INTERNATIONAL ARBITRATION AND PUBLIC CONTRACTS IN LATIN AMERICA

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Introduction (1)

The purpose of this article is to analyse the use of international arbitration to solve conflicts concerning public contracts in Latin American countries, given the "cultural revolution (2)" the region has undergone regarding alternative modes of dispute resolution over the last twenty years. In order to do so, we will first seek to outline the general movement in favour of the institution, by demonstrating the encouraging political context in which the theoretical difficulties were overcome in order to build a welcoming legal framework to arbitration. Subsequently, we will put forward the legal restrictions and the role of national courts as remaining challenges for a further expansion of arbitration in the region.

As a preliminary statement, let us point out that : (i) there is no regional agreement on the topic and (ii) there is not much to say

(1) All translations used in this article were free ones, not based on a professional expertise.

(2) To consult compelling arguments about this cultural revolution, see Wald, Arnold and Kalicki, Jean (2009), "The Settlement of Disputes between the Public Administration and Private Companies by Arbitration under Brazilian Law", *in Journal of International Arbitration*, 26 (4) : 557-578.

about domestic laws on international arbitration because the rules are not homemade. The lack of regional agreement means that there are no common rules about arbitration applicable to all Latin American countries. The starting point of this study is thus that drawing an overview of the region is rather disheartening because each country establishes its own rules at national level. Hence, in order to undertake research on this subject, it is necessary to analyse the countries individually. It appears that any attempt to propose general rules would certainly overlook the concrete particularities that matter on the daily treatment of the subject. As a result, the alleged regional approach is challenged by a rather realistic perspective. That is, Latin America cannot be considered as a homogenous block and the analysis of international arbitration in public contracts must take into account the different dynamics of each country.

Regarding the second statement, technically speaking, the domestic rules about international arbitration are virtually a reproduction of the rules enacted by international organizations. As a result, the countries have only two main concerns on the matter: (*a*) to identify the cases in which international arbitration is possible and (*b*) to regulate how international arbitration will be integrated into domestic jurisdiction. Apart from those two main concerns, the countries do not really innovate because they usually follow what has been established by international organizations. For example, there is a clear influence of the UNCITRAL (United Nations Commission on International Trade Law) model law on International Commercial Arbitration to qualify the content of what would be *international arbitration* (1) To illustrate this point,

(1) We are conscious that there is not only one technical concept of arbitration. It is important though to mention the one established by the model law of UNCITRAL in its article 1 (Scope of Application):

"(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country" (our emphasis).

in countries (1) like Colombia (2), Bolivia (3), Honduras (4), Nicaragua (5) and Panama (6), the criteria to identify an international arbitration are practically a replica of the cited first article of the UNCITRAL model law. To sum up, the countries "borrowed" the three main criteria that the model ascertains: (1) the place of business; (2) the impact of the contract on international trade and (3) the explicit agreement of the parties. Likewise, other sets of rules that come from abroad have worked as a source of inspiration for the domestic legislator, such as those of the International Chamber of Commerce (ICC). Consequently, the focus of discussion in Latin America is not whether the criteria (*per se*) to determine international arbitration are reasonable. After all, these criteria were assumed as a valid legal transplant (7). The discussion is rather concentrated on the concrete identification of cases of international arbitration and on the means by which arbitration awards will be guaranteed by domestic jurisdictions.

Given those two preliminary acknowledgments, it seems necessary to assess international arbitration in Latin America under a broader conceptual sense. That is, the particularities of the countries must be taken into account since there is no regional agreement on the matter. Besides, even if some arbitration procedures do

(1) In the same sense, the legislations of Argentina, Venezuela, Chile, Ecuador and Peru are highly influenced by the UNCITRAL model law.

(2) Art. 1: "*The arbitration will be international when the parties would have agreed in this sense and when one of the following conditions has been met:*

1. the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

2. the place where a substantial part of the obligations of the commercial relationship is to be performed is situated outside the State in which the parties have their places of business;

3. the place of arbitration is situated outside the State in which the parties have their places of business if determined in, or pursuant to, the arbitration agreement

4. the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

5. When the litigation submitted to an arbitral tribunal directly and certainly implies consequences to the International trade" (Law 315 on International Arbitration, 1996).

(3) Art. 71 of the Decree Law 1770 of 1997.

(4) Art. 86 of the Arbitration Law 161 of 2000.

(5) Art. 22 of the Mediation and Arbitration Law 540 of 2005.

(6) Art. 5 of the Decree Law 5 of 1999.

(7) The validity of the legal transplant is something different from the "transplant effect". Even though legal transplants are very often, the process of transplanting a law is not linear. As Arvind explains "*Much as winemakers claim that a grape variety transplanted outside its native terroir produces a different wine notwithstanding that it remains the same plant, a transplanted law often functions in a different way in its new home. This will obviously happen if the transplanted law is deliberately modified to meet local needs, but transformations may occur even if the text of the rule remains the same or is intended to remain mostly the same*" (ARVIND, 2010: 66).

not precisely correspond to the alleged technical concept of international arbitration, it is interesting to study them due to their implications on foreign enterprises and investments in Latin America. Accordingly, we will also highlight some cases of national arbitration that deserve to be explored because of the legal puzzle they usually entail for international affairs. For instance, in Brazil, although the general arbitration law does not distinguish national from international arbitration, the weight of the territorial (1) criteria imposes different legal treatments. While an arbitral sentence awarded in the Brazilian territory is auto-executed, a sentence given abroad needs to be ratified by the Higher Court of Justice (2) in order to become effective. Likewise, the status of arbitration awards varies according to its national or international character. On the one hand, in the majority of Latin American countries domestic arbitration enjoys the same status of state jurisdiction; which means that there is no need to proceed an exequatur of the arbitral award. On the other hand, when the award comes from abroad, a procedure of exequatur is demanded in most countries, apart from Nicaragua, who represents a noteworthy arbitration friendly example.

Thus, we will evaluate arbitration in public contracts in Latin American through a broad perspective, by taking for granted different treatments according to the country and a complex set of rules that in practice do not really follow fixed divisions between national and international spheres. We assume that practical impacts in both national and international spheres go beyond those fixed divisions. Besides, the fact that the combination of public contracts with arbitration is a delicate political and economic issue in the region reinforces the need for such a broad perspective to deal with the subject. If the general trend is towards the development of arbitration, the peculiarities of each country play their role

(1) Another element of the weight of the geographical criteria can be perceived in Brazilian law of public-private partnership contracts. The law 11.074/2004 introduced the possibility of using arbitration in public-private partnership contracts (JUSTINO DE OLIVEIRA, 2005). However, the arbitration must take place within the Brazilian territory, even if the arbitrator is foreign and the rules of international conventions will be applied.

(2) Art. 105, I, was introduced by the Constitutional Amendment No. 45 of 2004. Before the amendment, the Federal Supreme Court was the competent judicial body for the "exequatur" of foreign awards.

to limit the interpretation of the phenomenon by the domestic judge.

To understand this dynamic, we will first assess the aspects that show *the expansion* of the use of arbitration in public contracts (I). Then, we will examine those that still reflect *the restrictions* founded in some Latin American countries to use the institute (II).

I. – The Expansion of Arbitration

In most Latin American countries arbitration enjoys a certain tradition in the sense that the institute was not legally prohibited. Historically speaking, it was actually accepted in the former Spanish colonies as a possible way of settling disputes. Conversely, the possibility of resorting to the institute did not mean that contractual parties effectively did so frequently. Not only did theoretical difficulties prevent a larger use of arbitration, but there was also a lack of legislative policy to incite the development of the institute. Moreover, the Calvo doctrine (1) served for a long time as a resistant speech against international modes of dispute resolution that escaped from state jurisdiction.

However, a clear trend towards arbitration in public contracts in Latin American has emerged over the past twenty years (2). Yet, this trend has not been carried out at the same rhythm by all countries. In section (A) we will analyse the different paths of the tradition of arbitration in the region, by taking into account the theoretical difficulties to apply arbitration to public law affairs (1) and the pragmatic view adopted by the countries to implement it in the 1990s as a rather common project (2). In section (B) the legal consolidation of this common project will be investigated. We will show that building a legal apparatus for arbitration meant the constitu-

(1) In 1868, the Argentinean chancellor Carlos Calvo claimed the thesis according to which the national courts would be the only competent to judge disputes between the State and foreign parties. This doctrine was contrary to the international diplomatic principle that admits the involvement of the foreign State in order to protect the parties that are legally bound to it by their nationality. This protection is based on the fact that there is no balanced relationship between State and foreign parties. Therefore, the clause Calvo implied that the State, not individuals or enterprises, would abandon one of its recognizing rights within the International Law system. As a result, the international law scholars declared the nullity of the clause Calvo because the State could not dispose of its rights (Rezek, 2002 : 277).

(2) While in the 1980s Latin American countries participated to less than 3 % of the ICC arbitrations, in 2004 this number achieved 11 % (*ICC Bulletin*, 2005).

tional endorsement of the institute (1) and the extension of its use to public law affairs (2).

A. – *The Different Paths towards Arbitration*

The expansion of arbitration has not been homogenous in the region because of the already different existing practices of arbitration in each country. Moreover, if the use of arbitration to public contracts did challenge the pillars of public law in all countries, the level of resistance to reconsider those pillars varies greatly. It is thus necessary to verify the legal reasoning applied to surmount the initial theoretical challenges and the extent of the pragmatic choice to promote arbitration during the so-called neo-liberal wave. Both the legal elements of analysis and the political choices are representatives of the *tradition* that arbitration enjoys in a chosen country.

