INTERFERENCE IN THE CONDUCT OF INTERNATIONAL ARBITRATION BY THE POLITICAL CONSTITUTIONS OF IBERO-AMERICAN COUNTRIES

Study by the Latin American and Iberian Chapter of the ICC Institute of World Business Law

ICC INSTITUTE OF WORLD BUSINESS LAW

This Study provides a summary of the assessments carried out by various working groups formed by members of the Latin American and Iberian Chapter of the *ICC Institute of World Business Law* (the "**LAI Chapter**") :

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1. INTRODUCTION

1. This Study provides a summary of the assessments carried out by various working groups formed by members of the Latin American and Iberian Chapter of the ICC Institute of World Business Law (the *"***LAI Chapter***")* in relation to interference by the political constitutions of Latin American and Iberian countries in the conduct of international arbitration. These analyses were received by the Institute between November 2019 and January 2021 in response to a questionnaire[1] aimed at gaining a better understanding of the relationship between each region's constitutions and constitutional courts and international arbitration.

2. Contrary to what one might assume, interference between a country's constitution and arbitration is not a new phenomenon in Ibero-America[2]. Arbitration has been enshrined as a right for subjects of the Spanish Empire since the Spanish Constitution of 1812[3]. The use of clauses in a country's constitution banning or restricting the use of arbitration (particularly for matters involving the State or foreign investors) also became a regional trend when Latin American countries professed their almost unqualified adherence to the often-misunderstood Calvo Doctrine.

3. Although Ibero-America has more recently been well known for embracing international arbitration[4], today's constitutions still contain references[5] to arbitration and interfere with its use. Added to historical interferences, this phenomenon expanded as a result of the trend known as *the new Latin American constitutionalism*. In fact, one of the main features of many of the constitutions enacted towards the end of the 20th century is that they are "*mixed constitutions*"[6] with overlaps between State models and diverse economic and political agendas. The wish (which is otherwise a laudable one) to give bills of rights and the judiciary more power in the form of constitutional remedies that ensure the supremacy and observance of the constitution opened up new ways to challenge arbitral decisions and interfere with arbitral proceedings. It does not seem an overstatement to assert that the new regional constitutionalism has created a legal system based on the protection of fundamental rights that runs parallel to traditional civil and commercial law for the protection of individual prerogatives (subjective rights).

4. An analysis of the answers to the questionnaire shows that a country's constitution and arbitral proceedings generally interact in two different ways: On the one hand, constitutions contain provisions directly or indirectly regulating aspects of arbitration *(direct interference*). And, on the other, the national courts may interfere in arbitral proceedings or at the award enforcement (or annulment) stage based on constitutional provisions (generally those providing for some kind of constitutional remedy to protect fundamental rights or collective rights) (*indirect interference*).

5. Interference between a country's constitution and international arbitration is not a positive or negative phenomenon in itself. Both a constitutional provision and judicial intervention are capable of either protecting or reducing the effectiveness of this dispute resolution

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1 Annex

2 For a detailed explanation of this background information, see Alejandro Follonier-Ayala, "Constitucionalización del arbitraje en América Latina", *Revista del Club Español del Arbitraje,* 2015 (23), pp. 107 - 134.

3 Article 280 of the Spanish Constitution of 1812 ("*No Spanish national may be deprived of the right to settle their disputes through arbitration judges chosen by both parties*") and Article 281 ("*The arbitrators' ruling shall be given effect to unless the parties reserved the right to appeal in their undertaking").*

4 This is partly shown, for example, in the adoption by a number of Latin American countries of the UNCITRAL Model Law on International Commercial Arbitration, or in the drafting of arbitration laws inspired on that Model Law in countries such as Chile, Costa Rica, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, Spain, Uruguay and Venezuela, among others.

5 The Constitution of the Argentine Nation is an exception, as it contains no provisions about arbitration.

6 Roberto Gargarella, "Sobre el 'Nuevo Constitucionalismo Latinoamericano'", Revista Uruguaya de Ciencia Política. 2018, 27 (1), p. 123.

mechanism. In any case, we have noticed that parties in a number of jurisdictions tend to rely on constitutional supremacy and avail themselves of the actions enshrined in their respective constitutions to diminish the effectiveness of arbitrators' decisions and even neutralise the effects of arbitral awards in practice. This may be explained by the privileged position enjoyed by constitutional judges in certain legal systems (particularly if, under the legal system concerned, arbitration is seen as originating from the State's jurisdictional power).

6. Taking account of all of the above, we have analysed the interference of Ibero-American countries' constitutions based on whether their impact on international arbitration is positive (**Section 2***)* or negative *(***Section 3***)*. The conclusions of this Study are presented in **Section 4**.

2. CASES OF CONSTITUTIONAL INTERFERENCE WITH A POSITIVE IMPACT

7. To the extent that the principle of constitutional supremacy is expressly accepted by Ibero-American constitutions, we have identified cases in which constitutional interference with arbitration has a positive effect. As regards *direct interference*, we have noticed that arbitration is enshrined as a valid dispute resolution mechanism in a number of constitutions in the region (**Section 2.1**). And some constitutions similarly contain express provisions protecting subjective and objective arbitrability (**Section 2.2**). In some cases, this type of constitutional provision prevents legislators or judges from restricting the parties' ability to settle their disputes by arbitration.

8. As to *indirect interference*, based on constitutional provisions (and, in some cases, even on more generic provisions dealing with fundamental rights or the operation of the state apparatus), pro-arbitration judgments have been issued by constitutional judges in some jurisdictions (**Section 2.3**). It is also worth noting that the way certain constitutional principles have been interpreted by national courts has helped restrict instances of negative interference (**Section 2.4**).

2.1 Express Recognition of Arbitration as a Fundamental Right or Valid Dispute Resolution Method

9. Arbitration is a valid dispute resolution method, recognised by both written law and case law, in all the countries in the region analysed in the study. Furthermore, the validity of arbitration is expressly recognised in the constitutions of some of those countries.

10. The country in which constitutional interference has the most positive result is Costa Rica. Article 43 of Title IV ("*Individual Rights and Guarantees*") of the Costa Rican Constitution states that *"every person has the right to settle their property disputes by means of arbitrators, even if there is litigation pending"*.[7] Based on this provision, the Constitutional Chamber of the Supreme Court has confirmed that recourse to arbitration is a fundamental individual right with constitutional status.

11. Although stopping short of giving arbitration the status of fundamental right, the constitutions of other countries in the region expressly designate arbitration as a valid dispute resolution method. Ecuador's Constitution, for example, expressly acknowledges "*arbitration, mediation and other alternative procedures for the resolution of disputes"*[8]. The Constitution of El Salvador, for its part, states that "*no person with the right to freely*

7 Article 43, Title IV ("Individual Rights and Guarantees") of the Political Constitution of Costa Rica.

8 Article 109 of the Constitution of the Republic of Ecuador.

use and dispose of their property may be deprived of the right to resolve their civil or business affairs by means of a settlement or arbitration"[9] (unlike in Costa Rica, it is not clear whether this is a fundamental right).

