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The Guide to Arbitration in Latin America - Third Edition

Constitutional remedies meet arbitration in Latin America

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Edited by José Astigarraga of Reed Smith LLP and containing the knowledge and experience of leading practitioners from throughout the region, Latin Lawyer and Global Arbitration Review are delighted to publish the third edition of *The Guide to International Arbitration in Latin America*.

It provides guidance that will benefit all arbitration specialists in Latin America, one of the most important regions in the world for international arbitration, drawing on the expertise of highly sophisticated practitioners to draw out trends and give practitioners the tools they need to navigate the arbitration marketplace in the region today.

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Constitutional remedies meet arbitration in Latin America

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Summary

INTRODUCTION

In the dynamic legal landscape of Latin America, the interaction between constitutional remedies and arbitration has become a focal point of analysis. This chapter delves into the intriguing interplay between constitutional challenges, notably the ***amparo*** in Mexico, Peru and Venezuela, the 'appeal for complaint, appeal for protection and action for inapplicability due to unconstitutionality' in Chile, and the realm of arbitration.

Each jurisdiction's unique approach highlights the delicate balance between safeguarding constitutional rights and promoting a strong arbitration framework. This analysis delves into the nuanced interactions of these legal pathways, examining how they intersect, harmonise or sometimes conflict, thereby shaping the evolving landscape of legal practice in the region.

CHILE

ARBITRATION IN CHILE: AN OVERVIEW

Chile is commonly regarded as a jurisdiction that values and protects arbitration as a form of alternative dispute resolution. In general, the courts and the most prominent scholars consider that arbitration in Chile has a jurisdictional character;[2] therefore, although arbitrators are not part of the judiciary, they do exercise jurisdiction (although they cannot request the assistance of the public force) and their awards have the value of a binding judgment for the parties. Although not established by law, the ***Kompetenz-Kompetenz*** principle is generally recognised. There is wide latitude for parties to fix the rules of procedure of an arbitration, and the non-arbitrability of a dispute is an exception.

At the domestic level, arbitration has been recognised by the Code of Civil Procedure since the beginning of the twentieth century,[3] even contemplating arbitration ***ex aequo et bono***. However, when it comes to international arbitration, the applicable law is the International Commercial Arbitration Act No. 19,971 (the ICA Act), which is a replica of the UNCITRAL Model Law. The protection of international commercial arbitral awards has reached such a point that in Chile a request for annulment has never been reported.

CONSTITUTIONAL REMEDIES IN ARBITRATION

Notwithstanding the legal character assigned to arbitration, an open question remains of how both domestic arbitration and international commercial arbitration interact with some constitutional remedies.

MOTION FOR PROTECTION

Article 20 of the Chilean Constitution establishes that anyone who, as a result of arbitrary or illegal acts or omissions, suffers deprivation, disturbance or threat to the legitimate exercise of any of the rights and guarantees established in the Constitution, may bring an action before a court of appeal, 'which will immediately adopt the measures it deems necessary to reestablish the rule of law and ensure the due protection of the affected party'.[4] This action is known as the motion for protection and, like similar remedies in other Latin American constitutional systems, seeks to provide rapid protection for infringements of fundamental rights.

Although Article 20 states that this action is 'without prejudice to any other rights that [the affected party] may assert before the corresponding authority or courts', the courts of appeal

are reluctant to grant relief by motion for protection in pending court cases, let alone against court judgments, to the point that some scholars have noted that this has been a 'taboo'.[5]

However, in arbitration matters there are certain exceptions to this rule. Former president of Chile, Professor Patricio Aylwin – who was one of the most renowned arbitration experts in the country – argued that the submission of a matter to arbitration does not prevent the courts of appeal from hearing the motion for protection if fundamental rights are violated.[6] Even in international commercial arbitration, the Constitutional Court itself pointed out that the system of remedies of the ICA Act, which establishes the request for annulment as the sole remedy, left untouched 'the jurisdictional actions contemplated by the Political Charter in favour of those who may be affected in their fundamental rights by the application of this law'.[7]

The general rule is that it is not possible to file motions for protection to challenge decisions of the arbitrator or their jurisdiction. In the past, some courts have exceptionally granted motions for protection against arbitrators' decisions affecting third parties who were not party to the arbitration proceedings.[8] In October 2023, in a case in which the arbitrator decided to attach certain assets, the Court of Appeals of Santiago declared that the motion for protection 'is not the appropriate procedural channel to rule on the merits and relevance of a decision issued by the arbitrator',[9] which is even enabled to determine whether the decision affected a third party.