For instance, in Colombia (1), although the general rule is that all conflicts that are suitable for settlement may be submitted to arbitration, some issues are excluded by the law from the scope of arbitration (2). The analysis of the legality of administrative acts and of the application of "exceptional powers" to public contracts cannot be submitted to arbitration (Posse and Posada, 2008). Moreover, although the Constitutional Court has accepted that public entities have the capacity to agree with arbitration, it has imposed a reserve that has been interpreted in a broad sense by infra-constitutional courts. The Constitutional Court has accepted the capacity of public entities to agree with arbitration *if* the affair does not refer to an "administrative decision". Since the courts have broadly interpreted the content of "an administrative decision", arbitrations that include state entities have been restricted (WALD and KALICKI, 2009 : 561).

In Brazil, on the other hand, the manifestation of the Federal Supreme Court (STF) (3) in favour of arbitration in affairs involving the State took place much earlier. In 1973 by the bias of the *Lage* case law (4), the STF asserted the possibility of the State

(1) To consult a detailed analysis of the restrictions to arbitration in Colombia, see section II-A (2 – ii).

(2) Art. 70 of the Law 80 of 1993.

(3) In Portuguese, STF means "Supremo Tribunal Federal".

(4) Extraordinary Appeal (RE 71467 GB) judged by the Federal Supreme Court on the 14 November of 1973.

using arbitration, in spite of the lack of specific legislation in this sense. In the manifestation of Justice (1) Rodrigues Alckmin, he argues that *"the impossibility of the federal government submitting to arbitration would suppose, even if the law prescribed so, its incapacity to make agreements"* (2). Furthermore, the court refutes that the lack of appeal from an arbitration award violates the Constitution (3), which ensures the full access to State jurisdiction (4). The principle of *"pacta sunt servanda"* supported the reasoning. This principle was pointed out to guarantee the validity of the arbitration convention, which, according to the justices, did not mean incompatibility with the monopoly of jurisdiction. After all, due to the violation of right by the federal government in the *Lage* case, a judicial review took place. An evaluation of a potential violation of rights was not excluded to the court. The court indeed examined the case and the issued decision required the government to fulfil its obligations as regards the arbitration convention. It is the content of the arbitration award that is not accepted as an object of appeal. Finally, this leading case inaugurated the discussion about the compatibility of arbitration with public law principles, but a long path still had to be pursued, which will be evaluated in the next section.

1. *The Initial Difficulties*

Accepting the State as a part in arbitration imposed some theoretical difficulties because of the special legal regime under which the activities of the State are regulated. By challenging the principles that denote this special legal regime, arbitration would challenge the logic of the regime itself. Yet, arbitration was far from being the only cause that led the doctrine to review the paradigms of Administrative Law. The need to adapt this special regime to arbitration was actually just one more symptom of a loudly announced crisis of

(1) The judges of the Federal Supreme Courts of Brazil are called "ministers".

(2) The whole decision is available at: http://www.jusbrasil.com.br/filedown/dev0/files/JUS2/STF/IT/RE_71467_GB%20_14.11.1973.pdf (accessed on the 2nd April 2010).

(3) Art. 5, XXXV "Law shall not exclude any offence or threat to rights from judicial consideration", Constitution of the Federal Republic of Brazil, 1988.

(4) To consult a recent analysis on the matter, see ARMAS, Oliver and PIEPER, Thomas (2008), "Achieving the Intended Purpose of Arbitration Agreements in the U.S. and Brazil – The limited Scope of Judicial Review of Arbitral Awards under the U.S. Federal Arbitration Act and the Necessity of a Compromisso under the Brazilian Arbitration Law", *in Revista Brasileira de Arbitragem*, Year IV, No. 19, Jul.-Sep.

Administrative Law (1). Beyond the idea of crisis, the reconsideration of the main pillars of Administrative Law sounded necessary to eventually accept the State as a part in arbitration.

First, there would be a tension between arbitration and the principle according to which the Administration cannot dispose of the public interest. This tension derives from the fact that arbitration implies autonomy of the parties to negotiate their interests and to deal their rights. The subject of arbitration is supposed to be a transactional one, which reveals a material criterion of the use of arbitration. The nature of the right involved is crucial to define the possibility of using arbitration as a method of dispute resolution. In this sense, the impossibility of negotiating the public interest appeared as a major theoretical obstacle to accept the State or state entities as part to arbitration. The reasoning was the following: since the Administration cannot dispose of the public interest, it would not be able to take part in arbitration.

However, a review of this principle was imperative since the Administration started pursing a new role vis-à-vis the constituents. The position of the Administration has shifted because the source of legitimacy of its exorbitant powers has been contested. The legitimacy of the exorbitant powers used to rely on the imperative goal of ensuring the achievement of the public interest, which were supposed to prevail over the private ones and, therefore, could not be disposed of by the Administration. The content of the public interest, nevertheless, remained vague and eventually was deemed as unable to automatically justify the use of exorbitant powers. As a result, instead of reinforcing its exorbitant powers that used to constitute a vertical relationship with the constituents, the Administration sought a rather equivalent set of powers regarding the constituents (2). Following this, the consequent approximate (3)

(1) To consult one of the works that launched the debate in Brazil, see Avila, HUMBERTO BERGAMANN (1999), "Repensando o 'Principio da Supremacia do Interesse Publico sobre o Particular'", *in O Direito Publico em Tempos de Crise – Estudos em Homenagem a Ruy Ruben Ruschel*, Porto Alegre, Livraria do Advogado. To consult a published thesis that proposed a new paradigm to Administrative Law, see BINENBOJM, Gustavo (2008), *Uma Teoria do Direito Administrativo – Direitos Fudamentais, Democracia e Constitucionalização*, 2° Edition, Renovar.

(2) "*The public powers are no longer exerted in a authoritarian way, and the democracy is perceived as a convergence of public decisions with the concrete interests of the community*" (Justen Filho, 2005, cited *in* GAMA E SOUZA Jr., 2005).

(3) It is still an *approximate* horizontal relationship because the Administration continues to formally enjoy some special prerogatives.

horizontal relationship between the Administration and the private sector ended to somehow mitigate those exorbitant powers. As the content of the public interest has been challenged, the former logic of Administrative Law has sounded unsuitable, or even obsolete.

The doctrine has then developed the distinction between *primary* and *secondary* public interests in order to rethink the circumstances in which the Administration could dispose of them. The primary public interests would be those that promote the values of the society as a whole (justice, democracy, economic development, for example), while the second range of public interests would concern to patrimonial ones held by the State or public entities (GAMA E SOUZA Jr., 2005). Furthermore, the identification of what the public interest is has been understood as a strict *in concreto* procedure, which is no longer simply left to a discretionary evaluation of the civil servant. That is, the use of the principle of proportionality (1) has been claimed as an important tool to identify what the content of the public interest is in the concrete case. The principle of proportionality is deemed as an important tool exactly because the contraposition between public and private interests does not sound exact anymore. The public interest may also be conceived as a synthesis of several private interests, which means that the senses of public and private interests can move closer together. "People" is also from now the plural of "minority" (ROSANVALLON, 2008 : 14) and the public interest should be understood as "*general attention towards particularities*" (ROSANVALLON, 2008 : 18). Besides, one could argue that sometimes the Administration faces several public interests in place. The conflict between several public interests leads us to conclude that (*i*) there is not only one public interest (JORDÃO, 2009 : 60) and (*ii*) the Administration cannot legitimate its choice among several public interests by just mentioning the "*principle of supremacy of public interest*". The content of *the* public interest would then demand a case by case analysis. One could not *a priori* establish the content of public interest. More importantly, one could not *a priori* ascertain that the public interest will always prevail because the public interest may also correspond to private interests. Consequently, by following the principle of proportional-

(1) For example, the *Law of Administrative Procedure*, No. 9784 of 1999 establishes in the article 2 that the Brazilian Administration must comply with the principle of proportionality.

ity, the concrete verification of the interests in place would assert the substance of the public interest.

Secondly, there would be a tension between the principle of legality and the lack of specific laws authorizing the State or public entities to take part in arbitration. According to the traditional understanding of the principle of legality, the Administration can only act on the basis of a legal authorization (1). Therefore, an enactment of legal provisions allowing the State or public entities to take part in arbitration would be essential. Nevertheless, the principle of legality has been also challenged by the aforementioned new perspective of Administrative Law. The crisis of the formal law was one reason for this shift of perspective to interpret administrative activities. The law sounds unable to provide the adequate regulation to all State activities. Besides, it is no longer the *law* the only legal reference to legitimate administrative acts. The administrative acts are bound to the *Law* when they respect the unity of the legal system as a whole. The compliance with this "block of legality" would constitute the principle of administrative conformity to the Law (2) (BINEMBOJM, 2008 : 141). This "block of legality" is led by the Constitution, which acquired even broader practical functions in the wake of the crisis of the law (3). The legal system consolidates its sources not only through rules, but also through constitutional principles. Therefore, the constitutional endorsement of an issue would overcome the lack of a specific law to regulate administrative activities. The Administration may then submit to arbitration without a specific law prescribing so.