12. An interesting case in the region is Panama. In a ruling issued in 2001, the Supreme Court of Justice held the article of the arbitration law under which the kompetenz-kompetenz principle was enshrined to be unconstitutional. As a result of the ruling, Article 202 of the Constitution was amended in 2004 as part of a constitutional reform, clarifying that, in Panama, "*[a]rbitral tribunals may consider and rule on their own jurisdiction"*[10]. In this case, direct interference by a constitutional reform guaranteed arbitrators' ability to decide on their own jurisdiction without having to submit the issue to State judges before issuing their award.

13. In other constitutions, arbitration is associated with the idea that this option stems from the jurisdictional power of the State. The Panamanian Constitution states that "*justice can also be administered by the arbitral jurisdiction as provided by law*", without its hierarchy being subject to the judiciary and without arbitrators being considered public servants[11]. The Colombian Constitution in turn states that private individuals can be temporarily invested with the power to administer justice as "*arbitrators authorised by the parties to issue rulings in law or in equity, as may be provided by law"*[12]. The Peruvian Constitution similarly provides that "*there is [n]o independent jurisdiction other than the military and arbitral jurisdictions, and none other may be established"*[13]*;* and, under the Portuguese Constitution, "*there can be maritime courts, arbitral tribunals and courts of peace"*[14]. To the extent that arbitrators' rulings are seen as court orders that are binding on the parties, such direct interference can increase the effectiveness of this dispute resolution method (particularly as regards the observance of interim or provisional measures ordered by the tribunal).

14. In the case of Mexico, the Constitution states that: "*[t]he laws shall provide for alternative dispute resolution mechanisms"*[15]. Although the constitutional recognition of arbitration may seem limited at first sight, the country's federal courts have concluded that this provision enshrines alternative dispute resolution mechanisms in the Constitution[16]. In particular, the Mexican courts have held that arbitration is to some extent equivalent to the protection provided by the courts, as they both serve the same function: the resolution of disputes between individuals who are subject to the law[17]. It is worth noting, as discussed below, that this does not mean that arbitrators are considered *authorities* for all purposes in Mexico.

15. Finally, some Constitutions make ambiguous reference to arbitration as a dispute resolution mechanism. Legal theory and the case law sometimes construe these as an indirect validation of arbitration.

16. The Constitution of the Dominican Republic, for example, lays down the possibility of submitting disputes on contractual relations with the State to (national or international) arbitration[18]. The ambiguity in this case stems from the fact that the provisions that expressly

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9 Article 23 of the Constitution of the Republic of El Salvador.

10 Article 202 of the Political Constitution of the Republic of Panama.

11 Article 202 of the Political Constitution of the Republic of Panama.

12 Article 116 of the Political Constitution of Colombia.

13 Article 138 of the Political Constitution of Peru.

14 Article 209(2) of the Constitution of the Portuguese Republic.

15 Article 17 of the Political Constitution of the United Mexican States.

16 Thesis: 1a. XXXVI/2017, First Chamber of the Supreme Court of Justice of the Nation, Semanario Judicial de la Federación y su Gaceta, Volume I, March 2017, p. 438.

17 Thesis: III.2o.C.6 K, Tribunales Colegiados de Circuito, Semanario Judicial de la Federacion y su Gaceta, Volume III, October 2013, p. 1723.

18 Article 220 of the Constitution of the Dominican Republic.

recognised arbitration as a dispute resolution mechanism between private individuals have now been repealed (this more specific language was not included in the Constitution of 2015). The answers received suggest that this constitutional change cannot be construed as a ban on arbitration between private individuals. If the Constitution has constitutionally authorised the use of arbitration by the State, it would be wrong to claim reasons of public order, for example, or of any other kind to ban its use in entirely private contexts.

17. Finally, the Constitution of Uruguay refers to arbitration as a peaceful resolution mechanism for disputes between sovereign States under international law. Under Article 6, "*[i]n any international treaties concluded by it, the Republic shall propose a clause under which all disputes that may arise between contracting parties are to be settled by arbitration or other amicable method*"[19]. The Colombian Constitution contains a similar provision[20].

2.2 Constitutional Protection of Arbitrability

18. Establishing which disputes can be settled by arbitration (and who this mechanism is available to) constitutes a type of direct constitutional interference that does not by definition have a negative or positive impact. In any event, defining arbitrability in the Constitution can prevent the law from unnecessarily restricting the use of this method (as seems to be the tendency in most of the countries we have studied).

19. Some constitutions make express reference to objective arbitrability (in other words, stating which disputes can be submitted to, and settled by, an arbitral tribunal). Most of them take a traditional stance, authorising the use of arbitration for disputes whose subject matter can be freely decided on by the parties. The Costa Rican Constitution, for example, expressly states that only disputes regarding property matters can be submitted to arbitration[21]. The Constitution of Ecuador similarly provides that parties can resort to arbitration "*in relation to matters whose nature means they can be settled by agreement*".[22] The Peruvian Constitution also states that "*[d]isputes arising from contractual relations can only be settled through the courts or by arbitration, in accordance with the protection mechanisms envisaged in the contract or the law.*"[23] In the case known as the *Cantuarias* case, the Constitutional Court of Peru confirmed on this basis the availability of arbitration "*basically for the settlement of disputes relating to property matters on which the parties have the power to decide and, above all, for the settlement of disputes arising in international contracts*"[24].

20. In Chile, the Constitution makes express reference to compulsory arbitration for the resolution of collective labour disputes[25] (a provision that is of little help when it comes to defining objective arbitrability for other kinds of disputes). In any event, the Constitutional Court has confirmed that legislators have authority to establish which matters must be submitted to compulsory arbitration and, more generally, to develop the set of rules that are to govern arbitration[26].

21. As to subjective arbitrability (certain individuals' ability to settle their disputes through arbitration), there is a certain tendency in the area to add a clause to a country's Constitution regulating the conditions under which arbitration may be used by the State

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19 Article 6 of the Constitution of the Eastern Republic of Uruguay.
20 Article 101 of the Political Constitution of Colombia.
21 Article 43 of the Political Constitution of Costa Rica.
22 Article 109 of the Constitution of the Republic of Ecuador.
23 Article 62 of the Political Constitution of Peru.
24 Legal Ground No. 10 of the Constitutional Court Judgment in Case No. 06167-2005-HC ("Fernando Cantuarias Salaverry" Case).
25 Article 19(16), paragraph 5 of the Political Constitution of the Republic of Chile.
26 Constitutional Court of Chile, Judgment No. 2755-14-CPR of 30 December 2014.

and its bodies. An example of this is the Constitution of El Salvador[27]. The Constitution of Peru is particularly noteworthy in these countries in that it expressly authorises the State to enter into contracts between the State and private investors known as "law-contracts" in order to give investors guarantees to encourage private investment and submit any resulting disputes to arbitration[28]. The case of Ecuador is also worth noting for the fact that its public bodies are allowed to enter into arbitration agreements provided these are approved by the State Attorney General in accordance with the conditions provided by law[29].