However, it can be concluded that although the possibility of filing a motion for protection has been recognised, its possibility of success is low, given that the principle of autonomy of arbitration is protected.

MOTION FOR CONSTITUTIONAL INAPPLICABILITY

Article 93(6) of the Constitution of Chile allows parties to request the intervention of the Constitutional Court in cases in which a legal provision that must be mandatorily applied to a judicial case generates an effect contrary to the Constitution. This type of order from the Constitutional Court only has application in a specific judicial case and, therefore, does not have general or ***erga omnes*** effects. In this sense, the constitutional inapplicability is different from the action of unconstitutionality, which has the effect of expelling a legal provision for being contrary to the Constitution in all cases.

There has been discussion about the possibility that arbitration proceedings could be understood as judicial proceedings fit for the purposes of the motion for constitutional inapplicability. Some Chilean authors dissent, pointing out that it is only possible to request these remedies when the arbitral award is under review before an ordinary court – and not in the arbitration proceedings themselves.[10] Some justices of the Constitutional Court were in favour of declaring motions against arbitrator judges 'inadmissible' on a prima facie basis.-[11] However, the Constitutional Court has granted relief through these motions, ordering an arbitrator not to apply certain provisions in arbitration proceedings, which would confirm that it is possible to file this motion without waiting to challenge the award before ordinary courts.[12]

MOTION FOR COMPLAINT

The motion for complaint is established by Article 545 of the Organic Code of Courts; it is not generally included as a constitutional action (i.e., a remedy that is usually considered as having a constitutional nature (e.g., ***amparo***)). However, this remedy is in part recognised by

Article 82 of the Constitution, which establishes that the superior courts of justice (courts of appeal and the Supreme Court, as appropriate) 'in use of their disciplinary powers, may only invalidate jurisdictional resolutions in the cases and in the manner established by the respective constitutional organic law'.[13]

The purpose of this special action is to correct serious faults or abuses committed by judges through their rulings (which either settle a dispute or terminate the proceedings or make it impossible to continue them), which do not admit of any kind of appeal. Therefore, it functions in many cases as a last resort against seriously irregular judicial decisions. For a motion for complaint to be granted, it is not enough to show that there has been an error in the judgment, but that the error goes beyond any possible legal tolerance. To the extent that this remedy prevents arbitrary rulings, it has a protective function of the principle of effective judicial protection and due process (recognised both in the Constitution and in international human rights treaties ratified by Chile and in force).

Given that in Chile the jurisdictional nature of arbitration prevails, it is possible – in principle – to file a motion for complaint against decisions rendered by arbitrators. However, there is an important difference between domestic and foreign arbitration.

In domestic arbitration, if the parties to the arbitration have waived the remedies against the award, it is possible to file a motion for complaint against the arbitrator, which will be processed by the respective court of appeal. Although the motion for complaint is not an appeal, as it only proceeds against serious misconduct or abuse, it is not a remedy that is uncommon in the courts against domestic arbitral awards. In some cases, motions for complaints have even been accepted against the decisions of a court of appeals that in turn rejected a motion for complaint against an arbitrator (a true complaint over the complaint).-[14]

Although motions for complaint are exceptional and merits of awards are rarely reviewed, in 2023 the Supreme Court issued a judgment that caused a major legal commotion. While the Supreme Court rejected the motion for complaint, it decided to invalidate, ***ex officio***, an award rendered by an appellate arbitration panel on the grounds that there had been a breach of the principle of good faith.[15] The Court considered that because one of the parties performed more than 70 per cent of the project and the other only paid 20 per cent of the total price, the arbitral panel had to dismiss the appeal as it was contrary to the good faith principle. This sets a precedent for higher courts to thoroughly scrutinise awards, which has not been possible in the past, given the high protection surrounding arbitration.

In addition to the doubts as to whether it is possible for the Supreme Court to invalidate an award ***ex officio***, even having formally rejected the motion for complaint, there is also the concern that a higher court may examine the merits of an award when the parties have waived their rights, particularly because a breach of the principle of good faith requires a detailed scrutiny of the facts.