Finally, there would be an apparent contradiction between the principle of transparency and the principle of confidentiality. On the one hand, public Administrations that comply with the rule of law must ensure the transparency of their acts, hold procedures accessible to the constituents and motivate their decisions. On the other hand, the confidentiality was traditionally recognized as a

(1) This understanding is based on "the doctrine of positive Bindung", which was influenced by KELSEN and materialized on the Constitution of Austria of 1920 (art. 18). This doctrine was the refutation of "the negative Bindung" one, which used to ascribe a large discretionary power to the Administration (BINEMBOJM, 2008 :140).

(2) This is the *"principio da juridicidade administrativa"*, which was called in this way by Adolf MERKLY (1935), *Teoria General de Derecho Administrativo*, p. 132 (cited by BINEMBOJM, 2008 : 141).

(3) Regarding the new paradigms of the Law, see CHEVALLIER, Jacques (1998), "Vers un droit post-moderne? Les transformations de la régulation juridique", *in Revue du droit public*, p. 659.

main characteristic of arbitration, since the parties can negotiate the terms in which the decision will be taken and preserve their privacy. However, if parties of arbitration would be surprised to learn that the assumption of confidentiality is no longer applicable, debates among scholars and recent cases laws have showed that confidentiality is not an inherent attribute of arbitration. For instance, in the dispute between Esso and the Australian Minister for Energy and Minerals, the High Court of Australia decided that confidentiality was not a fundamental feature of arbitration (1). Likewise, in the case (2) that involved a request of the American Government for the production of documents used in an international arbitration in Switzerland, a Federal District Court decided that an agreement between the parties or explicit procedural rules that ensure privacy would be necessary to consider arbitration proceedings confidential (THOMSON and FINN, 2007). As a result, the tension between the principle of transparency and the principle of confidentiality appears as a "false dilemma" (CARMONA, 2004, cited *in* GAMA E SOUZA Jr., 2005). Confidentiality is not an intrinsic characteristic of arbitration, but merely a potential guarantee if it is agreed by the parties. Hence, the principle of confidentiality is not an obstacle that would necessarily withdraw the State or public entities from arbitration.

2. *The Promotion of Arbitration during the 1990s*

Theoretical initial difficulties were by and large discussed by scholars not only in Latin American, but also elsewhere (3). However, one should indicate as a peculiarity of the region the pragmatic nature of the political decision to overcome them. This political decision was justified by three major arguments: (i) the unsatisfactory performance of national courts, (ii) the lack of expertise of the Judiciary on some matters and (iii) the need for attracting foreign investments to push national development. It was necessary to incite a fast, effective and specialized alternative mode of

(1) *Case Law Esso Australia Resources Ltd. et al. v. Plowman.*

(2) *U.S. case United States v. Panhandle Eastern Corp, et al.*

(3) To consult French works on the subject: "L'arbitrage en droit public", Etude du groupe de travail sur l'arbitrage présidé par Daniel LABETOULLE, *JCP*, édition administrations, No. 14, 2 avril, 2007; JARROSSON, Charles (1997), "L'arbitrage en droit public", *AJDA*, p. 16; "Régler autrement les conflits: conciliation, transaction, arbitrage en matière administrative", *Etudes du Conseil d'État*, 1993.

dispute resolution in order to demonstrate the commitment of the country towards private investors.

The fact that this movement towards arbitration took place during the so-called neoliberal wave of the 1990s was not a coincidence. The State would no longer act as the main promoter of economic development, but instead it would seek an optimum legal framework that would encourage private initiatives. Likewise, governing is no longer seen as an exclusive prerogative of the State (Scott, 2004) and the participation of the private sector in traditional public sphere alleviated the vertical preponderant position of the State regarding the private contractor (FREEMAN, 2000). As a result, the institute of arbitration was no longer deemed as an outsider of public law since some of its principles have been mitigated to adapt to the new role of the State. In fact, arbitration would rather become a quite usual type of dispute resolution on public contracts. To give an extreme example, in Peru, not only the Constitution of 1993 itself establishes the possibility of using international arbitration for public contracts (1), but also the article 53 of the Public Procurement Law sets up that the parties may submit the eventual conflicts to conciliation or arbitration (2). In this sense, in Peru the use of arbitration to solve conflicts in public contracts would be the rule. In this country, it would be actually forbidden to forbid arbitration.

On the same path, Chile (3) enjoys a large tradition on arbitration (Figueroa Alves, 2008) and serves as a leading case in the expansion of the subject during the market-oriented reforms. Back to 1943, the Code of Judicial Organisation (4) already established a whole chapter about the arbitrators ("De los Jueces Arbitros"). Moreover, the Decree 2349 of 1978 permitted the State to submit to international jurisdiction in the cases of contracts involving economic oper-

(1) Art. 63 : "*The state and other public entities may submit the controversies derived from contractual relations to tribunals constituted by valid treaties. They can also submit them to national or international arbitration, according to the law.*"

(2) Art. 53.2 : "*The controversies that emerge between the parties from the conclusion of the contract about implementation, interpretation, cancellation, inexistence, inefficiency or invalidity will be settled trough conciliation and/or arbitration, according to the agreement of the parties, who should demand the beginning of these procedures at any time before the fulfillment of the contract. This is an expiring delay.*"

(3) In Chile international arbitration is ruled by the Law 19.971 of 2004, which is influenced by the model law of UNCITRAL. Besides, Chile has signed the treaty of the International Centre for Settlement of Investments Disputes (ICSID).

(4) Law 7.421 of 1943.

ations. Besides, since 1993 it has been possible to use arbitration in contracts of concessions, which was broadly supported because arbitration would be able to reduce the transaction costs of the contract (1). To illustrate this point, during an interview on the 29 April of 2005, the Chilean expert Ruffian Lizana declared that "*as well as a contract, arbitration is a financial issue*" (LEMES, 2007 :270). Furthermore, it is interesting to note that such a tradition continues to be the centre of high attention.

The contracts of concessions were recently object of the law No. 20.410 of 2010, which was approved by the Constitutional Court of Chile on the 27th November of 2009. The law No. 20.410 of 2010 modified the Law of Concessions (2) and intended to improve the already consolidated arbitral system. One of the innovations is the introduction of "Dispute Boards (3)", which would be responsible for a pre-arbitral phase, solving straightway the eventual conflicts between the parties. The Dispute Boards or "*Paneles Tecnicos o de Experts*" are of utmost interest because (*i*) they can be a solution to the contracts that last long period of time; (*ii*) they intervene immediately, without wasting time with the arbitral or judicial procedure; (*iv*) they prevent the eventual problem from becoming more complex or costly and (*v*) the parties can resort to them any time they judge it convenient. Another innovation is the shift from a system of "arbitration in equity" to a mixed one. According to the new law, the arbitral commission only can use the system of "arbitration in equity" on the matters regarding the procedure. The questions of law must be treated under the system of "arbitration in law" (4). Thirdly, an interdisciplinary council (5) will be created in the Ministry of Public Works in order to inform the development of concessions and promote coordination with the other Ministries implicated into those projects. Therefore, to sum up the way the country has considered arbitration as one key element of the success of public contracts, the Ministry of Public

(1) "The balance of the concessions is blue" (GALETOVIC, 2007).

(2) The Law of Concessions (DFL No. 164 of 1991) was adapted by the Decree No. 900 of 1996 and recently modified by the law 20.410 of 2010.

(3) The law 20.410 of 2010 modifies the art. 36 of the Decree No. 900, which establishes : "*The technical or economic controversies that issued between the parties during the implementation of the contract of concession can be submitted to the consideration of a Dispute Board through the demand of any of the parties.*"

(4) Art. 1, 18 of the Law 20.410 of 2010.

(5) Art. 1, 2 of the Law 20.410 of 2010.

Works has informed that Chile has passed 48 contracts on infrastructure for the period between 2008 and 2012, while if we look back at 1995, the deficit of public transport investment was around 15 % of the national PIB (FIGUEROA VALDES, 2008 :80).

Yet, the trend spread in the region in diverse ways. On the one hand, some countries legally expressed their agreement with the compatibility of arbitration and public contracts early, as did Ecuador with its law of State Modernization, Privatization and Performance of Public Services by the private sector in 1994. The decree No. 2328 that regulates this law establishes the possibility of resorting to an arbitration commission to settle up conflicts between the parties (1). On the other hand, other countries took more time to conceive such a change in the treatment of public affairs. For instance, in Dominican Republic, the steps towards public arbitration sound continuous but slower. The law used to forbid the use of arbitration when the State or its related entities were implicated on the matter (2). In 1987, through the enactment of the Law 50, the prohibition was suspended for domestic arbitration. Finally, in 2008 the new arbitration law withdrew the prohibition of the code and explicitly enabled the State to submit to arbitration (3) (WALD and KALICKI, 2009).

B. – *Building a Legal Framework for Arbitration*

The follow-up of the pragmatic political decision towards arbitration was its necessary consolidation on the legal system. The countries revised their Constitutions and enacted statutes that would permit the use of arbitration in public contracts. Although the country-based particular dynamics we have highlighted, one can observe a general movement to fabricate an appropriate legal framework for arbitration. To understand the expression of this movement in the positive law; in this section we will demonstrate the constitutional approval arbitration enjoyed in some countries (1) and the infra-constitutional materialization of the phenomenon regarding

(1) Art. 109 : *"The controversies between the contractor and the concessionaire regarding the application, interpretation, implementation and breach of the contract of concession may be aroused by any part before the Arbitration Commission"*.