2.3 Indirect Interference with a Positive Impact: Protection in the Constitutional Case Law

22. We noted in the answers we received that the constitutional case law of some countries has construed the Constitution as favouring arbitration. This can basically be seen in two ways:

23. On the one hand, a number of constitutional courts have confirmed in general terms the favourable arbitrability rules that are expressly stated in the constitutions of other countries. The Constitutional Court of Guatemala, a country whose Constitution says nothing about the arbitrability of disputes, has held that, "*whether the dispute concerns private individuals or the Administration, they can both withdraw from the ordinary courts any disputes arising in their contractual relations. Private individuals can do so pursuant to the principle of freedom of action and autonomy of will, and the State or Administration can do so under the principle of legality that governs its actions*"[30]. The Supreme Court of Panama has similarly confirmed the constitutionality of the Arbitration Law, particularly as regards the capacity of the State to conclude arbitration agreements.

24. Colombia's Constitutional Court has acknowledged that the material scope of arbitration is restricted to those matters that can be freely decided upon by the parties[31] (*contrario sensu*, those matters that cannot be freely decided upon by the parties are not arbitrable). This means, for example, that arbitral tribunals cannot rule on the legality of administrative acts (although arbitrators can rule on their economic effects)[32]. In any event, even if the Constitutional Court has a pro-arbitration attitude, the courts have held that access to this mechanism may be limited by law. For example, in disputes in which "*a public body or any party carrying out administrative functions is involved [that] have arisen as a result of, or in connection with, the conclusion, performance, enforcement, construction, termination and liquidation of contracts with the State, including the economic consequences of administrative acts issued pursuant to exceptional powers, the award must be issued in law*"[33], which means that technical arbitration or arbitration in equity cannot be used in such cases.

25. On the other hand, in some of the countries included in the study, the courts have acknowledged arbitrators' jurisdiction to interpret and apply the law, which includes constitutional provisions and principles. In some countries in which judges have diffuse constitutional review powers (the power to decide not to apply a rule in a given case on the basis that it is deemed to be contrary to the Constitution), the courts have even accepted that such reviews can also be carried out by arbitrators. This type of interference can have a positive impact if the freedom to exercise the constitutional review themselves

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27 Article 146 of the Political Constitution of El Salvador.

28 Article 62 of the Political Constitution of Peru.

29 Article 109 of the Constitution of the Republic of Ecuador ("*In public procurement, arbitration in law may be used following the issue of a favourable opinion by the Office of the State Attorney General in accordance with the conditions provided by law*").

30 Constitutional Court, joined cases nos. 99-2018 and 119-2018.

31 Constitutional Court, Judgement C-098 of 2001.

32 Constitutional Court, Judgement C-1436 of 2000.

33 Article 1 of Law No. 1563, National and International Arbitration Statute, of 2012.

means that arbitral tribunals are not required to submit questions of constitutionality to the courts, with the potential cost and time increases that such procedures entail.

26. The Supreme Court of Argentina has held that "*de jure arbitrators can rule on any matters that may be submitted to them other than those excepted by law, whether they are purely legal matters, mixed or simply factual issues. And in their broad elucidation of cases, they can take into account all the reasons—both legal and constitutional—that may be adduced. Reliance on a constitutional ground by a party in the course of the arbitration cannot lead to the removal of the arbitral tribunal*".[34]

27. Based on the responses received, similar stances have been taken by the Brazilian, Guatemalan, Peruvian and Portuguese courts. In those jurisdictions, as well as being able to construe and apply constitutional provisions or principles as part of the applicable law, arbitrators can subject laws and lower-ranking provisions to diffuse constitutional review.

28. In Mexico, although arbitral tribunals are under a duty to consider and apply the law as a whole (including constitutional provisions and principles), it is not clear whether they have diffuse constitutional review powers. This is because this power is attributed exclusively to the *authorities*, and arbitrators do not qualify as such in that jurisdiction[35]. There is a similar debate in the Dominican Republic: although the Constitution seems to attribute diffuse review powers only to the State's judges, some authors argue that arbitrators have this power too. This opinion is based on the premise that, when acting as the body with responsibility for settling a dispute in law, arbitrators are under an obligation to discharge this responsibility even if it entails deciding on matters of constitutionality.

29. In other jurisdictions in the area, constitutionality issues are resolved by constitutional courts at the request of judges (in the form of a preliminary ruling on constitutionality). We have found interference in those jurisdictions in which arbitrators are considered equivalent to judges for this purpose. The extent of the positive effect of such interference on arbitration is difficult to establish in the abstract. On the one hand, the possibility of raising issues of constitutionality may result in a more consistent interpretation of constitutional principles by arbitral tribunals. However, as mentioned above, the ability (or obligation) to refer a case to a court can result in longer and costlier arbitration. In Section 3 below, we will discuss a few troublesome aspects arising as a result of arbitral tribunals being considered equivalent to the courts.

30. Costa Rican case law, for example, considers judges and arbitrators equivalent in their dispute settlement function, which opens the way for the latter to raise issues of constitutionality before the Constitutional Chamber of the Supreme Court. Arbitral tribunals in Chile are similarly both able and required to apply constitutional provisions[36], and both the tribunal and the parties to proceedings can file a motion of inapplicability of a provision on the grounds of unconstitutionality before the Constitutional Court[37].

31. In other countries (such as Panama, Uruguay, and Spain[38]), arbitrators cannot carry out any constitutional review of any kind or raise issues of constitutionality before the

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34 Supreme Court, Rulings 173: 221.

35 First Chamber of the Supreme Court of Justice of the Nation, Indirect *Amparo* Judgment no. 71/2014 ("*[A]rbitration is not constitutionalised by treating arbitral tribunals as equivalent to State authorities as provided in the third paragraph of Article 1 [of the Constitution], which establishes that '[a]ll authorities acting within their powers are subject to' various obligations regarding the protection of human rights, as arbitration is an activity regulated by the parties' wishes. Instead, arbitration is constitutionalised, where appropriate, by the fact that the freedoms under which people resort to it are constitutionally relevant in accordance with the fourth paragraph of Article 1 of the Constitution").*

36 Article 6 of the Political Constitution of the Republic of Chile; Articles 222 et *seq.* of the Chilean Organic Law on Courts.

37 Article 93(6) of the Political Constitution of the Republic of Chile; Constitutional Court Judgment in case no. 4249-18-INA of 2 July 2019.

38 Article 163 of the Spanish Constitution. Spanish Constitutional Court, Order No. 259/1993 of 20 July 1993.

constitutional courts. In the case of Spain and Portugal, arbitrators might theoretically be able to raise issues for preliminary ruling before the Court of Justice of the European Union (international arbitrators' power to interpret and apply EU law is beyond the scope of this analysis). In any case, the answer is negative[39]. Furthermore, the Spanish Constitutional Court has recently clarified that its traditional view of arbitration as "equivalent to the courts" applies only to the *res judicata* effect shared by court and arbitration proceedings[40], and that arbitration proceedings cannot be subject to the requirements entailed in the right to effective judicial protection enshrined in the Constitution, as they are not court proceedings, just like arbitrators do not exercise jurisdiction because this falls within the exclusive remit of the judiciary[41].

2.4 Limiting Possible Cases of Negative Indirect Interference

32. In Section 3.2 below, we will discuss how *indirect interference* (that which takes the form of rulings by constitutional judges) can have a negative impact on arbitration (either by preventing the issue of an award or by increasing the cost and length of the proceedings). We should note, however, that the case law of certain constitutional courts has helped limit this type of interference.