In international arbitration, the higher courts of justice have consistently rejected all motions for complaint against international commercial arbitral awards on the grounds that the only remedy provided by law is the request for annulment. However, in 2004, when examining the constitutionality of the ICA Act, the Constitutional Court of Chile stated that Article 34 of the Act – which establishes the request for annulment as the only remedy against an arbitral award – is in accordance with the Constitution 'in the understanding that the powers granted by the Constitution to the Supreme Court are not affected'.[16] Under this interpretation, it

would be theoretically possible to admit a motion for complaint in international commercial arbitration, although this has not yet been seen.[17]

MEXICO

AMPARO ACTION IN MEXICO

Amparo is a judicial action to challenge the constitutionality of government measures, such as laws, regulations, administrative acts or judicial decisions. Virtually all government actions from the three branches (executive, legislative and judicial) may be subject to ***amparo*** actions. The Amparo Statute calls these measures 'acts of authority'. Under the Statute, an act of authority is a unilateral, imperative and coercive action (or omission) from a government entity, a private entity or an individual whose actions emulate the action of a government entity.[18] Under the Statute, the person or entity conducting an act of authority is called a 'responsible authority'.[19]

There are two types of ***amparo***: direct and indirect. The former is to challenge final court judgments (i.e., decisions that end a dispute, even if they do not rule on the merits) that violate constitutional norms.[20] The courts' decisions on direct ***amparos*** are final (not subject to appeal) unless they deal with exceptional constitutional or human rights issues.[21]

Indirect ***amparos***, on the other hand, are brought to challenge actions or omissions that violate human rights, such as laws, administrative acts or court decisions that do not end a dispute (e.g., interim measures).[22] Unlike direct ***amparo*** actions, these proceedings have two instances (i.e., the court's decision is subject to appeal).[23]

ARBITRATORS ARE NOT 'AUTHORITIES' FOR AMPARO PURPOSES

Mexican courts have held that arbitrators are not 'responsible authorities' under the Amparo Statute because:

- arbitrators' actions do not emulate the acts of authorities because arbitrators cannot enforce their own decisions.[24] Other authorities, such as courts, have this power;
- the arbitrators' authority to solve disputes relies on the parties' agreement.[25] Unlike courts or administrative authorities with 'natural' jurisdiction derived from the law, arbitrators lack official or 'delegated' jurisdiction;[26] and
- the parties' appointment of arbitrators is a private affair that does not affect the public interest. It solves a private dispute.[27]

With this in mind, arbitral awards alone are not directly subject to ***amparo*** challenges in Mexico. However, as we explain below, court decisions confirming or annulling awards may be challenged through ***amparo***.

ARBITRATIONS ARE NOT ENTIRELY SAFE FROM AMPARO IN MEXICO

Although arbitral awards are not directly subject to ***amparo*** under Mexican law, judgments confirming or annulling the award are. Therefore, until recently, the question hinged on the appropriate type of ***amparo*** to challenge these judgments.

Actions from the judiciary (an authority) are subject to ***amparo***. Under Mexican law, federal courts may review arbitral awards and rule on their validity.[28] Thus, a court's judgment on an award's validity is inevitably subject to ***amparo*** under Mexican law. This invites disgruntled parties to concoct constitutional claims against the judgment confirming an award to try to

annul it by surpassing the limited annulment grounds under Mexican law. At a minimum, these ***amparo*** actions will delay the enforcement of an award. The extent of the delay depends on the type of ***amparo***. Direct ***amparo*** would only allow for one instance (no appeal). Indirect ***amparo*** has two instances. The Mexican Supreme Court ruled on the appropriate type in 2019.

Before 2019, Mexican courts were split regarding the type of ***amparo*** that would apply against judgments confirming or annulling awards. Some courts held that it should be direct because the legislator aimed to set aside or enforce an arbitral award as quickly as possible (considering it only involves one level of review, unlike indirect ***amparo***, which involves two).-[29] Additionally, the decision is a final judgment because the set-aside or confirmation action is an independent and autonomous proceeding.[30] In this vein, the courts also held that direct ***amparo*** was more appropriate because these special proceedings followed all the legal formalities and ended a dispute regarding the award's validity.[31]

Other courts thought it should be indirect because it is the appropriate remedy for challenging a court's decision regarding the recognition and enforcement of an award or a request to set it aside.[32]

The Supreme Court held that it should be indirect because a court's ruling on these requests is not a final judgment that concludes a trial.[33] Further, the decision on an award's validity does not relate to any civil action, whether personal or real. Strictly speaking, final judgments rule on personal, real or civil claims.[34] Here, the court's judgment does not rule on the merits of the parties' dispute. It only rules on the award's validity, which is a procedural, non-substantive matter.[35]

Because of the Supreme Court's decision, the post-award stage in Mexico now consists of three instances (i.e., set-aside or confirmation proceeding, indirect ***amparo*** and appeal).