(2) Art. 1004 of the Civil Procedure Code.

(3) Art. 5 of the Law of Commercial Arbitration, No. 489 of 2008.

public contracts (2). In addition, we will draw attention to the significant role the courts played in providing an arbitration welcoming case law. The convergence of all those elements built a legal system capacity to operate the alternative mode of dispute resolution.

1. *Constitutional Endorsement of Arbitration*

Regarding the constitutional endorsement of arbitration, we identify three sorts of situations : (*i*) countries that have expressly introduced in their Constitutions the State as a part into arbitration; (*ii*) countries that have simply introduced in their Constitutions the general use of arbitration and (*iii*) countries that have not established any constitutional provision about arbitration. In this latter situation, arbitration has been ruled only by statutes and pushed by the courts, without constitutional endorsement. In this section we will treat the first and the second cases; that is, the cases that somehow have been influenced by a constitutional endorsement.

The first case is illustrated by Panama and Peru. It is interesting to note that since 1972 the Constitution of Panama has already ascertained the possibility of the President of the Republic submitting the State to arbitration to solve the conflicts in which it is involved, provided the agreement of the Government Council and the General Attorney (1). Likewise, as we have mentioned above, Peru made a significant effort to encourage the use of arbitration. If the law used to restrict the use of arbitration, the Constitution of 1993 not only endorsed the institute for general contracts (2), but also expressly permitted the State and public entities to submit to arbitration in the case of contractual conflicts.

On the other hand, we observe that Colombia (3), Ecuador (4), El Salvador (5), Honduras (6), Paraguay (7), Uruguay (8) and Venezuela (9) decided to legitimate at the constitutional level the arbitration as an alternative mode of dispute resolution in general

(1) Art. 195, 4 of the Political Constitution of the Republic of Panama, 1972.
(2) Art. 62 of the Political Constitution of Peru, 1993.
(3) Political Constitution of Colombia of 1991.
(4) Political Constitution of the Republic of Ecuador of 1998.
(5) Constitution of the Republic of El Salvador of 2000.
(6) Constitution of the Republic of Honduras of 1982.
(7) Constitution of the Republic of Paraguay of 1992.
(8) Constitution of the Oriental Republic of Uruguay of 1968.
(9) Constitution of the Bolivarian Republic of Venezuela of 1999.

terms. They did so without explicitly prescribing the possibility of the *State* figuring as a part to arbitration. However, those *general terms* varied and provided different interpretations about the use of arbitration. As a result, this variation would represent different obstacles to the future implementation of the institute on public law affairs. For example, if the Constitution of Uruguay simply sets that the law will promote Arbitration Tribunals (1), the Constitution of Paraguay made clear that the monopoly of the State jurisdiction allows the exception of Arbitral Tribunal *in the cases of private law* (2). Therefore, one could ask to what extent the inclusion of arbitration *in general* to the constitutional system would allow its application to the affairs involving the State. Would it be necessary a specific statute regulating the participation of the State to arbitration or the interpretation of the new constitutional system would be already enough to extend to the State the use of an institute stipulated *in general*?

To address this point, one cannot neglect the role of the courts. We will use the case of Venezuela, whose Constitution establishes that the law will promote arbitration, conciliation, mediation and any other alternative modes of dispute resolution (3). In this country, the general rule is that arbitration involves rights that can be disposed of by the parties. However, this general rule endures exceptions (4). The article 151 of the Constitution imposes the immunity of jurisdiction of the contracts of public interest and the article 3 (b) of the Law of Commercial Arbitration establishes that the controversies directly related to the sovereign activities or public entities cannot be submitted to arbitration (5).

(1) Art. 57 of the Constitution of the Oriental Republic of Uruguay of 1968.

(2) Art. 248 – Regarding the Independency of the Judicial Power:

"The independency of the Judicial Power remains ensured. Only this power can decide in a contentious way.

Neither can the members or servants of other powers attribute to themselves judicial competences in any case apart from those that the Constitution explicitly establish, nor can they re-establish previous affairs, paralyze current ones or intervene in any way to the judgments. Such acts would imply an insolvable nullity. All this without undermining the arbitral awards in the scope of private law, according to the means the law determines to ensure the right of defense and equitable solutions".

(3) Art. 258 of the Bolivarian Republic of Venezuela, 1999

(4) To consult a further detailed analysis of the Venezuelan jurisprudence on the limits of arbitration, see the section II – A (1).

(5) *"Art. 3 There are exceptions on the controversies: (b) directly concerned about the competences of imperial functions of the State or state entities under the public law regime", Law of Commercial Arbitration.*

Regardless of the mentioned exceptions established by the law, the case law recently played a favourable role towards arbitration by using an interpretation based on the constitutional system as a whole, not being restricted to isolated norms. The Supreme Court did so even if the Constitution prescribes arbitration only in *general terms*. In 2008, the Supreme Court admitted the possibility of a state entity submitting to arbitration tribunals in some cases, since the consent was given. The Court pointed out that "*the inclusion of arbitration to the judicial system of the Republic met, under a pragmatic view, the need to allow through the constitutional system the possibility of the State submitting its conflicts regarding* **contracts of public interest** *to arbitral jurisdictions and, therefore, to encourage the international economic relations that are necessary to the development of the country*" (our emphasis) (1). The Court also clarified that "*when the legislator establishes that, according to a protective principle, a subject must be ruled as one of public order, it does not mean that one should exclude per se the alternative modes of dispute resolution and, among them, the arbitration*" (2). Indeed, the Court provided a pragmatic legal support to a pragmatic political decision, by reinforcing the assessment of the constitutional system as a whole to interpret isolated norms.

2. *Infra-Constitutional Endorsement of Arbitration*

Some other legal systems do not provide *any* type of constitutional norm on the matter. Neither have they included in the Constitution norms about arbitration involving the State, nor norms about arbitration in general terms. For these countries, the rules on the subject of arbitration are of infra-constitutional

(1) The full decision is available at http://www.tsj.gov.ve/decisiones/scon/Octubre/1541-171008-08-0763.htm (accessed on the 10 April of 2010).

(2) The Spanish version is the following: "*Cuando el legislador determina que conforme al principio tuitivo, una materia debe estar regida por el orden público, no deben excluirse per se a los medios alternativos para la resolución de conflictos y, entre ellos, al arbitraje, ya que la declaratoria de orden público por parte del legislador de una determinada materia lo que comporta es la imposibilidad de que las partes puedan relajar o mitigar las debidas cautelas o protecciones en cabeza del débil jurídico, las cuales son de naturaleza sustantiva; siendo, por el contrario que la libre y consensuada estipulación de optar por un medio alternativo – vgr. Arbitraje, mediación, conciliación, entre otras –, en directa e inmediata ejecución de la autonomía de la voluntad de las partes es de exclusiva naturaleza adjetiva*", http://www.tsj.gov.ve/decisiones/scon/Octubre/1541-171008-08-0763.htm (accessed on the 10th April of 2010).

nature (1). Following this, one can observe that Argentina (2), Bolivia (3), Brazil (4), Chile (5), Costa Rica (6), Guatemala (7), Mexico (8), Nicaragua (9) and Dominican Republic (10) do not have any constitutional provision on the topic of arbitration. These countries have introduced arbitration in their legal systems through an infra-constitutional apparatus.

In some cases, the resort to arbitration is still based on general statutes about the institute, without mentioning the possibility of using arbitration to solve conflicts emerged from public contracts (11). In other cases, despite the lack of constitutional endorsement, specific statutes explicitly establish the possibility of solving controversies of public contracts through arbitration. For example, issued by the revision of 28th May of 2009, the Mexican statute that regulates public contracts establishes the possibility of resorting to arbitration to discuss the interpretation of clauses and the implementation of public contracts (12). Likewise, Costa Rica sets in its Procurement Law (13) that the controversies regarding public contracts can be solved through arbitration (14). Similarly, in 2004 the Bolivian government enacted the Supreme Decree No. 2738 that consented the use of arbitration to solve conflicts a propos the implementation of public contracts (15).

(1) However, if those infra-constitutional norms do not enjoy constitutional nature, it does not mean that they are not *conformed* to the Constitutional system as a whole. For instance, after a debate among scholars, in 2001 the Federal Supreme Court of Brazil declared the constitutionality of the general arbitration law No. 9.307 of 1996.

(2) Constitution of the Argentinean Nation, 1994.

(3) Political Constitution of the State of Bolivia of 2004.

(4) Constitution of the Federal Republic of Brazil of 1988.

(5) Political Constitution of the Republic of Chile of 1980.

(6) Political Constitution of the Republic of Costa Rica of 1949.

(7) Political Constitution of the Republic of Guatemala of 1985.

(8) Political Constitution of the United States of Mexico of 1917.

(9) Political Constitution of Nicaragua of 1987.

(10) Constitution of the Dominican Republic of 2002.

(11) This is the case of Guatemala and Argentina. In Argentina, the dispute must be over matters of economic content and susceptible to private settlement in order to be arbitrable (WALD and KALICKI, 2009 : 560).

(12) However, the law excluded from the scope of arbitration the analysis of eventual administrative cancelation and anticipated termination (Art. 98 of the Law of Public Work and related Services of 2000).