33. The courts of some countries have expressly clarified that arbitrators' decisions are not subject to appeal on constitutional grounds. In Costa Rica, none of the remedies laid down by the Constitution to guarantee people's fundamental rights and freedoms can be exercised against procedural acts in arbitration proceedings (or against the award). The Constitutional Chamber of the Supreme Court has repeatedly held that arbitration proceedings and their awards cannot be appealed against by means of an *amparo* action (an action for protection against the actions of authorities) or an action for unconstitutionality[42]. In Panama, the Supreme Court of Justice sitting in full court has held that a decision issued in arbitration could not be appealed against by means of an *amparo* action, on the grounds that the appeal for annulment is the only viable way to protect any constitutional right that has been threatened or infringed by the arbitration proceedings or the award[43].

34. In the case of Chile, the action for protection is similarly enshrined in the Constitution[44] and can be exercised in the face of infringements of constitutional rights and guarantees[45]. However, actions for protection have only rarely been brought in the context of arbitration

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39 CJEU Judgments of 23 March 1982, *Nordsee case* (Case 102/81); 6 March 2018, *Achmea case* (Case C-284/16); 2 September 2021, *Komstroy case* (Case C-741/19).

40 Spanish Constitutional Court, Judgment 17/2021 of 15 February 2021 (Legal Ground No. 2).

41 Spanish Constitutional Court, Judgment No. 65/2021 of 15 March 2021 (Legal Ground No. 4).

42 For example, Ruling No. 2002-10270 of 11.30 am on 25 October 2002, issued by the Constitutional Chamber of Costa Rica; Ruling No. 016473-2018 of 11.40 am on 2 October 2018 issued by the Constitutional Chamber of Costa Rica; Ruling No. 2010-018383 of 4.07 p.m. on 3 November 2010 issued by the Constitutional Chamber of Costa Rica.

43 Supreme Court of Justice sitting in full court. Judgment of 30 September 2015 on an action for *amparo* for the protection of constitutional guarantees brought by Las Brisas de Amador, S.A., against an Order issued by the Arbitral Tribunal in the arbitration proceedings brought against it by Vikingo Joint Ventures, Inc. and Vikingo Overseas, Inc. ("*As noted already, the decision challenged under this extraordinary appeal was issued in the course of the arbitration proceedings; i.e. before they had finished. This means that, in view of the content of the last paragraph of the above-mentioned Article 66, the only specific and suitable remedy for protecting any constitutional right that has been threatened or infringed in the course of arbitration proceedings or an arbitral award is the appeal for annulment of the award. This new provision means that [the] constitutional remedy of amparo is not available when fundamental rights are threatened or infringed in the course of arbitration proceedings or an arbitral award: the only option or alternative is to appeal for annulment before the Fourth Chamber of General Business of the Supreme Court of Justice*").

44 Article 20 of the Political Constitution of the Republic of Chile.

45 Article 19 of the Political Constitution of the Republic of Chile. It is worth noting that, in the constitutional review envisaged in the draft law on international commercial arbitration, the Chilean Constitutional Court held that Articles 5 and 34 of the said law (which replicates the UNCITRAL Model Law) did not apply to the court actions envisaged in the Chilean Constitution in favour of any persons whose fundamental rights may be affected by the application of that law. See the Constitutional Court Judgment of 25 August 2004 under case no. 420 on the Draft Law on International Commercial Arbitration.

and have rarely been admitted against arbitrators' decisions (even by judges). The majority of the case law has held that this action is not available if there are pending proceedings or if it is being used for the purpose of reviewing or annulling awards or judgments.

35. Brazil has shown a certain tendency to try to interfere in arbitration proceedings by means of constitutional remedies aimed at protecting fundamental rights (such as free access to justice). Since the Federal Supreme Court's ruling upholding the constitutionality of arbitration in 2001, such actions have become rarer and in any case do not usually succeed.

36. Finally, there are some jurisdictions that have seen no such interference, either due to legal impediments or because the interpretation of constitutional remedies leaves no room for it. In Argentina, for example, the *amparo* action is enshrined in the Constitution. However, the way this remedy has been interpreted by the courts precludes its use against the decisions of arbitrators. In Uruguay, the law expressly states that amparo actions are not available against judicial acts, regardless of their nature or of the issuing body[46]. This includes arbitrators' decisions.

3. CASES OF CONSTITUTIONAL INTERFERENCE WITH A NEGATIVE IMPACT

37. Although constitutional provisions can prevent undue interference in arbitral proceedings by legislators or judges, they can also have the opposite effect. As regards *direct interference*, constitutional provisions can render arbitration less effective by providing that certain disputes are not arbitrable (**Section 3.1**). Constitutions can similarly open the door to court review of arbitral decisions (negative *indirect interference*). This is usually the result of a party seeking constitutional remedies (particularly under the writ of amparo for the protection of subjects' fundamental rights) (**Section 3.2**). This study shows that, in other residual cases, this result can also be achieved by constitutions considering that arbitrators stem from the jurisdiction of the State or are subject to the hierarchy of the judiciary and its case law (**Section 3.3**).

3.1 Constitutional Provisions Limiting the Effectiveness of Arbitration: Constitutional Limitations on Objective Arbitrability

38. The constitutions of certain jurisdictions, although stopping short of banning arbitration, contain provisions that affect its effectiveness. The two clearest examples can be found in the constitutions of Bolivia and Ecuador.

39. On the one hand, our analysis confirms that not all forms of arbitration are banned by the Bolivian Constitution. Its validity in that country's legal system is confirmed not only by its case law but also by its constitutional case law according to which ratified bilateral investment agreements (and, therefore, their provisions on arbitration between investors and the State) cannot be held to be unconstitutional and/or subject to subsequent constitutional review[47]. However, the constitution of that country reflects a State policy that is against submitting disputes with foreign investors to arbitration. Under the 2009 Constitution, all foreign investments are subject to Bolivian law and the Bolivian authorities[48]. The Constitution similarly expressly prohibits the use of international

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46 Article 1 of Law No. 16,011 on the *Amparo* Action.

47 Bolivian Constitutional Court, Constitutional Judgment No. 0031/2006 of 10 May 2006.

48 Article 320 of the Political Constitution of the Plurinational State of Bolivia (*"I. Bolivian investment shall be given priority over foreign investment. II. All foreign investments shall be subject to the jurisdiction, laws and authorities of Bolivia, and no one may attempt to rely on a state of emergency or appeal to diplomatic claims in order to obtain more favourable treatment. III. Economic relations with foreign States or companies shall be carried out under conditions of independence, mutual respect and equity. Foreign States or companies may not be given more beneficial terms than Bolivian ones".)*

arbitration for the settlement of disputes relating to the hydrocarbons sector production chain[49]. Based on these provisions, the type of disputes for which arbitration was prohibited was expanded by Law 708 of 2015 (by including disputes on the ownership of natural resources, titles to tax reserves granted, administrative contracts, access to public services, the exploitation of natural resources, public order and State functions[50]).