While legally correct under a strict interpretation of the Amparo Statute and judicial practice, the Supreme Court's ruling is unfortunate for the development of arbitral practice in Mexico. Now, a party prevailing in an arbitration seated in Mexico is left at the mercy of disgruntled debtors who may seek to delay enforcement. The increased judicial intervention of this sort normally encourages dilatory tactics from debtors.

REQUIREMENT TO SUPPLY AN AUTHENTICATED VERSION OF THE AWARD IS UNCONSTITUTIONAL

Under Mexican law, the party applying for recognition and enforcement of an arbitral award must produce a duly authenticated original award or a certified copy of the same.[36]

This requirement would entail one of two things: that a notary public witnessed the arbitrators signing the award; or that the arbitrators confirmed before a notary public that the signatures on the award are theirs.

However, after reviewing the proportionality of this provision, the Mexican Supreme Court of Justice declared that this requisite is unconstitutional because it undermines the basic principle of access to justice.

Even though this measure may have a valid purpose under a constitutional lens, and that it would be adequate to reach that purpose, the Supreme Court found that this was an unnecessary requirement that obstructed the judicial action to recognise and enforce the award. The reasons that support this decision are the following:

- the courts should not assume that the award is false only because it is not authenticated. The party opposing the enforcement of an award carries the burden of proving its falsehood;
- the validity or consequences of the award does not depend on its authentication. These issues would have to be dealt with based on the legal causes for annulment or for denying the enforcement of an award; and
- the requirement does not preclude the possibility that the other party would claim (with or without merits) that the award is false. Thus, the authentication does not actually eliminate all controversies involving the award's authenticity.[37]

Mexican law recognises awards under the New York Convention and the relevant provisions of the Commercial Code (which replicate the language of the Convention).

PERU

AMPARO ACTION IN PERU

Amparo is a judicial action that proceeds against the act or omission of any authority or particular who violates or threatens the fundamental rights guaranteed by the Peruvian Constitution, as opposed to those protected by ***habeas corpus*** (freedom of locomotion), ***habeas data*** (access to public information and the right to information self-determination) or ***mandamus*** (against an authority that does not abide by a legal rule).

Therefore, ***amparo*** in Peru protects the fundamental rights to a due process, right to present and make your case and the right to a duly sustained written explanation of judicial decisions (motivation), among others. ***Amparo*** proceeds against judicial decisions, as long as they are 'irregular' (that is, they violate the rights that make up the due process).

The Peruvian Constitution recognises the ***amparo*** expressly[38] and it is regulated by a specific law, namely the New Constitutional Procedural Code. As a matter of principle, the ***amparo*** is designed to be resolved expeditiously, without further formalities, as it only proceeds when there are manifest violations of fundamental rights, without allowing further evidentiary activity, and as long as there are no specific and equally satisfactory alternatives to the ***amparo*** to protect the rights that are allegedly being violated. In other words, if there is a judicial action other than ***amparo*** that also protects the rights, the other judicial action should take precedence over ***amparo***.

ARBITRATION IS 'JURISDICTIONAL' IN PERU AND ARBITRAL AWARDS CAN OBTAIN THE RES JUDICATA CONDITION

The Peruvian Constitution establishes the 'unity and exclusivity of the jurisdictional function' in Article 139.1. It also establishes that no 'independent jurisdiction exists, nor shall it be established, except regarding the military and arbitration'. Thus, the Peruvian Constitution grants arbitration the same protections and safeguards (and burdens) – ***mutatis mutandi*** – as those granted to 'typical' jurisdictional functions (i.e., those of the judiciary). For example, all arbitral awards must be reasoned and duly motivated with a written explanation (unless otherwise agreed by the parties); no authority may take up a case that is being validly discussed in arbitration, and arbitral awards have the quality of res judicata when the mechanisms to challenge them are exhausted or not used at all.