(13) This law was revised by the Executive Decree 33411 of 27th September of 2006.

(14) Art. 61 of the Law 7494 of 2nd May of 1995.

(15) Art. 56 of the Supreme Decree 27328 of 2004 – Purchases of Public Goods, Works, General Services and Consulting.

Nonetheless, once again one should note the significant role the courts have played in pushing the use of arbitration in public contracts even before the enactment of specific statutes on the matter. The Brazilian case is illustrative. In addition to the case Lage (1) discussed above, which inaugurated the possibility of the Administration submitting to arbitration, we have witnessed further commitment of the Brazilian courts towards arbitration on public affairs (2). However, a reticent behaviour could still be felt vis-à-vis the confirmation of state entities as parties in arbitration. This confirmation (3) was done by the case law COPEL and by the fact that the possibility of using arbitration in contracts of Public-Private Partnerships and of Concessions became legally recognized in 2004 (4) and 2005 (5). In 2003, the Energy Company of State of Parana (COPEL) tried to cancel the arbitration clause by arguing its quality of public entity before a national judge (6).

Even though the national judge suspended the arbitral clause, the attempt failed to pursue in this sense before the International Court of Commerce (ICC). The ICC confirmed its jurisdiction by arguing that state entities can play a role of a private institution according to the Brazilian Constitution and, therefore, may submit to arbitration (7). Following this logic, in an affair of 2008 the Superior Court of Justice of Brazil awarded the special appeal made by Petrobras (8) in favour of the arbitration agreement passed in a public contract. The affair involved three parties : (*i*) Tractel Energia S/A, (*ii*) Petroleo Brasileiro S/A, which produced the gas, and

(1) See section I (A).

(2) (i) Case *CAESB vs. Seveng Civilsan and Construtora Andrade Gutierrez. Wirt of Mandamus*, No. 1998/002003066-9 TJDF, 18 May 1999, Published *in Revista de Direito Bancário e Mercado de Capitais e Arbitragem* (RDBA 8/359); (*ii*) Case *CEEE vs. AES*, Published *in Revista de Direito Bancário e de Mercado de Capitais e de Arbitragem* (*RDBA* 18/389) and (*iii*) Case *Nuclebras Equipamentos Pesasos S/A (Nuclep) vs. Terminal Multimodal de Coroa Grande* (*TMC*) – SPE – S/A. Writ of Mandamus 11308 DF 2005/0212763-0 STJ, published in the *Official journal* on the 14 August of 2006, p. 251.

(3) We add that at the end of the 1990s the laws that created regulatory agencies (the Law of the National Agency of Oil of 1997 and the statute of the National Agency of Telecommunications of 1999) also prescribed the use of alternative modes of dispute resolution. Nonetheless, these provisions were not enough to consolidate a large acceptation of the issue by Brazilian courts.

(4) Art. 11, III of the Law of Public-Private Partnerships No. 11.079 of 2004.

(5) The Law 11.196 of 2005 added the art. 23-A to the Law of Concessions No. 8987 of 1995

(6) Tribunal of Justice of the Federal State of Parana.

(7) To consult more details of the decision, see (2007), *Revista de Arbitragem e Mediação*, No. 11, p. 257.

(8) Petrobras is a public oil enterprise in Brazil.

(*iii*) MSGaz, which distributed the gas. Tractebel demanded the continuation of the contract before a national judge, whose positive pronouncement was ratified by the Court of Appeal of the State of Mato Grosso do Sul, instead of resorting to an arbitration tribunal. Subsequently, Petrobras issued a "special appeal" to the Superior Court of Justice in order to claim for the respect of the arbitration agreement and obtained a positive award. This evolution towards the compliance with arbitration shows that public entities themselves (as it was the case for Petrobras) have pursued and legitimized arbitration, instead of arguing the subjective incapacity of the State to take part in public arbitration. In this sense, the culture of arbitration has been consolidated in spite of the sphere (public or private) in which it is considered.

Nonetheless, one cannot fail to detect the puzzled, or even contradictory, role Brazil has played. If Brazil is the Latin American country that has mostly used arbitration and the fourth one on the global ranking (BRAGHETTA, 2010), diplomatic instruments still enjoy a major leverage to solve disputes. Firstly, neither has Brazil signed the International Centre for Settlement of Investments Disputes (ICSID) convention, nor bilateral conventions on investments. Thanks to its increasing powerful economy, Brazil keeps its quality of attractive country to invest (WHITSITT and VIS-DUNBAR, 2008), without providing a standard of procedure vis-à-vis dispute resolution. By refusing to sign the ICSID convention, Brazil announces an *ad hoc* treatment of the cases and prevents Brazilian investors from having certitude of protection when they invest abroad. Given the rising of the number of Brazilian investors all over the world, it appears that the Brazilian adhesion to the ICSID will probably be soon revisited.

Secondly, the international arbitration of public contracts within the region may be affected by the role of regional leader Brazil has assumed. The conflict we have witnessed between an Ecuadorian state-owned enterprise (HYDRO PASTAZA (1)) and the Brazilian private enterprise Odebrecht demonstrated that the issue went beyond legal considerations and provoked political reactions. The Ecuado-

(1) Hydro Pastaza was a joint venture with the following participation: 14 % of Odebrecht (Brazilian private enterprise), 80 % of Hidroagoyán (which belongs to an Ecuadorian public entity – "El Fondo Solidaridad") and 6 % of Alstom-Va Tech. This information is available at http ://www.eluniverso.com/2008/10/17/0001/9/2E85BA49A5C84E908F12CF87A8DD5814.html.

rian government challenged the conditions of the loan given by the National Brazilian Bank of Social and Economic Development (BNDES) to finance the project of construction of the hydroelectric San Francisco in Ecuador. Ecuador filled an international lawsuit by alleging that the terms of the contract were unlawful and claiming irregularities of the implementation of the contract by Odebrecht. This lawsuit caused the recall of the Brazilian ambassador in Ecuador (1), since the commitment to such a loan was part of a communitarian policy towards the regional integration (2). Finally, the BNDES did not claim its incapacity to participate to arbitration, which shows a consolidation of the institute among Brazilian public entities, but the political reaction concerning the lawsuit would question the position of the country on the matter.

II. – Restrictions to Arbitration

Although the large extent of legislative reforms at the domestic level in Latin American countries, which brought about explicit possibilities of arbitration in public contracts, there are important restrictions that narrow down this dynamic. In this section will assess the fact that the statutes, and sometimes the Constitutions, rule out arbitration to certain contracts or certain fields that comprise the prerogatives of public authorities. Accordingly, we will verify that in such cases domestic judges enjoy the power of cancelling decisions that derive from arbitration.

A. – *Restrictions to Contracts and to Contractual Prerogatives*

The recent Latin American Constitutions have noticeably promoted the alternative settlement of dispute resolution. The problems of justice, which are linked to the lack of efficiency and to the obstruction of the courts, incited the search for others more direct

(1) After the payment of the debt in December, the ambassador went back to Ecuador and the BNDES envisaged the possibility of financing other projects in the country once the disputes will be solved. http ://www.bicusa.org/es/Article.aspx ?id = 11036

(2) There is an Agreement on Reciprocal Payments and Credits (CCR), under the Latin American Integration Association (ALADI), between twelve central banks. The goals of this agreement are (*i*) to encourage the financial relations of the signatory countries, (*ii*) to facilitate the expansion of the reciprocal commerce and (*iii*) systematize the mutual consults in monetary issues. In order to see the text of the agreement, see http ://www.aladi.org/NSFALADI/CONVENIO.NSF/conveniopagosingles.

ways of dispute resolution. The Constitutions provide several illustrative examples towards a participative and direct justice. The creation of "juizes de paz", who are elected through a universal suffrage and the promotion of alternative mechanisms, such as mediation, conciliation and arbitration, are established by the Ecuadorian (art. 191), the Colombian (art. 116), the Salvadorian (art. 23), the Honduran (art. 15 and 110), the Paraguayan (art. 248), the Peruvian (art. 62), the Uruguayan (art. 57) and the Venezuelan (art. 258) Constitutions.

As we have mentioned above (1), the reluctance regarding arbitration used to derive from the strict conception of the principle of legality, which would demand an explicit legal authorization to include an arbitration clause in public contracts. That reluctance has been actually replaced by specific stimulus to include such a clause, which has been done by the Concessions and Private Investments statutes (Venezuela (2), Uruguay (3), Ecuador (4)) or by the Arbitration law (El Salvador (5), Bolivia (6), Honduras (7)). The authorization has been also frequently ascribed by the Public Contracts laws (Ecuador (8), Costa Rica (9), Colombia (10), Paraguay (11), Bolivia (12), Guatemala (13) and Honduras (14)). It is also possible that a general law about Public Administration (Costa Rica (15)) inserts a specific mention by authorizing public bodies to include an arbitration clause in their contracts.

Nonetheless, the contracts that include arbitration clauses may be subjected to a special control. This is the case for Venezuela, where it is required a beforehand scrutiny provided by the Public

(1) See the section I – A (1).

(2) Art. 61 of the Decree-law about the promotion of private investments under the concessions regime of 1999.

(3) Art. 25 of the Law 16906.

(4) Law of promotion and insure of investments of 1997.

(5) Art. 25 of the Law of Mediation, Conciliation and Arbitration – Decree 914 of 2000.

