, upon request from the party enforcing such remedy, the Superior Court would order so, after said party submits a security guaranteeing the award enforcement as well as any potential damage in case such request is denied.” (Translated from Spanish by the author).

as such law does not contravene with the public policy (*orden público*) in the place of recognition or enforcement. Even on such substantive aspects the arbitral award may have true practical and legal effects on parties not directly involved in the arbitration. That would in a way assimilate the enforceability of the award against the parties to the arbitration with the general enforceability against third parties *vis-à-vis* the theory of *res iudicata*.

Naturally, an arbitration award cannot be dismissed or not recognized in a jurisdiction just because it is substantively based on a foreign law. If such foreign law is compatible, as for all matters concerning public policy (*orden público*), with the relevant domestic laws, the award cannot be ignored. This is accepted as part of the international efforts to harmonise arbitration law. In general, Latin American laws on arbitration reflect such position.

The New York Convention allows enforcing and recognizing awards issued in other jurisdictions, with no need for an *exequatur* from a court of last or higher instance in the place of enforcement. When courts receive an arbitration award for recognition or enforcement, they must be highly deferential towards the award. Courts must proceed as if the award is vested with a presumption of validity and effectiveness, and impose no practical obstacles, preconceptions or enforcement standards inherent to judicial judgments. There would be no point in constitutionally allowing parties to detract from courts to submit to arbitration, if then – for the recognition or enforcement of the arbitral award – the parties must deal with all formalities inherent to judicial proceedings. Obviously, courts cannot act exactly in the same way as arbitral tribunals when enforcing an award, but courts must proceed in a rational manner assuming, among other things, that the award is immediately applicable and that the losing party's rights to defense and due process were honoured in the arbitration proceeding.⁷⁸

The Panama Convention reflects the same principles. In fact, article 5 of the Panama Convention seems to be a copy of article V of the New York Convention.

XI. State entities and formation of the arbitration agreement

In Latin America, the requirement for special authorizations or approvals for governmental entities to enter into arbitration agreements has been a constant more than a trend.⁷⁹ This is a general

⁷⁸ This is, in this author's view, implicit in the affirmative mandate of article III of the New York Convention: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." This is stressed by the text of article V of the Convention, which states that recognition or enforcement may be denied "only" in limited circumstances: "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if [...]".

⁷⁹ Article 42 of the Law on Arbitration and Mediation in Ecuador provides, "International arbitration shall be governed by the treaties, conventions, protocols and other acts of international law signed and ratified by Ecuador. Every natural or legal person, public or private, without any restriction, is free to stipulate directly or by reference to rules of arbitration, everything relating to arbitration proceedings, including the constitution [of the tribunal], procedure, language, applicable law, jurisdiction, and the seat of the arbitration, which may be in Ecuador or in a foreign country. In order for State or public-sector institutions to submit to international arbitration, the provisions of Constitution and laws of the Republic shall be respected. In order for the different entities that make up the public sector to submit to international arbitration,

condition for entities ruled by public law; and in many cases also for state-owned companies governed by private (civil) law.⁸⁰ For entities ruled by public law, such condition is understood as based on the competence (authority) legality requirement and the administrative legality principle, which imply that public officers may only carry out what has been expressly allowed by law. For entities ruled by private law, the requirement seems to be based on the need to protect the public interests, to ensure that an inappropriate performance of an isolated individual (government or corporate officer) representing a state company, does not indirectly affect the community or public interest.

For international arbitration proceedings, however, the pro-arbitration principle and the supremacy of international laws over domestic laws make such requirements more flexible. No State or state entity may allege any privilege or requirement provided by its domestic laws for evading an arbitration agreement.⁸¹

XII. Liability of state entities in arbitration

The use of public law enforcement agencies and public force is uniformly under the exclusive control of government entities (including courts), and particularly in case of enforcement of judgments and arbitral awards, under the judiciary. In Latin America, the compulsory enforcement or foreclosure, or at least the charge of directing and ordering such compulsory enforcement, of judgments and arbitral awards, either domestic or foreign, is the domain of the judiciary, not the executive or legislature, nor any private entity or individual. The judiciary hence has the mandate of giving practical, substantial effect to the legal liability of state entities, including state-owned companies. The executive and legislative branches of government may have significant roles in the enforcement, when the enforcement goes against an entity primarily governed by public law, but the ultimate control thereof rests with the judiciary. This is a universal principle throughout Latin America.