Arbitration in Peru is governed by Legislative Decree No. 1071 (the Peruvian Arbitration Law). Article 59.2 of the Peruvian Arbitration Law establishes that arbitral awards shall have the

effect of res judicata. In Peru, the legislation on arbitration matters is monist, meaning that, essentially, the same rules apply in national and international arbitration. In international arbitration seated in Lima, these rules will also be considered in challenges (annulment before the Judiciary Branch) and enforcement, without prejudice to the application of the New York Convention.

AMPARO IS NOT A STANDARD COURSE OF ACTION AGAINST ARBITRAL AWARDS, BUT EXCEPTIONALLY IT CAN BE

The Peruvian Constitutional Court has settled the discussion about whether ***amparo*** proceeds against arbitral awards, considering that there is, at least in most cases, a specific and equally satisfactory alternative to ***amparo*** when a party claims that their fundamental rights have been violated: the arbitral award annulment lawsuit.

Pursuant to Article 62 of the Peruvian Arbitration Law, only an appeal for annulment may be filed against an arbitral award, which 'constitutes the only means of challenging the award'. According to this Article, judges are forbidden from pronouncing 'on the merits of the controversy or on the content of the decision or to qualify the criteria, motivations or interpretations set forth by the arbitral tribunal'. Article 63 of the Peruvian Arbitration Law establishes the exhaustive and specific grounds under which the annulment of the arbitral award proceeds, none of which state that it is applicable to 'violation of fundamental rights'.

Moreover, with respect to ***amparo***, the Peruvian Arbitration Law provides that 'it is understood that the recourse for annulment of the award is a specific and suitable means to protect any constitutional right threatened or violated in the course of the arbitration or in the award'.[39]

To prevent litigants from resorting to the ***amparo*** process to challenge the merits of an award, a legal or jurisdictional definition was needed to establish clear parameters for resorting to this remedy. After much discussion, the Peruvian Constitutional Court finally settled the matter by issuing the binding precedent known as ***María Julia***.[40] In ***María Julia***, the Court ruled the following.

- The remedy of annulment provided for in the Peruvian Arbitration Law is a specific procedural judicial action, equally satisfactory to ***amparo***, for the protection of constitutional rights,[41] except for the exceptions established in ***María Julia*** itself.[42]
- According to paragraph 21 of the ***María Julia*** case, the ***amparo*** does proceed:
    - when the arbitral tribunal disregards or fails to follow binding precedents set by the Constitutional Court;[43]
    - when the arbitral award has exercised diffuse control (judicial review) over a standard that is declared unconstitutional by the Constitutional Court or the judiciary (in a process of judicial review of regulations);[44] and
    - when the ***amparo*** is filed by a third party that is not a party to the arbitration agreement and is based on the direct and manifest affectation of its constitutional rights as a consequence of the award rendered in the arbitration (except in the case of 'non-signatory parties' contemplated in Article 14 of the Peruvian Arbitration Law).[45]
- In the case of grounds (a) and (b) of paragraph 21 of ***María Julia***, it is necessary that the affected party 'has previously formulated an express claim before the arbitral tribunal and that such claim has been rejected'. Finally, the Constitutional Court

> established that, as a consequence of the ***amparo***, the arbitral award may be totally or partially annulled, but that 'in no case may the judge or the Constitutional Court resolve the merits of the dispute submitted to arbitration'.[46]

As demonstrated, the ***María Julia*** case has established that the ***amparo*** against arbitral awards is highly exceptional and only proceeds in very specific cases. For all other cases not provided for in ***María Julia***, any challenge to the arbitral award must be discussed in the annulment action.

AMPARO CAN EXTEND AWARD DISCUSSIONS THOUGH COURTS USUALLY DISMISS THOSE CASES

Amparos can unfortunately serve to extend the discussions on an award and delay its effectiveness. As previously indicated, an award can be challenged via the annulment action, which is resolved by a judicial decision. And ***amparos*** also proceed against 'irregular' judicial decisions (i.e., those that violate fundamental rights, such as the right to a duly sustained written explanation of judicial decisions (motivation)). In other words, it is possible for a party to lose the arbitration, then lose its annulment action, and finally try to continue 'arguing' and 'delaying' the case through an ***amparo*** challenging the judicial decision that ruled on the award's annulment. That said, the ***amparo*** would not be against the award and in no case could it suspend its enforcement because what is at issue is the judicial decision of annulment. The award would already be final.