(6) Art. 4 of the Law of Arbitration and Conciliation 1770 of 1997.

(7) Law of Conciliation and Arbitration and art 31 of the Decree 161-2000.

(8) Art. 104 of the Organic Law of the National System of Public Contracts of 2008.

(9) Art. 211 of the Law 7494, updated in 2006 (Law 8511).

(10) Art. 70 of the Law 80 of 1993, General Statute of Contracts in Public Administration.

(11) Art. 161 of the Law of Purchases and Contracts in the Public Administration and art 161 of the Decree 868 of 2000.

(12) Art. 56 of the Supreme Decree 27328 of 2004, Contracts of Goods, Work and General Services of Consultancy.

(13) Art. 103 of the Law of Contracts of the State 57 of 1992.

(14) Art. 129 of the Law of Contracts of the State 74 of 1001.

(15) Art. 27 of the General Law of Public Administration, on the 28 April of 1978.

Ministry (1). Likewise, in order to establish an international arbitration clause, it is also necessary to obtain an authorization of the regulatory authority (2). Other significant limits can be noticed, some of them at the constitutional level and others that derive from the general rule that restricts arbitration to the rights the parties can dispose of.

1. *Constitutional Restrictions*

In Venezuela, the Constitution of 1999 excludes the application of arbitration to the contracts qualified as of "public interest". The disputes derived from those contracts must be settled either directly or by the Republican tribunals (art. 151). This immunity of jurisdiction is restricted to those particular contracts, but the qualification of "public interest" does not have a concrete definition : it is about the contracts that comprise a strategic interest given their importance, their timing, or, broadly speaking, their strategic interest in the country.

In a judgment of the 17th August of 1999, the Supreme Court of Justice considered that the associative contracts were qualified as of *public* interest because of its administrative character (3). In 2002 the case law decided that they were contracts subscribed by public authorities, whose subject is decisive or essential to accomplish the goals of the Venezuelan State. The idea is to fulfil national interests through contracts whose obligations are paid during more than one fiscal exercise (4), beyond the individual interests of the public authority that is the contractor. Therefore, the Administration must analyse the specific circumstances to determine the public interest of the contract, as well as the convenience of arbitration to the collective interests. In 2004, the Supreme Court qualified a concession of mine as of national public interest because its subject was *"decisive or essential to accomplish the goals and the tasks of the Venezuelan State to satisfy the individual interests and those of the national community"* (5). Likewise, in 2006 the Court refuted arbi-

(1) Art. 12 and 13 of the Organic Law of the General Republic Attorney.
(2) Art. 42 of the Law of Arbitration and Mediation of 1997.
(3) T.S.J. Ass., decision of the 17th August 1999, case *Simón Muñoz Armas*.
(4) T.S.J. sec. Constitutional, decision of the 24th September 2002, case *Andrés Velásquez*.
(5) T.S.J. sec. Administrative Policy, decision of the 14th July 2004, case *Minera Las Cristinas c.a.*

tration in a contract concluded by the Venezuelan Autonomous Company of Television because of its public financing, the payment of its costs in several fiscal years, its qualification as of administrative contract and its precise and essential subject to accomplish the goals of the State (1).

Therefore, the criteria to qualify those contracts are not very conclusive, especially because the Constitution does not systematically exclude arbitration clauses from those contracts. The *immunity of jurisdiction* is thus relative, as it is required on the basis of *the nature of the contract of public interest* (art. 151). Consequently, the Public Ministry (*"Procuradoría General"*) can consider that the arbitration compromise is possible, as it has been conceded regarding a foreign public loan (2) or for the contracts that do not undermine the security of the Republic or of the domestic sovereignty. However, the wide application of this criterion allowed the Public Ministry to consider that a loan to purchase missiles should not be submitted to the Arbitration Tribunals (3). Concerning the Supreme Court, it considered that not only could the trade contracts include the arbitration clause, but also those of public character, in which the clause would be convenient given *the circumstances of their negotiations* (4). This is the reason for why we consider that it would be convenient, for legal certainty matters, that the legislator determines what a contract of public interest is and when it must be only submitted to the national jurisdiction (5).

The second example of constitutional restrictions is Bolivia. The government of Evo Morales tried to impose general restrictions to the international arbitration since the country has been remarkably condemned by the awards delivered by the International Centre for Settlement of Investments Disputes (ICSID) related to investments, which are in particular politically delicate on the field of water. Nevertheless, the constitutional reform of 2006 limited this intention of general prohibition of international arbitration on the

(1) T.S.J, sec Administrative Policy, decision of the 4th April 2006, case *Electronica Industriale S.P.A. vs. Cia anónima venezolana de televisión C.A.*

(2) Recommendation of the 14th January of 1977 and 8th June 1984, and 14th March 2993 cited by Victor Raúl Díaz CHIRINO, "El mecanismo de arbitraje en la contratación pública", *in Ley de contrataciones públicas*, Dir. Allan R. BREWER-CARÍAS, 2e ed. Ed. Jurídica venezolana, Caracas 2009, p. 340.

(3) Recommendation of the 19th December 1996, *op. cit.*, p. 340.

(4) T.S.J. Ass., decision of the 17th August 1999, cited.

(5) Victor Raúl Díaz CHIRINO, *art. cit.*, p. 341.

field of hydrocarbon, although it is worthy to note that in 2007 Bolivia withdrew from the ICSID (1). To understand the scope of this restriction, we will cite the article 366 of the revised Constitution : "*Art. 366. All the foreign enterprises that execute activities on the subject matter of hydrocarbon on behalf of the State will submit to the State sovereignty and must comply with the law and the public authority. No foreign jurisdiction or tribunal will be recognized and it will not be possible to evoke an exceptional situation of international arbitration or resort to diplomatic claims.*"

The intention of Bolivia to integrate Mercosur, as long with the international dynamic that imposes arbitration to multilateral banks, might have warned the constituents of 2009 to not definitely close the door to arbitration. Indeed, the international context is so important that the government enacted a decree to authorize international arbitration to the public oil company Bolivian Fiscal Oilfield (YPFB). As the government had nationalized the exploration of oil and gas industries in 2006, this recent measure was very significant. The supreme decree 0224/09 allows the enterprise to contract by mutual agreement the works, the supply of goods and special services when they are not available in the domestic market or, by and large, when this modality of procurement comprises a great economic beneficial effect to the enterprise. The extent of the measure entails doubts about its constitutionality (2) and restricts the purpose of the constitutional reformers. Nevertheless, apart from the oil field, national and international arbitration is frequent and important on the matter of public work procurement.

2. *Material Criterion as Restriction to Arbitration*

The statutes establish a material criterion to arbitration : only litigations that can be submitted to transaction can be solved through arbitration. This criterion is explicitly prescribed in Argentina (3), Bolivia (4), Colombia (5), Costa Rica (6), Ecuador (7), El Salva-

(1) In 2009, Ecuador also withdrew from the Centre.

(2) José Mario SERRATE PAZ R., "El Estado y los arbitrajes del 2009", *Rev. Cash*, No. 85, 2009, p. 55.

(3) DROMI, Roberto (1987), *Manual de Derecho Administrativo*, Astrea, Buenos Aires, Volume I, p. 329.

(4) Art. 3 of the Law of Arbitration and Conciliation 1770 of 1997.

(5) Art. 115 of the Decree 1818 of 1998, Statute of alternative modes of dispute resolution.

(6) Art. 211 of the Law 7494.

(7) Art. 1 of the Law of Arbitration and Mediation of 1997.

dor (1), Paraguay (2), Honduras (3), Uruguay (4) and Venezuela (5) and implies restrictions to arbitration of public contracts. These restrictions are specially related to public prerogatives or other sorts of administrative controls that are frequently utilised on those contracts, as well as the definition of the extent of the public order.

(i) *Prerogative of Public Power as a non-Arbitrable Subject*

Several statutes establish the impossibility of using arbitration on the matters related to prerogatives of public power. Even though that restriction is barely applied in concrete cases, the fact that it is a very general assumption may increase the level of intervention of the judge (6) to exclude certain subjects from the scope of arbitration. In this sense, the Venezuelan arbitration law excluded the possibility of arbitration to the litigations *directly concerning the attributions or functions of the State or legal persons submitted to public law* (art. 3b). This restriction, which would be applied strictly to the prerogatives of public power, has been broadened by the doctrine to the functions of the Public Administration. The idea is to directly satisfy the public needs (7), which would refer to the public service in general. In Bolivia, the arbitration and conciliation law of 1997 rules out the possibility of arbitration to "*the questions concerning the functions of the Public Administration when it acts as a person of public law*" (art. 6.4). Since it is a general legal provision, this article could allow an extensive interpretation in order to be applied to a large part of administrative functions.