Keeping the foregoing in mind, we must acknowledge that for any individual or entity holding a right, the access to justice must include the access to actual compensation and an effective practical solution, (both real and tangible) for any damaging situation caused by third parties (either private or governmental) through their tangible actions or formal acts. This should be the case whether

the express authorization of the authority of the respective institution shall be required, after a favourable report from the Attorney General, unless the arbitration is stipulated in international instruments in force. The awards rendered within an arbitration procedure shall have the same effects and shall be enforced in the same manner as arbitral awards from domestic arbitrations” (Translated from Spanish by the author). This rule is subject to a partial exception pursuant to article 11 of the Organic Law for the General Attorney’s Office of the State of Ecuador.

⁸⁰ See Political Constitution of the Republic of Panama, art. 200(4). Further, article 4 of Venezuela’s Law on Commercial Arbitration (1998) sets forth that whenever in an arbitration agreement at least one party thereto would be a company where the Republic, the States, the municipalities, or the autonomous institutes would have an interest equivalent to or higher than fifty percent (50%) of the capital stock, or a company where any such entity would have an interest in equivalent to or higher than fifty percent (50%) of the capital stock, the approval of all the members of the Board of Directors thereof and the written authorization from the responsible minister shall be required for its validity. The arbitration agreement shall specify the kind of arbitration and the number of arbitrators, which in no case may be less than three. (Translated from Spanish by the author).

⁸¹ This is expressly set forth, for instance, by article 4 of Law 131 governing the Domestic and International Commercial Arbitration in Panama, (2013).

adjudication comes from courts or arbitral tribunals. Reparation or compensation should not be limited to an idealistic, declarative, nominal or illusory scope. The State's liability under arbitration awards must not only stand and be valid in legal theory, but also has to be effective.

Access to justice implies, first of all, having the right to induce arbitral tribunals to act, but it also inevitably implies that if the petition or request is in accordance with laws, results thereof shall entail a balance in the party's favour, including in monetary terms. Therefore, if an arbitral tribunal issues an award in favor of a particular entity or individual and against a state entity governed by public law, but the award cannot be enforced due to the exorbitant prerogatives granted to most entities of the government in Latin America, and the compensation afforded consequently stays only on paper, it cannot be deemed access to justice. Nor can we deem as access to justice a situation where a verdict or award annuls a government decision, considering it unlawful or unconstitutional or orders a government entity to pay indemnification, but the assets of the winning party are substantially reduced due to the costs incurred in the course of the judicial or arbitration proceeding, and consequently become even more reduced or damaged than if the annulled government decision had continued to be effective. For the state's liability to stand not only in theory but to be effective in practice, the compulsory enforcement and foreclosure of arbitral awards against state entities, within certain limits and parameters, must be allowed.

In Latin America, however, the principle of sovereign immunity from enforcement, although not absolute, is rather broad and generally accepted, be it based on statutes or court precedents.⁸² Ultimately, this principle limits the liability of state entities in arbitration, at least with regard to the practical effectiveness of such liability.

In arbitration, the immunity from jurisdiction (as opposed to the immunity from enforcement) has far less relevance than in judicial proceedings, as the governmental entity's consent to an arbitration agreement entails accepting the jurisdiction of the arbitral tribunal. On the other hand, in the transnational sphere, the legal position of arbitral awards is comparable to and in some cases, possibly better (as several treaties and statutes excuse the need for any *exequatur* or homologation of arbitral awards) than that of judgments of the court including with regard to enforcement or foreclosure.⁸³

XIII. Conclusion

In Latin America, nowadays arbitration is broadly not deemed as a mere contractual mechanism for dispute resolution as it was in the past, and jurisdictional components and effects have gradually been recognized for arbitration. Several Latin American constitutions include arbitration among alternative mechanisms for the administration of justice or dispute resolution. Gradually, arbitration has started to concur and to cooperate – and not only to exclude – the jurisdiction of the courts, in

⁸² See, Hernando Díaz-Candia, *Eficacia de la responsabilidad del Estado: inmunidad doméstica y extranjera en la ejecución de sentencias y laudos contra entes estatales*, 17(i) REVISTA IBEROAMERICANA DE DERECHO PROCESAL CONSTITUCIONAL (2012).