Fortunately, ***amparos*** against judicial decisions are also exceptional, and do not proceed when it is evident that the party that initiated it only seeks to extend the discussion or question the merits of the case. However, even if ***amparos*** do not end up being declared well-founded, they can delay the enforcement of an award. Courts also generally dismiss these types of cases.

VENEZUELA

CONSTITUTIONAL REMEDIES OR AMPARO ACTIONS

The constitutional remedy (or ***amparo*** action) in Venezuela is regulated in Article 27 of the Constitution,[47] the Organic Law of Amparo on Constitutional Rights and Guarantees[48] (the Law of Amparo) and the Organic Law for the Protection of Personal Freedom and Security.[49] The ***amparo*** action can be used for the protection of all rights enshrined in the Constitution due to violations from government authorities or persons, including rulings from courts in Venezuela.[50] The ***amparo*** action in the Venezuelan legal system has been conceived for a broad range of premises, opening the door for its continual usage.

ARBITRATION IN VENEZUELA

Article 258 of the Constitution of Venezuela recognises arbitration as an alternative means to resolving legal disputes. Article 258 entails the constitutional protection of using arbitration and the execution of arbitral awards in the country. Arbitral awards have full effect and efficiency in Venezuela according to international treaties and local law.[51] Arbitral awards can be executed voluntarily by the defeated party or by ordinary courts following written request of either party. The sole alternative to 'appeal' awards is by requesting annulment.

The efficiency of arbitral awards has been ratified by rulings such as No. 1,541 and No. 1,773 of the Constitutional Chamber of the Supreme Court of Venezuela of 17 October 2018 and 30 November 2011, respectively:

> Thus, through alternative mechanisms to the judicial process, the purpose of the Law is achieved, such as social peace, in perfect conjunction with the Judicial Power, which holds the monopoly of the coercive protection of rights and, therefore, of the forced execution of the sentence . . . it is not possible for an arbitration award to be heard in second instance or appealed before the Superior Courts, since only the annulment of the award is applicable against the award.

Therefore, considering the constitutional protection of arbitration in Venezuela, all arbitral awards are subject to a voluntary compliance or compulsory execution by local courts unless a specific ground for annulment is established in the law.

AMPARO ACTION AND ARBITRATION IN VENEZUELA

As arbitration continues to increase in the country, a discussion has developed on whether an ***amparo*** action can be an appeal remedy against arbitral awards.

The ***amparo*** action encompasses a wide array of rights violations for which it can be filed. However, the Commercial Arbitration Law does not prescribe an appeal alternative for the defeated party other than the option to request annulment of the award. Under Article 44 of the Commercial Arbitration Law, an arbitral award can be declared null if:

- parties lack legal capacity to engage in arbitration;
- due process guarantees were violated;
- the designations of arbitrators and the arbitration proceeding were not in compliance with the law;
- the award refers to a controversy not included in the arbitration agreement or the award decision is out of the scope of the arbitration agreement;
- the party against which the award is being executed proves it is not yet binding, is not enforceable or has been declared null; or
- the controversy falls out of the scope permitted by law to be solved by arbitration or the matter brought into the case is a public policy matter.

Legal commentators on the matter have begun supporting the fact that ***amparo*** actions might be an alternative to challenge or appeal an arbitral award under the argument that certain constitutional rights have been violated. In line with the foregoing, ***amparo*** actions have been filed before the Supreme Court of Venezuela by losing parties in arbitral proceedings and have been admitted. The foregoing position has been heavily criticised by those who are of the view that ***amparo*** actions cannot be filed as a means to appeal and overturn arbitral awards.

This has generated a debate in Venezuela, as one sector believes using ***amparo*** actions is perfectly compatible with arbitration because the Venezuelan Constitution conceives arbitration as part of the judicial system and, therefore, all available legal institutions in the ordinary process are also applicable to arbitral awards. In contrast, another sector considers that using ***amparo*** actions to override arbitral awards would be a violation of the arbitration process, as its purpose would be to use the jurisdictional power of a court, which is by definition excluded in arbitration.