However, nowadays the restriction has been interpreted in a strict way, which means that it essentially comprises the administrative acts through which the Administration makes unilateral decisions. For instance, if the acts constitute administrative regulations, there is no doubt because they are expressions of the Administration's authority. Nevertheless, the analysis becomes more com-

(1) Law of Mediation, Conciliation and Arbitration and art. 22 of the Decree 914 of 2000.
(2) Art. 2 of the Law of Arbitration and Mediation 1879 of 2002.
(3) Law of Conciliation and arbitration and art. 28 of the Decree 161 of 2000.
(4) Art. 476 of the General code of Procedure, law 15982.
(5) Law of Commercial Arbitration 36430 of 1998.
(6) The questions regarding this intervention of the judge (*"le juge d'annulation"*) will be further discussed below.
(7) RONDÓN DE SANSÓ, Hildegard (2001), "Ad Imis Fundamentis. Análisis de la Constitución Venezolana de 1999. Parte Orgánica y Sistemas", edited by *Ex Libris*, 5° Edition, Caracas, p. 116.

plex regarding the contractual acts, that is, the Administration's unilateral acts that will have effects on a contract. This unilateral act would either modify the content of a contract or cancel it because the co-contractor did not comply with his obligations and the public interest was not met.

The Venezuelan administrative judge decided that the unilateral termination of a contract could not be submitted to arbitration because *the possibility of declaring the nullity of administrative acts is a subject qualified by the Constitution and the laws as of exclusive competence of the jurisdictional organs* (1). Likewise, the Constitutional Court of Colombia excluded the possibility of arbitration to the contractual acts. The Court clarifies that after having enabled the particular individuals to delivery justice under the mechanisms of arbitration and conciliation, the Constitution largely ascribed to the legislator the specific development of these mechanisms, although it fixed important limits. As a result, the arbitrators can only administrate justice in a transitory way. The same, the arbitrators cannot totally replace the State's jurisdiction. Finally, there are limits regarding the subject of arbitration : the arbitrators cannot deliberate about the civil status of persons, the disputes involving the public order, the national sovereignty or the constitutional order. The Constitutional Court concludes therefore that the arbitrators are not able to deliberate about the legality of the administrative decisions because the Constitution attributes this competence to the administrative judge (2).

Even though the positive legal order is by and large against the possibility of applying arbitration to the contractual acts, there is a debate regarding the existence of the aforementioned constitutional restrictions. The restrictions to arbitration sound a legal, not a constitutional issue because Latin American Constitutions and legislations widely support the jurisdictional character of arbitration, as well as the legislative competence on the matter. The argument of both Constitutional Courts (the Venezuelan and the Colombian ones) relies on the constitutional attribution of the judgment of contractual acts to the administrative judge. Nonetheless, the alternative character of arbitration, if one compares it with the *nat-*

(1) T.S.J. sec. Administrative Policy, Judgement of 14th July of 2004, affair *Cia Minera Las Cristinas c.a.*

(2) C.C., Judgement C-1436/00 de 2000.

ural judges of dispute resolutions, is contrary to this reasoning. The impossibility of applying arbitration to contractual acts would therefore be a legal question, not a constitutional one. That is why some statutes, such as the Ecuadorian one, allow the use of arbitration to fines imposed by the Administration to the co-contractor (1) and, even implicitly, in the case of unilateral termination of contracts (2).

(ii) *Frequency of Administrative Decisions*

Even though the Administration does not utilize its contractual prerogatives (modification, termination and unilateral interpretation) very often, there are other types of acts that, without being qualified as contractual acts, require administrative decisions that may not submit to arbitration. Despite the high encouragement towards arbitration in Peru, which has even pushed the legislator to impose it to all public contracts (3), the contract law requires a notice of compliance of the General Audit Office ("*Contraloría General de la República*") for the complementary services that are 15 % above the original cost of the works or 25 % above the prices of goods and services. And yet, the legislative text forbids the use of arbitration to this notice as well as to the implementation of additional services when the cost is above those percentages (4), which would prohibit arbitration to the extra-contractual services, despite the existence of the notice of the General Audit Office.

In Colombia, in addition to the exorbitant clauses that are explicitly qualified by the law (cancelation-sanction, cancelation for the public interest and unilateral modification and interpretation – L-80/93, art. 14), other measures adopted through administrative acts, whose use is very often, could not be submitted to arbitration. To illustrate this point, one could cite (*i*) the fines imposed to the co-contractor due to delays to implement the services and (*ii*) the power ascribed by the law to the Administration of declaring the non-fulfilment of the contract or of the decade warrant for vices of

(1) Art. 71 of the Contract Law of 2008.

(2) Art. 94 of the Contract Law of 2008 : "*The judgment of unilateral termination will not be suspended by claims or administrative appeals, administrative contentious or arbitration lawsuits, or any other type of request by the co-contractor.*"

(3) Art. 53.2 of the Contract and Purchasing law of the Peruvian State of 2001.

(4) *Idem*, Art. 41.

the works. In these cases, the Administration enjoys the privilege of demanding, through administrative acts, directly to the assurance company the assurance policy. The final act of the contract termination is equally important. The public contract law establishes that the contractors must sign a final act of the contract in order to elaborate the financial balance of its implementation. However, if the parties do not meet an agreement, the Administration can impose the liquidation of the contract through administrative acts (L-80/93, art. 61).

Those distinct manifestations of contractual acts restrict arbitration in two senses. On the one hand, the constitutional (1) and administrative (2) case law considers that the arbitrators cannot decide about the legality of administrative acts. On the other hand, the restriction fosters the Administration to issue contractual acts in order to prevent the possibility of arbitration. This was the case in a "*sentencia de amparo*" of the Constitutional Court, which considered valid the arbitration despite the administrative act of unilateral liquidation of contract because this act was issued after the co-contractor having launched the arbitration procedure (3).

B. – *Scope of Judicial Review of Arbitration Awards*

Several Latin American systems restrict the cancelation of arbitration sentences to the vices of procedure. Hence, the statutes reject the possibility of revising the content of the decisions, which is a material issue reserved to arbitrators. This universally recognized principle has been reinforced in Latin America because arbitration enjoys jurisdictional status, which is either established by the Constitution itself or by the law. The Peruvian Constitution of 1993 explicitly recognizes the *arbitration jurisdiction* (art. 139) and the Colombian one of 1991 establishes that *arbitrators are temporarily invested in the function of administrating the justice* (art. 116). The jurisdictional recognition entails an enforcement of arbitration because it enables the direct implementation of arbitral sentences, without the need for exequatur. In addition to that, several coun-

(1) C.C., Judgement C-1436/00, cited.
(2) C.E., sec. III, Judgement of 4th July of 2004, affair 19333.
(3) C.C., Assembly (Plenary Session). Auto A-100/06 of 22nd March of 2006.

tries, such as Ecuador (1), El Salvador (2), Venezuela (3) and Nicaragua (4) allow the direct execution of international arbitration awards.

1. *Control of Arbitration Awards as a Jurisdictional Act*

Nevertheless, the same argument of reinforcement of arbitration constitutes a source of restrictions. The jurisdictional character of arbitral awards implies their strict submission to the domestic legal order, especially to the Constitution and to the protection of fundamental rights. In several Latin American countries, fundamental rights are protected by a summary procedure (appeal of *amparo* or of *tutela*), which enables the judge to pass a large amount of transitory measures, such as constraints to the Administration, in order to interrupt the violation of a fundamental right or to avoid its imminent violation.

Following this reasoning, the Supreme Court of Justice of Venezuela considered that an arbitration tribunal of the International Chamber of Commerce exerted jurisdiction, even if such a tribunal is not part of the country's jurisdictional organization. Since the arbitration tribunal was recognized as able to exert jurisdiction, its arbitration award was a matter of issue to an *amparo* appeal in order to assess the respect of fundamental rights (5).

Moreover, whereas several arbitration statutes adopt a favourable criteria regarding international arbitration, by following very often the ICSID model (Bolivia (6), Chile (7), El Salvador (8), Guatemala (9), Honduras (10), Mexico (11), Nicaragua (12), Panama (13), Peru (14)), the Constitutional Court of Colombia consid-

(1) Art. 42 of the Arbitration and Mediation Law of 1997.
(2) Art. 72 and 77 of the Mediation, Conciliation and Arbitration Law of 2000.
(3) Art. 48 of the Commercial Arbitration Law 36430 of 1998.
(4) Art. 62 of the Mediation and Arbitration Law 540 of 2005.
(5) T.S.J. Sec. Constitutional, Judgement of 16th October of 2001, affair "*Cia anónima venezolana de television*".
(6) Art. 71 of the Decree 1770 of 1997.
(7) Art. 1 of the Trade International Arbitration Law 19971 of 2004.
(8) Art. 3 of the Mediation, Conciliation and Arbitration Legislative Decree 914 of 2002.
(9) Arbitration Law and art 2 of the Decree 67 of 1995.
(10) Conciliation and Arbitration Law and art 86 and 87 of the Decree 161-2000.
(11) Art. 1416 of the Commercial Code.
(12) Art. 22 of the Mediation and Arbitration Law 540 de 2005.
(13) Art. 5 of the Law 5 of 1999.
(14) Arbitration Law and art 5 of the Legislative Decree 1071 of 2008.

ered that this would only be the case through the verification of international elements related to trade. By permitting the contractors to choose international arbitration on the basis of its exclusive will, without requiring the existence of neither subjective conditions (foreign domicile of one of the contractors) nor material ones (economic account), would bring about the possibility of establishing international arbitration in a contract concluded by national individuals or companies without implications in the international trade, which would be a violation of the principle of the equality of citizens before the law (1).

In the same sense, the extensive use of arbitration in Argentina becomes a source of its restriction, which is verified by internal judicial control. The jurisdictional character of arbitrators' competence enables them to pronounce about the constitutional validity of a norm that is applied to the case under judgement (2). This widespread constitutional control, which follows the United States' model, is often in Latin America (3). However, in the case of arbitration, recognizing the full jurisdiction of arbitrators implies to enable them to decide about the constitutionality of the norm that will be applied in the concrete case.