40. The Ecuadorian Constitution, on the other hand, provides that "*[n]o international treaties or instruments in which the Ecuadorian State yields sovereign jurisdiction to international arbitration bodies in contractual or commercial disputes between the State and private natural or legal persons may be entered into. This shall not apply to international treaties and instruments establishing that disputes between States and citizens in Latin America are to be settled by regional arbitration bodies*"[51]. Based on this provision, the Constitutional Court of Ecuador issued a number of judgments around a decade ago holding several bilateral investment agreements concluded between the State and other countries that included an offer to submit disputes with foreign investors to arbitration to be unconstitutional. Both the constitutional provision itself and the Court's interpretation of it were decisive factors in the Ecuadorian State's decision to denounce these treaties and the ICSID Convention.

41. However, on 21 June 2021 the country re-acceded to the ICSID Convention, and its Constitutional Court found a few days later that its ratification did not require the involvement of the legislature[52]. The Court held that the ratification of any international treaty in which the State reaches agreements on offers to submit disputes with foreign investors to arbitration before the ICSID shall require prior legislative approval. It remains to be seen how Ecuador will negotiate and conclude new treaties in view of the restrictions stipulated in its Constitution.

3.2 Indirect Negative Interference by Means of Constitutional Remedies

42. The constitutions of most countries[53] in the region provide for extraordinary remedies—usually called *amparo* or *tutela*—for the protection of fundamental rights. Due to their nature, they are usually processed as expedited proceedings, with judges authorised to issue orders for immediate compliance. Furthermore, their constitutional nature means that they can generally be reviewed or ruled on by the higher-ranking courts of the State.

43. By way of *preliminary comment*, in certain countries in the region, constitutional remedies are not available directly against the decisions of arbitrators but can be used against rulings issued by the courts in their capacity as courts with the ability to annul (or enforce and recognise) the award or assist the arbitral tribunal. This stems more from the fact that constitutional remedies in those countries are available against judges' decisions in general than from any arbitration-specific considerations. This is the case of Brazil[54],

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49 Article 366 of the Political Constitution of the Plurinational State of Bolivia.

50 Article 4 of Law No. 708 on Conciliation and Arbitration of 25 June 2015.

51 Article 422 of the Constitution of Ecuador.

52 Constitutional Court of Ecuador, Ruling No. 5-21-TI/21 of 30 June 2021.

53 As discussed in Section 2.4 above, there is no clear precedent in Argentina, Brazil, Chile, Costa Rica, Portugal or Uruguay confirming that these remedies are available to parties to interfere with arbitral proceedings.

54 In Brazil, the *mandado de segurança* is a remedy available to persons who have been the victim of an illegal action or abuse of power by an authority. The remedy is available to any person who has been detrimentally affected in any way by arbitrariness in the exercise of the authority's functions. The question whether arbitrators in Brazil can be deemed equivalent to an authority and, therefore, whether abusive acts by them are subject to review by means of a *mandado de segurançam,* is open to debate. The majority opinion seems to be that arbitrators are not deemed equivalent to public authorities and the *mandado de segurança* is therefore unavailable to parties to arbitration either before starting the proceedings, to prevent the arbitral tribunal from being established, during the proceedings, or after the arbitration has concluded, with only the option to file for the annulment of the award being available to them in the cases expressly laid down by the legislators. Since the

Spain[55], Mexico[56] and the Dominican Republic[57]. *It is hard to analyse in the abstract whether such remedies can be considered indirect interference with arbitration, particularly when most of them take place after the issue of the award—or even after the annulment decision.*

44. In other countries included in the study, constitutional remedies interfere, to a greater or lesser extent, with the conduct of the arbitration. Parties can use this to increase the time and costs involved in settling the dispute, and even to prevent the tribunal's award from being enforced.

45. Guatemala appears to be the jurisdiction with the greatest potential for such actions to interfere with arbitration. The Constitutional Court of that country has held that the *amparo* action[58] is broad in scope, as "*the number of cases in which it is available is an open list", and "the Guatemalan legal system does not include any acts of power that cannot be challenged in this way*[59]". It is therefore common for parties to try to bring such actions in order to interfere with the conduct of the arbitration. Along the same lines, the Constitutional Court has also given a free interpretation of the powers of review judges, holding that they are capable of modifying or overturning arbitral awards[60].

46. In other jurisdictions, constitutional remedies are restricted to more specific situations or to the fulfilment of a set of conditions developed by the case law. Bolivia belongs to the former group. The constitutional remedy of *amparo* is thus available against acts of persons who restrict or threaten to restrict or suppress the rights recognised by law and the Constitution. There is a precedent in which the Constitutional Court held that

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enactment of the Arbitration Law in 1996, no rulings have been issued by the higher federal courts confirming the ability to use the *mandado de segurança* against arbitral decisions. The few precedents from lower courts suggest that this is more of a theoretical possibility.

55 The Spanish Constitution gives the Constitutional Court jurisdiction in *amparo* actions for infringement of public rights and freedoms. This type of appeal can be brought against court decisions once the appellant has exhausted the previous judicial avenue. There is therefore no possibility for the amparo action to directly interfere in arbitral proceedings. The *amparo* remedy is available, on the other hand, against a judgment on an action for annulment of the arbitral award or a petition for the recognition and enforcement of an arbitral award. In fact, the Constitutional Court has clarified in its most recent case law that High Courts of Justice are unable to annul awards based on a broad definition of public order, particularly of economic public order, because arbitration is an essentially different institution from the court. See Spanish Constitutional Court Judgment No. 17/2021 of 15 February 2021, and Judgment No. 65/2021 of 15 March 2021 (Legal Ground No. 4).

56 In Mexico, the Constitution provides that the remedy of *amparo* may be used against acts or omissions of State authorities and private individuals carrying out acts equivalent to those of an authority and whose functions are established by a general provision. However, the Mexican courts have held that arbitrators do not qualify as an authority, rendering the remedy of amparo unavailable. Although an action for *amparo* can be brought against a judgment for the recognition and enforcement of an arbitral award, this is restricted to cases of possible infringement by the judge of fundamental rights or constitutional provisions. Such actions are not often brought in this jurisdiction. See Article 107 of the Mexican *Amparo* Law.

57 In the Dominican Republic, court decisions relating to arbitration, including those ruling on appeals against awards, can be subject to appeal for review before the Constitutional Court. The *amparo* action, on the other hand, is the option most commonly used by individuals who feel that their fundamental rights, particularly their right of access to justice as part of effective judicial protection, have been infringed. See, in particular, Judgment No. TC/0421/19 of the Constitutional Court of the Dominican Republic (*"It is furthermore worth noting that, where an award is upheld or annulled, the ruling is subject to appeal in cassation, and the ruling issued on such appeal is then subject to appeal before the Constitutional Court by means of an appeal for constitutional review of a court decision").*

58 Article 265 of the Political Constitution of the Republic of Guatemala ("*The remedy of amparo is provided for the purpose of protecting people against threats following a violation. There are no matters for which the action of amparo is not available, and such action may be brought whenever the acts, rulings, provisions or laws of an authority entail an implied threat, restriction or violation of the rights guaranteed by law and the Constitution").*