⁸³ In Venezuela, for example, the Civil Procedure Code in article 850 sets forth the requirement of *exequatur* (homologation or express domestication) by the Venezuelan Supreme Tribunal of Justice of all foreign judicial judgments prior to their enforcement in Venezuela. In contrast, the Venezuelan Commercial Arbitration Law, by article 48, expressly waives or dispenses the requirement of *exequatur* for foreign arbitral awards.

spite of the fact that it must preserve fundamental constructive differences with the latter. Such evolution has widened the scope of matters or legal issues deemed as arbitrable, and has concurrently decreased the use of equity arbitration and the relevance of public policy (*orden público*) as an excluding element of arbitrability, although some statutes still mention the settleable nature and the disposition of rights as component of arbitrability, even for law based arbitration. A major difference between arbitration and courts, which we deem as a constitutive element of the first, is the procedural and substantive flexibility in such fields as legal reasoning, and the dynamism in evidentiary issues.

Arbitration law, as a legal discipline in the region, has started to show signs of scientific autonomy. The influence of the UNCITRAL Model Law on arbitration is both distinct and unquestionable in Latin America. In practice, the influence of an arbitral *lex mercatoria* which transcends geographical barriers and formal laws has become significant. For countries preserving transcendental regulatory differences between domestic and international arbitration, the flexibility, enabling an expansive operation of arbitration is deeper or clearer in international arbitration. The *Kompetenz-Kompetenz* principle as well as the severability and autonomy of the arbitration agreement are constants in their legal recognition. Here, even though some judicial decisions have resulted in certain intrusions, such instances have gradually diminished.

The use of arbitrators referred to as emergency arbitrators, as well as the possibility of approaching courts to obtain precautionary or preventative measures to secure the potential enforcement of a future arbitral award, without waiving or renouncing the arbitration agreement, are clear trends in Latin America. Arbitrators' ability to issue precautionary, preventative or preliminary measures is generally not questioned.

The flexibility of arbitration has led to the acceptance of parties who have not signed or executed the arbitration agreement as being legally bound thereunder in some circumstances. That has been brought about under various theories, basis or perspectives. However the requirement for the arbitration agreement to be reduced in writing is still deemed as mandatory. Arbitration law seems more lax and less rigid than the civil law of contracts, with regard to the binding nature, extension and formation of consent. This condition is underpinned by the arbitration agreement's severability and autonomy.

In general, the request for annulment is seen as the sole ordinary remedy or recourse available against arbitral awards, and it is not conceived as an appeal remedy or a review of second instance. Subsequent remedies or appeals against a judicial decision on the request for annulment tend to be limited. For the time being the author holds a perceived minority opinion that a necessary and positive provision is allowing arbitral awards to be annulled, albeit exceptionally and in limited circumstances, for reasons related to merits or the heart of the dispute, when resulting in an inexcusable error (such as a serious, manifest and obvious breach of the applicable substantive law). This may be supported on the fact that arbitral awards which are contrary to public policy (*orden público*) are at minimum, not enforceable.

There is a clear trend to accept the involvement of state entities in arbitration, even if having to submit the arbitration agreement to special bureaucratic authorizations. However, this involvement is affected, in its practical effectiveness, by the relative immunity from enforcement of many, if not most, state entities.

Arbitration was born primarily for commercial matters, where arbitrators acted *ex aequo et bono*. As such, the use of arbitration was not extensive in Latin America until the late 20th century, when the New York Convention was widely adopted in the region and domestic arbitration statutes (and in some countries, constitutional provisions) recognizing the legal force for arbitral awards became the norm. That has significantly expanded the use of arbitration and the scope of arbitrability. The relevance of public policy (*orden público*) in a particular dispute, and the legal availability of private settlements have greatly diminished in the analysis of arbitrability and have been replaced by a broader social trust in arbitration.

The foregoing discussion has brought about a philosophical dilemma or conceptual crossroad: if subject matters or issues previously reserved to the judiciary can now be adjudicated in arbitration, then which are or should be the procedural and substantive differences that arbitration must have *vis-à-vis* judicial proceedings. Defining and truly giving meaningful content to the term ‘alternate’ (or alternative), in the context of dispute resolution mechanisms, while continuing to promote the growth of arbitrable subject matters, is part of the dilemma. The risk, or perhaps an inherent temptation which must be avoided, is making arbitration proceedings all too rigid, and similar – and hence not truly alternative – to judicial proceedings. The challenge is striving to strike the right balance.