On this debate, the Constitutional Chamber of the Venezuelan Supreme Tribunal stated in Ruling 151 of 30 April 2021 that:

> once the final arbitral award has been rendered, the respective challenge of the same, if considered pertinent, would proceed either through ordinary channels by filing an appeal for annulment of the arbitral award in accordance with the provisions of the Commercial Arbitration Law, or exceptionally through the exercise of an action for constitutional protection or through the mechanism of constitutional review, as the case may be.[52]

Ruling 151 cleared the path to use ***amparo*** actions against arbitral awards, supported by its most relevant case law.

In contrast, scholars have opposed the concept of using ***amparo*** actions to overturn arbitral award rulings. Lawyer Andrés Mezgravis believes that the existence of restricted annulment premises in Venezuelan law entails the exclusion of ***amparo*** actions as it is an exceptional means.[53] Additionally, lawyer James O Rodner follows, stating that 'the writ of amparo has been used (in my opinion, wrongly) as a kind of supra recourse that intervenes in the arbitration process'.[54]

To this day, there is no unified criteria by scholars of the applicability of ***amparo*** actions against arbitral awards. However, it is a reality that this action has seen increased usage in recent times with acceptance and applicability of Venezuelan courts.

The ongoing debate for the application of ***amparo*** actions against arbitral awards in Venezuela applies for both local and international arbitral awards. Article 49 of the Commercial Arbitration Law establishes the only grounds for which the execution of international arbitral awards can be denied in Venezuela.[55] Additionally, Ruling 151 creates a path for the application of remedies against international arbitral awards.

ENDNOTES

[1] Rodrigo Díaz de Valdés, Alfonso Cortez-Fernández, Ana María Arrarte and Maria Eugenia Salazar-Furiati are partners at Baker McKenzie. The authors would like to thank Felipe Soza, Emilio Gonzalez-Guzman, Gonzalo Monge and Federico Palma for their contributions to this chapter.

[2] Eduardo Jequier, 'La acción de inaplicabilidad por inconstitucionalidad en el derecho chileno sobre arbitraje interno: algunas propuestas', Estudios Constitucionales, 2013, Volume 11, No. 2, p. 168.

[3] Chilean Civil Procedural Code, Article 628 et seq.

[4] Chilean Constitution, Article 20.

[5] Ignacio Ried, 'El Recurso de Protección como control de constitucionalidad de las resoluciones y sentencias civiles, en respuesta a la ineficacia de la acción de inaplicabilidad por inconstitucionalidad', Estudios Constitucionales, 2015, Volume 13, No. 1, p. 290.

[6] Patricio Aylwin, El Juicio Arbitral (Editorial Jurídica de Chile, 2009), p. 464.

[7] Chilean Constitutional Court, Docket No. 420, final ruling dated 25 August 2004, paragraph 17.

[8] See Elina Meremiskaya, 'Anti-suit injunctions y recurso de protección: su incidencia en el arbitraje comercial internacional de acuerdo al derecho chileno', 2009.

[9] Court of Appeals of Santiago, Docket No. 13532-2023, ruling dated 23 October 2023, recital paragraph 8.

[10] Eduardo Jequier, 'La acción de inaplicabilidad por inconstitucionalidad en el derecho chileno sobre arbitraje interno: algunas propuestas', Estudios Constitucionales, 2013, Volume 11, No. 2, p. 194.

[11] For example, see dissenting opinion of Justice Domingo Hernandez in the Chilean Constitutonal Court, Dockets No. 2532-13-INA and No. 2543-13-INA, 27 November 2013.

[12] e.g., Chilean Constitutional Court, Docket No. 4249-18-INA, final ruling dated 2 July 2019. In this case, the arbitrator was advised not to apply the provisions of Article 43 of the Limited Liability Companies Act (Act No. 18,046), which prescribes that 'directors are obliged to maintain confidentiality regarding the company's business and the corporate information to which they have access due to their position and that has not been officially disclosed by the company'. Here, the Court recognised that the arbitrator is a judge and that arbitration is a 'judicial procedure'.

[13] Constitution of Chile, Article 82.

[14] e.g., Supreme Court, Docket No. 53981-2022, final ruling dated 9 June 2023.

[15] Chilean Civil Code, Article 1546.

[16] Chilean Constitutional Court, Docket No. 420, final ruling dated 25 August 2004, paragraph 17.