59 Constitutional Court of Guatemala in Cases Nos. 4128-2012, 4756-2011 and 5195-2017, among others.

60 Constitutional Court of Guatemala, Case No. 252-2015 ("*By specifying that the Chamber is required to issue the relevant ruling in any cases in which it overturns or modifies an arbitral award, the provision states that the court hearing the appeal may issue a different ruling from the one on which it is deciding on the basis that its analysis of the case in accordance with the grounds claimed by the appellant has led it to notice circumstances precluding it from upholding the arbitral award under appeal, in which case it must naturally issue a different ruling. Those circumstances can only be identified as a result of the court's review of the merits of the case, as this could not be done superficially because the cases in which the action of appeal for review is available by law are intended to carry out a re-evaluation of actions that in turn entails reviewing the facts appearing in the file, which in some cases means going into the merits of the dispute").*

the fundamental right of petition had been infringed by the Conciliation and Arbitration Centre of the Santa Cruz Chamber of Industry, Commerce, Services and Tourism (CAINCO). The court found that the Centre had ignored the defendant's requests revealing significant defects in the notifications made, and it therefore annulled its decision[61]. This case stands out because you could in principle get the same result through the remedy available against arbitral awards (which is laid down in Article 111 *et seq.* of the Bolivian Conciliation and Arbitration Law). In any case, the tendency seems to be limited to clear violations of fundamental rights.

47. The case of Peru provides an example of those jurisdictions in which interference is mitigated by rules developed by the case law. Its constitution provides for the remedy of amparo, stating that "*it is available against the acts or omissions of any authority, official or person that infringes or threatens the other rights recognised by the Constitution*"[62]. The Constitutional Court has accepted the availability of actions for *amparo* for parties to arbitral awards[63]. After issuing unfavourable rulings for the conduct of arbitration[64], the Constitutional Court's position in this regard was clarified in its *María Julia ruling* of 2011[65] (which is a binding precedent[66]). Under this ruling, the action of *amparo* is unavailable in cases of arbitration if a party's intention is to use it in place of the appeals for reversal and annulment envisaged in the General Arbitration Law[67]. Specifically, *amparo* is only available for arbitration when: (i) a party claims that there has been a direct infringement of the Constitutional Court's binding precedents; (ii) the arbitral tribunal has exercised in its award the power of diffuse review in relation to a provision held to be constitutional by the Constitutional Court or the Judiciary; or (iii) a third party claims that the award has clearly infringed its fundamental rights[68].

48. We have not found in Peru any precedents of constitutional remedies being used to prevent the start or continuation of arbitral proceedings (for now, the case law has only admitted this possibility for appealing against arbitral awards). According to a minority of Constitutional Court judges, this hypothesis is viable if the party can prove: (i) irreparable risk to its fundamental rights if the *amparo* remedy is not granted; (ii) that the use of arbitration was imposed on it without its consent; or (iii) that the subject matter of the dispute was not one that could be freely decided on by the parties[69].

49. In Ecuador, the Constitutional Court has similarly held that the extraordinary action for protection, which was originally designed to appeal against final judicial acts or judgments that infringe rights recognised by the Constitution[70], is also available against the decisions of arbitrators. As this action requires all other ordinary and extraordinary remedies envisaged in the legislation to have been exhausted, it is only available against arbitral

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61 Constitutional Court of Bolivia, Constitutional Judgment No. 0065/2018-S2 of 15 March 2018.

62 Article 200(2) of the Political Constitution of Peru.

63 Constitutional Court Judgment, Case No. 189-99-AA/TC, Pesquera Rodga S.A., of 26 October 1999.

64 Constitutional Court Judgment, Case No. 4195-2006-AA/TC, PROIME Contratistas Generales S.A., of 16 November 2007; Constitutional Court Judgment, Case No. 5311-2007-AA/TC, Compañía Distribuidora S.A., of 5 October 2009; Constitutional Court Judgment, Case No. 2851-2010-PA/TC, IVESUR S.A., of 18 March 2010.

65 Constitutional Court Judgment, Case No. 142-2011-PA/TC, Sociedad Minera de Responsabilidad LTDA. María Julia., of 12 September 2011.

66 Legal Grounds Nos. 20 and 21 of Constitutional Court Judgment, Case No. 142-2011-PA/TC, Sociedad Minera de Responsabilidad LTDA. María Julia., of 12 September 2011.

67 Legal Ground No. 20 of Constitutional Court Judgment, Case No. 142-2011-PA/TC, Sociedad Minera de Responsabilidad LTDA. María Julia., of 12 September 2011.

68 Legal Ground No. 21 of Constitutional Court Judgment, Case No. 142-2011-PA/TC, Sociedad Minera de Responsabilidad LTDA. María Julia., of 12 September 2011.

69 Constitutional Court Judgment, Case No. 183-2012-PA/TC, Minera Los Quenuales S.A., of 3 May 2018, Legal Ground No. 5.1 of the Separate Opinion of the Judge Blume Fortini.

70 Article 94 of the Constitution of Ecuador.

awards after the action for annulment has been processed[71] or in cases in which the action for annulment is not available[72].

50. Unlike in Peru, parties wishing to interfere with the conduct of arbitration have resorted to the interim measures envisaged in the Constitution (to prevent or put an end to the violation of a fundamental right or threat thereof)[73]. According to legal theorists, however, admitting these measures is wrong, because this remedy is not generally available against the acts of courts (to which the decisions of arbitrators are considered equivalent by Ecuadorian law)[74].

51. In Colombia, the Constitutional Court considers that the *tutela* action, which is enshrined in its constitution as a special mechanism for the protection of fundamental rights[75], is available for use against domestic and international arbitral awards[76]. The Court's position is based on the fact that, under the Colombian Constitution, arbitrators exercise a temporary judicial function (and the *tutela* action is available against court decisions). Furthermore, the Court has developed a number of fairly stringent[77] requirements that must be met by a party in order for a *tutela* action against an arbitral award to succeed. In the case of international arbitral awards, the Court considers that the tutela action is only available in "*highly exceptional*" cases[78], in view of the fact that the parties to such proceedings have greater freedom to agree on the applicable law and procedural rules. When the applicable law in international arbitration proceedings is fully or partially Colombian law, the award can be reviewed on the grounds of a substantive defect (legal infringement), which might enable the award to be reviewed on its merits through a *tutela* action[79].

52. Finally, in El Salvador, the availability of constitutional remedies against the decisions of arbitrators hasn't been fully clarified by the case law. There are cases of the Supreme Court reviewing the decisions of arbitral tribunals in constitutional *amparo* proceedings. However, the Constitutional Chamber recently held that this remedy could not be used against the decisions of an arbitral tribunal[80].

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71 Constitutional Court, Judgment No. 323-13-EP/19, Primax vs. Gómez, 19 November 2019, para. 24.

72 Constitutional Court, Judgment No. 31-14-EP/19, Delcon vs. la Municipalidad de Pasaje, 19 November 2019, para. 49.

73 Pinturas Wesco S.A. c. Banco Guayaquil S.A., Case No. 050-2011, Guayas Second Civil and Commercial Chamber, Judgment of 25 May 2011; Unidad Judicial Penal de Cuenca, Cooperativa de Ahorro y Crédito Jardín Azuayo Ltda. vs. SIFIZSOFT S. A., Case No. 01283-2017-00268 (action for protection), 9 February 2017, cited in n J. D. VICUÑA, "El Arbitraje y las Cortes: la experiencia del Azuay", Revista Ecuatoriana de Arbitraje, no. 10, 2019, pp. 45-78.