Nevertheless, the jurisdictional character of arbitration awards also allows their control through the *extraordinary appeal of arbitrariness (recurso extraordinario de arbitrariedad)*. The Supreme Court of Justice of Argentina created such an appeal in order to review the sentences enacted by a superior court when they do not constitute *a reasonable derivation of the law in force*. After all, in this case the sentence violates the Constitution. This appeal against an arbitrary sentence has been extended to arbitration awards (4).

(1) C.C. Judgement C-347/97 of the article 1.3 of the international arbitration law 315 of 1996.

(2) Tribunal of General Arbitration of the Stock Exchange of Buenos Aires, Decision of the Director of Procedure (steady), 5/11/2002, *IGT Argentina S.A. c. Trilenium S.A.* and others without restitution of patrimony, ED, 7th of March of 2003. Ratified competence by the jurisdiction : 1st Commercial Instance of the Federal Capital, Judgement No. 10, "Otondo, *César Alberto c. Cortina Beruatto SA* and other without summary", 17.3.03; confirmed by the CN Com., room E, 11.6.03, with a favourable enactment for the arbitration competence of the Fiscal Chamber, LL 2003-F-744; JA 2003-IV-73.

(3) Bolivia, Colombia, El Salvador, Guatemala and Peru. There would also be the possibility of extraordinary appeal against unconstitutionality, which would allow the control in concrete cases by the highest judicial body, as it happens in Argentina, Costa Rica, Brazil, Mexico, Nicaragua and Venezuela.

(4) *Comparative Law Journal*, No. 11, 2005, Buenos Aires, *Rubinzal Culzoni* edited by, pp. 157-186.

The traditional case law of the Supreme Court used to consider that the evaluation of the facts and the application of the law, which is ascribed to the arbitrators due to the will of the parties, would mean that the parties had renounced to the appeal (1). If the parties have renounced to the State jurisdiction, it would imply that they also have done so before the extraordinary appeals. However, in 2004 the Court decided that "*in the arbitration commitment, the clause that prevents the possibility of appealing against an arbitration award should be restrictively interpreted when it is related to the public interest – arts. 872 and 874 of C.C. – and not being possible when an arbitration award violates the public order because it is unconstitutional, illegal or unreasonable, since it is not logic to foresee, while the parties are formulating the renounce, that the arbitrators would adopt a decision that entails such vices...*" (2).

The judicial power is then significant and the doctrine highlights how arbitrary the Court considered the way of balancing the interest and the costs of public works, which used to permit arbitrators to promote exorbitant and not proportional solutions (3). *The reasonable deviation of the law in force* does not seem to be flagrant and it is hard to differentiate it from the revision of the content itself.

2. *Enlargement of the Control of "Arbitration in Equity"*

The protection of constitutional rights, which motivates the extension of the Argentinean appeal against arbitrariness, enjoys a variant in the Colombian case law by enlarging the qualification of arbitration in equity. As well as the majority of legislations (4), the Colombian one only admits arbitration in law (*ex lege)* on the matter of public contracts, which explains that one of the causes of cancellation of arbitration sentences is exactly the fact of having enacted it on the basis of arbitration in

(1) C.S.J.N. in the affair "C.S.N. 5.11.02 Meller Comunicaciones S.A. UTE C/ENTEL", LL 2003-B-906.

(2) C.S.J.N. sent. On the 1st June of 2004, *José Cartellone Construcciones Civiles S.A. c. Hidroeléctrica Norpatagónica o Hidronor S.A.*, LL 2004-E-266.

(3) Adriana APREA, Flavia BELMONTE, Maria Eugenia CAFIERO, Sabrina KOPEL, Silvia MADRAZO, *Arbitraje*. Article on the 3rd October of 2008; http ://flaviabelmonte.blogspot.com/2008/10/arbitraje.html.

(4) To consult information about the innovations regarding the type of arbitration in Chile, see the section I – A (2).

equity (1). The arbitration in equity is frequently pointed out in order to motivate an eventual revision of the content of the awards. However, the State Council has repeatedly refuted such a motivation, by reminding that the appeal is only possible to demonstrate procedural flaws of the awards (2). Consequently, the judge of extraordinary instance cannot cancel awards for the improper application of law by the arbitrators, unless they did not motivate their decisions by the legal order.

In the judgement in equity the arbitrators decide according to their loyal knowledge and understanding. The State Council explains that "*the decisions of such a nature are adopted in spite of legal rules, without making any legal reasoning and, as it has been specified by the Room, they have been only supported by 'the criteria of justice inside of the judge' or 'in its deep down conviction'. That is, it is about decisions that are based on 'the judge's heart of hearts', without any normative justification*" (3). Thereby, "*when an award that is supposed to be in law ostensibly overlooks the legal order to simply base on equity, this award can become similar to a decision in all conscience*" (4). Likewise, a wrong evaluation of the proofs does not constitute a judgement in equity (5). The decision, at the end of the day, must constitute an administrative trespass ("voie de fait").

Nonetheless, the consolidation of this conception achieves a further analysis in State Council. The State Council has considered that the freedom of analysis that the arbitrator enjoys regarding the proofs, which is under the rules of sound judgement, does not allow him to evaluate them *according to his simply conscience* because otherwise the awards would not be enacted in law (6). This control over the lack of legal motivation is intensified in certain cases, when the State Council considers that the judgement in law demands not only the appointment of a legal norm, a doctrine or a

(1) "*Art. 163 – The causes of cancellation of the award are the following: [...]*
6. Having decided in equity instead of in law, when this circumstance is manifestly showed in the award".

(2) C.E. sec. III, sent. On 4th July of 2004, exp. 22012; on the 11th September of 1999, exp.: 10.416; 24th October of 1996, exp.: 11.632; on the 12th November of 1993, exp.: 7809; 15 May of 1992, exp: 5326; 24th of May of 1991, exp.: 5669; 28th of May of 1987, exp.: 4768.

(3) C.E. sec. III, sent. On the 19th August of 2009 (exp. 36534) and on the 7 June of 2007 (exp. 32.896).

(4) C.E. sec. III, sent. On the 4th July of 2004, cit.

(5) C.E. sec. III, sent. On the 7 November of 2002 (exp. 2194).

(6) C.E. sec. III, sent. On the 19th August of 2009 (exp. 36534).

jurisprudence, but also that *they are related to the decision and coherent to the affair* (1). The State Council has recently cancelled an award after having thoroughly analysed the proof material examined by the arbitrators, by concluding that the decision was based on a wrong qualification of the components of the remuneration of the concessionary and neglecting the added-value of an expert proof. The fact that the judgement qualifies the sentence as one in equity, *given the lack of contractual fundaments or evidences*, enlarges the scope of the appeal of cancelation (2). In fact, the judge analyses the correct evaluation of the proofs made by arbitrators, which corresponds more to an instance appeal or an annulment appeal.

Constitutional reasons also restrict the scope of arbitration through complementary ways. In Venezuela, the Constitutional Room of the Supreme Court affirmed that the Constitution (art. 258) permitted the ICSID arbitration, provided that the respective contract explicitly establishes it as an expression of the State's right of selecting the most convenient procedure to its interests (3). The Court therefore adds a special requirement to those arbitrations, whose general application to all situations of investment is based on an international treaty and not on the parties' willingness. In a similar sense, the doctrine has considered that the obligation to resort to arbitration, which was imposed by the Peruvian public contracts law of 2008, would not be according to the Constitution because the parties would be constrained by an institute that is supposed to be based on its contractual freedom. Victor Baca reminds us that this reasoning was supported in a sentence of the Constitutional Court of Spain, which considered the legal provision regarding land transportation (Art. 38.2 of the Law 16 of 1987) unconstitutional because it presumed an arbitration clause as part of the contract. The arbitration clause was *presumed* because the contracts were usually *of adhesion*, which means that the clauses are seldom refuted (4).

The several observations mentioned demonstrate that the dynamic of enlargement of arbitration concerning public contracts

(1) C.E. sec. III, sent. On the 22 July of 2009 (exp. 35564).
(2) C.E. sec. III, sent. On the 13 May of 2009 (ex. 34525).
(3) T.S.C., sentencia 08-0763 de 17 de octubre de 2008.
(4) Victor Sebastián BACA ONETO, *"Los medios 'alternativos' de solución de conflictos en el derecho administrativo peruano (en especial, análisis de la transacción y el arbitraje en la ley de contratos y adquisiciones del Estado"*, *in Rev. Lima arbitration*, Circulo peruano de Arbitraje, No. 1, 2006, pg. 232.

is a reality in Latin America. The restructuring of the Public Administration and its role in strongly liberalized economies during the 1990s intended to use arbitration as a mechanism to attract private capital to the projects of infrastructure and, broadly speaking, the participation of the private sector in the management of public activities. This common dynamic can be noted in the spread of public contract laws that envisage arbitration and the influence of the ICSID's model arbitration, as well as in the consolidation of the alternative settlement of conflicts, which was encouraged by several Constitutions. On the other hand, this common trend does not entail an identical treatment in all countries. Particularities emerge in the different legislations and the national judges impose special dynamics regarding the practice of arbitration, which frequently represents significant restrictions.

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