[17] See Rodrigo Díaz de Valdés and Felipe Soza, 'Chile', in Baker McKenzie International Arbitration Yearbook 2022–2023, www.globalarbitrationnews.com/2023/01/01/baker-mckenzie-international-arbitration-yearbook-2022-2023-chile/.

[18] See Amparo Statute, Article 5(II).

[19] ibid.

[20] id., Article 170.

[21] id., Article 81(II).

[22] id., Article 107.

[23] id., Article 81(I).

[24] See Twelfth Collegiate Court in Civil Matters of the First Circuit (Mexico City), judicial decision I.12o.C.14 K (10a.), amparo revision appeal 197/2018, 9 August 2018,issuing justice: Neófito López Ramos.

[25] See Eighth Collegiate Court in Civil Matters of the First Circuit (Mexico City), judicial decision I.8o.C.23 C (10a.), amparo challenge (queja) 195/2014, 29 October 2014, issuing justice: Abraham S Marcos Valdés.

[26] ibid.

[27] ibid.

[28] See Mexican Commerce Code, Articles 1457 and 1462.

[29] See Plenum Chamber of the First Circuit (Mexico City), judicial decision PC.I.C. J/23 C (10a.), contradiction of criteria 8/2015, 10 November 2015, issuing justice: María Soledad Hernández Ruiz de Mosqueda.

[30] ibid.

[31] ibid.

[32] See Sixth Collegiate Court in Civil Matters of the First Circuit (Mexico City), judicial decision I.6o.C.41 C (10a.), direct amparo 226/2014, 25 June 2014, issuing justice: Ismael Hernández Flores.

[33] See First Chamber of the Supreme Court of Justice, judicial decision 1a./J. 87/2019 (10a.), contradiction of criteria 250/2019, 16 October 2019, issuing justice: Jorge Mario Pardo Rebolledo.

[34] ibid.

[35] ibid.

[36] See Mexican Commerce Code, Article 1461.

[37] See First Chamber of the Supreme Court of Justice, judicial decision 1a. XXV/2022 (10a.), direct amparo motion for review 7586/2019, 14 October 2020, issuing justice: Norma Lucía Piña Hernández.

[38] Article 200: 'The following are the constitutional guarantees: . . . 2. The writ of amparo, which operates in case of an act or omission by any authority, official, or person who violates or threatens the other rights recognized by the Constitution, with the exception of those mentioned in the following subparagraph.'

[39] Twelfth Supplementary Provision of the Peruvian Arbitration Law.

[40] Case No. 00142-2011-AA/TC.

[41] id., paragraph 20(a).

[42] id., paragraph 21.

[43] id., paragraph 21(a).

[44] id., paragraph 21(b).

[45] id., paragraph 21(c).

[46] id., paragraph 21.

[47] See Constitution of Venezuela, published in Official Gazette No. 5,908 of 19 February 2009.

[48] See Organic Law of Amparo on Constitutional Rights and Guarantees, published in Official Gazette No. 34,060 of 27 September 1998.

[49] See Organic Law for the Protection of Personal Freedom and Security, published in Official Gazette No. 6,651 of 21 September 2021.

[50] Article 40, Law of Amparo.

[51] See the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Inter-American Convention on International Commercial Arbitration and the Commercial Arbitration Law, published in Official Gazette No. 36,430 of 7 April 1998.

[52] Constitutional Chamber of the Supreme Court of Venezuela, Ruling 151 of 30 April 2021, http://historico.tsj.gob.ve/decisiones/scon/abril/312015-0151-30421-2021-20-106.HTML.

[53] See Andrés Mezgravis, 'El Amparo Constitucional y el Arbitraje', Revista de Derecho Administrativo, No. 6, www.ulpiano.org.ve/revistas/bases/artic/texto/RDA/6/rda_1999_6_255-278.pdf.

[54] See James O Rodner, 'La Anulación del Laudo Arbitral', https://rvlj.com.ve/wp-content/uploads/2021/05/La-anulacion-del-laudo-arbitral.pdf.

[55] In a ruling from the First Civil, Commercial and Transit Superior Tribunal of the Judicial Circumscription of the Metropolitan Area of Caracas dated 22 April 2013, the tribunal declared that the dispute solved under arbitral award No. 1-12-CV-24174-KMW, executed under the rules of the International Centre for Dispute Resolution in Miami, had been annulled because the object of the award was public order in Venezuela. This review was requested by the losing party using the amparo action remedy in Venezuela.

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