74 Article 27 of the Organic Law on Jurisdictional Guarantees and Constitutional Control.

75 Article 86 of the Political Constitution of Colombia.

76 Among others, Colombia Constitutional Court, Judgments Nos. SU 033 of 2018, Judge Rapporteur Alberto Rojas Ríos; T 173 of 1993, Judge Rapporteur: José Gregorio Hernández Galindo; C 590 of 2005, Judge Rapporteur: Jaime Córdoba Triviño; T 269 of 2018, Judge Rapporteur: Carlos Bernal Pulido.

77 The general requirements for the *tutela* remedy to be available against arbitral awards are: (i) that the *tutela* action is based on the protection of fundamental rights and is not equivalent to, or intended to seek, the revival of a claim related to the merits of the dispute ruled on in the award; (ii) that the petitioner has exhausted all ordinary and extraordinary remedies —appeal for annulment—to defend the fundamental rights claimed to have been infringed; (iii) that the action is brought in time; (iv) in the case of procedural defects, that the defect is essential and decisive in the arbitral award; and (v) that the petitioner has claimed the alleged infringement in the arbitral proceedings. Colombia Constitutional Court, Judgment No. SU 033 of 2018, Judge Rapporteur: Alberto Rojas Ríos. In addition to these general requirements, the petitioner must prove that one of the following specific requirements developed by the case law of the Court has been met. The specific requirements are: (i) substantive defect (legal infringement); (ii) organic defect (infringement of rules relating to jurisdiction); (iii) procedural defect; (iv) induced error; (v) failure to provide reasons; (vi) defect of fact (due to lack of evidence supporting the decision); (vii) lack of awareness of precedent; and (viii) direct infringement of the Constitution.

78 Colombia Constitutional Court, Judgment No. T 354 of 2019, Judge Rapporteur: Antonio José Lizarazo Ocampo.

79 Colombia Constitutional Court, Judgment No. T 354 of 2019, Judge Rapporteur: Antonio José Lizarazo Ocampo.

80 Resolution of the Constitutional Chamber of the Supreme Court of Justice (SCN/CSJ) of 5 March 2018 in *amparo* proceedings no. 744-2016 (*"It must be noted in this regard that the arbitral tribunal does not belong to any of the bodies of the State of El Salvador, and it can therefore not be considered in any way to be a public authority that can be sued before this Court under constitutional proceedings of this kind, and neither can the question of whether it committed the unlawful acts alleged by the claimant be directly or indirectly analysed. We must therefore hold the amparo action to be inadmissible in relation to this point").*

3.3 Other Negative Interference as a Result of the Constitution's Classification of Arbitrators

53. A final residual category of indirect constitutional interference includes other scenarios in which the courts are able to control the decisions of arbitral tribunals, either because they see them as stemming from the jurisdictional power of the State or because they consider them to have an obligation to apply their interpretation of constitutional provisions.

54. As seen above, arbitral awards that infringe constitutional rights and guarantees may be subject to review by the Constitutional Court in Ecuador. The said court also clarified that arbitrators are under a duty to observe and enforce the supremacy of the constitution and guarantee the rights enshrined therein. Failure to do this shall entitle the parties to file an extraordinary action for protection[81]. This possibility remains available particularly for cases of infringement of fundamental rights for which redress through an action for annulment is not available.

55. In Portugal, parties may not appeal against an international arbitral award (save where otherwise agreed by them as provided in the Portuguese Arbitration Law). However, most jurists are of the opinion that, based on the principle of equality (i.e. by comparing arbitral awards to court judgments), the extraordinary remedy of review before the Constitutional Court is available to parties in cases in which the arbitral tribunal has ruled on the constitutionality of a provision. The Constitutional Court's ruling on the constitutionality of that provision will be binding on the arbitral tribunal.

56. In Argentina, the matter of judicial review of: (i) awards containing rulings on constitutional issues; or (ii) awards holding that a law is unconstitutional does not have a consistent answer either in the case law or in the writings of legal experts[82].

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81 Constitutional Court, Judgment No. 323-13-EP/19, Primax vs. Gómez, 19 November 2019, para. 2; Constitutional Court, Judgment No. 31-14-EP/19, Delcon vs. la Municipalidad de Pasaje, 19 November 2019, para. 49.

82 The Supreme Court has interpreted that voluntarily waiving State judicial jurisdiction includes waiving the extraordinary remedy – a remedy granted before the higher court to ensure that the Constitution is applied consistently – and recourse to the Supreme Court as the highest instance for the review of the process. The Court has held that the extraordinary remedy only applies to court judgments. Some authors thus consider that the Supreme Court is only available through an extraordinary appeal against the acts of a judge in an appeal for annulment of the arbitral award. Others, on the other hand, are of the view that a direct extraordinary appeal can be brought against an arbitral award in which a provision has been held to be unconstitutional. Finally, a third group of legal experts agree with the first group but would agree with the second only in cases in which there were no grounds for challenging the award through an appeal for annulment (but there were grounds for an extraordinary appeal).

4. CONCLUSION

57. Constitutions and constitutional courts in Ibero-American countries have historically played a significant (positive or negative) role in the development of arbitration in the region. However, this study has shown that, even now, the constitutionalisation of arbitration is still very much a current issue. In other words, constitutions and constitutional courts continue to interfere with the conduct of international arbitration in Ibero-America to an extent not seen in other parts of the world.

58. Certain recent instances of constitutional interference have been described by international legal experts as a resurgence of Carlos Calvo's principles. However, the findings of this study suggest that this is not the case. In general terms, claims that Carlos Calvo's ideas are associated with anti-international arbitration positions are wrong, as shown by Horacio Grigera Naón in a recent article (published in Liber Amicorum pour Yves Derains, Pédone, 2021).

59. The phenomenon of constitutional interference in international arbitration in the region rather seems to be the result of the adoption of a paradigm of law originating from Hans Kelsen's legal theory according to which the political constitution and fundamental rights are the pillars of the legal system and the direct source of rights and obligations. In other regions, on the other hand, constitutions are not direct sources of citizen rights and obligations, or at least they are so to a lesser extent than in Ibero-American countries.

60. The countries in this region also have a tendency to use constitutional reforms to protect certain threatened individual rights pursuant to the prevailing political ideology, something that has entailed in the past, and still continues to entail, an extension to the fundamental rights category in each respective legal system.

61. This is how the campaign to modernise Latin American constitutions embarked upon from the 1990s in accordance with the region's observed trend of adding more and more fundamental rights to constitutions led to the recognition of arbitration in the constitutions of certain countries. A clear example is the enshrinement of the *kompetenz-kompetenz* principle in the Panamanian constitution in the country's constitutional reform of 2004 in direct response to an unfavourable constitutional ruling.

62. This direct constitutionalisation in the region can be positive as, when constitutions expressly mention arbitration, it is usually to enshrine it as a valid method. We have found no cases in the region of arbitration being expressly prohibited by a country's constitution. Furthermore, in most of the countries under study, when the Political Constitution expressly mentions arbitrability, the aim of the provision concerned is usually to prevent other legislators from unnecessarily restricting the parties' ability to settle their disputes by arbitration.

63. However, the constitutionalisation of arbitration has also had the effect of allowing parties to use actions or remedies for the protection of fundamental rights or constitutional principles against arbitral proceedings or awards. This manifestation of the constitutionalisation of arbitration in Ibero-America has been in the past, and rightly continues to be, a cause for concern as regards the development of the region, in particular towards becoming a seat of international arbitration.

64. Having said that, even indirect constitutional interference can have positive effects. Despite having noted that parties tend to use the remedies enshrined in their country's constitution to challenge the decisions of arbitrators or annul the effects of their awards, the region provides many examples of constitutional judges issuing pro-arbitration rulings. The judgments issued by the Spanish Constitutional Court in 2021 are undoubtedly the most recent and clear examples of this.

ANNEX
Questionnaire on Interference in the Conduct of International Arbitration by the Political Constitutions of Ibero-American Countries

FOR	Members of the Latin American and Iberian Chapter of the ICC Institute of World Business Law
FROM	*Bureau of the Latin American and Iberian Chapter of the ICC Institute of World Business Law*
SUBJECT MATTER	Questionnaire on Interference in the Conduct of International Arbitration by the Political Constitutions of Ibero-American Countries

1. Constitutional provisions recognising arbitration as an alternative dispute resolution method, and their interpretation by domestic case law and legal theory

1.1 Does the constitution of your country contain any provisions recognising arbitration as an alternative dispute resolution method? If yes, please describe and discuss such provisions.

1.2 Does your country have any legislation implementing the constitutional provisions mentioned in your answer to the previous question? If yes, please describe and discuss such legislation.

1.3 How have the constitutional courts of your country interpreted the constitutional provisions mentioned in your answer to question 1.1 and their implementing legislation?

1.4 How has the prevailing legal theory of your country interpreted the constitutional provisions mentioned in question 1.1 and their implementing legislation?

2. Constitutional provisions limiting the scope of arbitration, and their interpretation by domestic case law and legal theory

2.1 Objective limits to arbitration (objective arbitrability)

2.1.1 Does your country's constitution contain any provisions limiting the ability to submit disputes on certain matters to arbitration? If yes, please describe and discuss such provisions.

2.1.2 Does your country have any legislation implementing the constitutional provisions mentioned in your answer to the previous question? If yes, please describe and discuss such legislation.

2.1.3 How have the constitutional courts of your country interpreted the constitutional provisions mentioned in your answer to question 2.1.1 and their implementing legislation?

2.1.4 How has the prevailing legal theory of your country interpreted the constitutional provisions mentioned in your answer to question 2.1.1 and their implementing legislation?

2.2 Subjective limits to arbitration (subjective arbitrability)

2.2.1 Does your country's constitution contain any provisions limiting the ability to submit disputes relating to certain types of subjects to arbitration? If yes, please describe and discuss such provisions.

2.2.2 Does your country have any legislation implementing the constitutional provisions mentioned in your answer to the previous question? If yes, please describe and discuss such legislation.

2.2.3 How have the constitutional courts of your country interpreted the constitutional provisions mentioned in your answer to question 2.2.1 and their implementing legislation?

2.2.4 How has the prevailing legal theory of your country interpreted the constitutional provisions mentioned in your answer to question 2.2.1 and their implementing legislation?

3. Constitutional provisions providing for actions or remedies for the protection of fundamental rights and/or constitutional principles that may interfere with the conduct of arbitration and/or the validity, recognition and/or enforcement of arbitral awards, and their interpretation by domestic case law and legal theory ("*Theory of Fundamental Rights*")

3.1 Does your country's constitution provide for any actions or remedies for the protection of fundamental rights and/or constitutional principles that, due to the way they have been established and/or their interpretation by domestic judicial authorities, can interfere with arbitral proceedings or the validity and/or recognition and enforcement of arbitral awards? If yes, please describe and discuss such provisions.

3.2 Does your country have any legislation implementing the constitutional provisions mentioned in your answer to the previous question? If yes, please describe and discuss such legislation.

3.3 How have the constitutional courts of your country interpreted the constitutional provisions mentioned in your answer to question 3.1 and their implementing legislation?

3.3.1 In particular, please explain whether the actions or remedies for the protection of fundamental rights and/or constitutional principles mentioned in your answer to question 3.1 have been interpreted by the constitutional courts of your country as being intended to prevent the start and/or continuation of arbitration ("anti-arbitration injunctions").

3.4 How has the prevailing legal theory of your country interpreted the constitutional provisions mentioned in your answer to question 3.1 and their implementing legislation?

3.4.1 In particular, please explain whether the actions or remedies for the protection of fundamental rights and/or constitutional principles mentioned in your answer to question 3.1 have been interpreted by the prevailing legal theory of your country as being intended to prevent the start and/or continuation of arbitration ("anti-arbitration injunctions").

3.5 How has the concept of public order been interpreted by the domestic case law and legal theory of your country in connection with fundamental rights? Have they been interpreted as comparable or independent concepts?

4. Interaction between domestic constitutional courts and arbitrators in relation to constitutionality issues

4.1 Arbitrators' authority to rule on constitutionality issues in their awards or refer them to national constitutional courts

4.1.1 Does your country's constitution contain any provisions regarding arbitrators' authority to apply constitutional provisions or principles in their awards, apply the case law of national constitutional courts, carry out any kind of constitutional review

or refer unconstitutionality issues to constitutional courts? If yes, please describe and discuss such provisions.

4.1.2 Does your country have any legislation implementing the constitutional provisions mentioned in your answer to the previous question? If yes, please describe and discuss such legislation.

4.1.3 How have the constitutional courts of your country interpreted the constitutional provisions mentioned in your answer to question 4.1.1 and their implementing legislation?

4.1.4 How has the prevailing legal theory of your country interpreted the constitutional provisions mentioned in your answer to question 4.1.1 and their implementing legislation?

4.2 Jurisdiction of national constitutional courts to review arbitral awards ruling on constitutionality issues and to issue binding decisions in relation thereto

4.2.1 Do your country's national constitutional courts have jurisdiction to review arbitral awards in which the arbitrators have applied constitutional provisions or principles or the case law of national constitutional courts or in which they have carried out any kind of constitutional review?

4.2.2 Does your country have any binding legal precedents on constitutionality issues issued by domestic constitutional courts? Please describe and discuss the relevant provisions, as well as the domestic case law and legal theory interpreting them.

4.2.3 If yes, are those legal precedents also binding on arbitrators? Please describe and discuss the relevant provisions, as well as the domestic case law and legal theory interpreting them.

4.2.4 If yes, what are the consequences of arbitrators failing to apply the interpretation laid down in the binding legal precedents? Please describe and discuss the relevant provisions, as well as the domestic case law and legal theory interpreting them.

5. Additional comments

5.1 Please include any additional comments that you deem relevant to the subject matter of this questionnaire that have not already been covered by your answers to the above questions.

The questionnaires completed for each country can be found in the following links:

- Argentina
- Bolivia
- Brazil
- Chile
- Colombia
- Costa Rica
- Ecuador
- El Salvador
- Spain
- Guatemala
- Mexico
- Panama
- Peru
- Portugal
- Dominican Republic
- Uruguay

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