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Recent Developments In Key Latin American Jurisdictions To Attract International Commercial Arbitration

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INTRODUCTION

Although there is a long tradition of using arbitration to resolve commercial disputes in Latin America, in recent years, most Latin American jurisdictions have revised or amended their national arbitration laws to make their jurisdictions even friendlier toward and supportive of arbitration as a method of alternative dispute settlement. This trend suggests that Latin American jurisdictions are even more committed to using arbitration to resolve commercial disputes, especially given the

* Partner, King & Spalding. This Article draws upon remarks made by Henry (Harry) G. Burnett at the Third Symposium on International Commercial Arbitration, which took place at American University Washington College of Law in Washington, D.C. on November 17, 2015. The specific panel on which he participated focused on developments in international commercial arbitration in Latin America. Mr. Burnett made four main observations, which are discussed below. Mr. Burnett would like to thank his colleagues Viren Mascarenhas and Alberto Madero for the invaluable assistance in putting together both the presentation and this Article.
backlog of cases being litigated in the national courts.

Second, it is insufficient to look at the arbitration laws as they are written in the books to assess whether a jurisdiction is supportive of arbitration. When advising a client about seating an arbitration, in a particular Latin American jurisdiction, one must assess the attitude of the judiciary to determine the level of respect given to the arbitral process and the degree of judicial involvement (or interference) with the arbitral process. In this regard, a review of recent case law reveals that there is generally healthy support on the part of national judiciaries toward arbitration.

Third, there is a proliferation and flourishing of arbitration institutions throughout Latin America. This may be regarded as a sign that the business and legal communities believe that arbitration will be used more frequently to resolve commercial disputes. However, it is insufficient to simply look at the number of arbitral institutions in a particular jurisdiction to assess its local arbitration culture. Rather, one must be more sophisticated in assessing the relevance and use of the various institutions, which can be accomplished by examining their institutional rules and practices; reviewing their caseloads, including the types of disputes they hear and examining the identities of the parties in those cases to determine whether the institution deals primarily with domestic, regional, or international disputes.

Fourth, the use of mediation is in its relative infancy compared to the use of arbitration as a mechanism for alternative dispute resolution. However, it is likely that, over the course of the twenty-first century, mediation will become a more popular form of alternative dispute resolution in Latin America. In part, this move toward mediation will be driven by costs, as international arbitration and litigation practices are becoming increasingly expensive. Accordingly, it is likely that parties will turn to mediation in an attempt to reach a compromise before continuing down the path of binding dispute settlement (whether before a court or an arbitral tribunal). In some cases, legislation in various jurisdictions (for example, Brazil) will require the parties to engage in good faith mediation in complex commercial cases before proceeding to litigation. Thus, it is likely that we will see more recourse to mediation in Latin America than has previously been witnessed.

II. Arbitration Laws in Latin America: Overhaul and Fine-Tuning of Prior Legislation

Arbitration is by no means a new method of dispute resolution in Latin America. Indeed, the use of arbitration to resolve a wide range of disputes, both inter-state and private commercial disputes, dates back centuries in some Latin American jurisdictions. Nevertheless, it was not until the twentieth century that arbitration became codified in the national
legislations of most Latin American jurisdictions as a viable mechanism to resolve commercial disputes. In particular, the market–oriented reforms witnessed in a number of Latin American jurisdictions in the last quarter of the twentieth century brought an increased focus on improving the use and availability of arbitration to resolve commercial disputes. During this period of reform, many Latin American jurisdictions signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) and promulgated national arbitration laws that were based in large part on the UNCITRAL Model Law on International Commercial Arbitration of 1985. Thus, the stage was set for arbitration to be used as an effective and popular form of dispute settlement, especially given the judicial backlog prevalent in many Latin American jurisdictions.

Latin American jurisdictions have spent the early years of the twenty-first century fine-tuning and improving their national arbitration laws. In particular, many jurisdictions have amended or revised their national laws in the last ten years to make sure that they are up-to-date and represent international best practices. Examples of jurisdictions that have made such changes to their national arbitration laws include Argentina (2015), Brazil (2015), Panama (2013), Colombia (2012), Costa Rica (2011), Ecuador (2009), Peru (2008), and Chile (2004). This is by no means a comprehensive list of Latin American jurisdictions that have revised or amended their national arbitration laws during the past ten years. However, this illustrative list demonstrates that improving or revising arbitration laws has been a recent focus of many jurisdictions in Latin America that are leading the way in the use of arbitration to resolve commercial disputes.

Of course, it is important to look at the specific changes that have been made in each country’s legislation. When advising a client on whether to seat an arbitration in a particular jurisdiction, or whether the laws of a country are arbitration-friendly, it would be improper and insufficient to generalize Latin America as an arbitration-friendly climate. Rather, it is important to get into the specifics and ask the right questions. For example, it would be prudent to inquire as to whether the recent revisions to the laws signify an overhaul or merely a fine-tuning of prior legislation. For example, in Brazil, Law 13.129/2015, enacted in July 2015, amended some of the provisions of the Brazil Arbitration Act that had been passed in 1996. This was the first change to the country’s arbitration regime in nineteen years. The arbitral community has generally regarded Brazil’s 1996 arbitration law as a relative success, but the Brazilian legislature wished to make the arbitration law even more efficient. Accordingly, some fine-tuning was in order. The revised law contains an express provision authorizing arbitrators to issue partial arbitral awards, which courts may enforce. It had already become common practice to enforce a partial award
in Brazilian courts — the amendment simply codified this judicial practice to make it clear that courts may enforce partial awards, even if they are not final awards, and to prevent a party from raising an objection to such enforcement. The amendment also contains an express provision granting arbitrators the power to issue provisional remedies, a prevailing practice confirmed by the legislative amendment. Thus, it appears that the 2015 amendment to the 1996 Brazilian legislation falls more into the category of fine-tuning, rather than an overhaul, of the arbitration regime.

Similarly, the 2011 modifications to the Mexican Commercial Code provisions addressing arbitration also fall into the category of fine-tuning. Four main amendments were made in 2011. First, Articles 1464 and 1465 confirmed the arbitral tribunal’s authority to decide its own jurisdiction (the principle of *kompetenz-kompetenz*). Second, Article 1466 introduced a special summary procedure for courts to decide enforcement and set-aside applications. Third, Article 1478 confirmed existing practice that Mexican courts could issue interim measures in aid of arbitration. Fourth, Article 1479 provided that interim awards issued by arbitrators were judicially enforceable, and could be enforced using a fast-track procedure. As was the case with Brazil, the main focus of the amendments was to codify existing practice and make a strong domestic arbitral regime even stronger.

In other cases, there has been a more significant overhaul of prior national arbitration laws. For example, in July 2012, Colombia enacted a revised version of its arbitration statute in the adoption of Law 1563/2012. Law 1563 adopted a dualistic approach by providing separate legal regimes for domestic and international arbitration. The international arbitration chapter is based on the UNCITRAL Model Law on International Commercial Arbitration, including the amendments approved in 2006. However, minor changes were made in order to adapt the UNCITRAL Model Law to the Colombian legal tradition and to introduce certain innovations adopted in other jurisdictions, such as France and Belgium.

The detailed provisions of the new arbitration statute differ significantly from the preceding legal framework, Law 315/1996, which contained just five articles. When applying Law 315/1996, Colombian courts relied on local procedural rules to fill in the gaps and determined the degree to which they were willing to intervene in international arbitration proceedings. The new arbitration statute sought to end the local courts’ discretion to intervene in the arbitral process. Article 67 of Law 1563 expressly limits the intervention of local courts in international arbitration proceedings to those few instances where the arbitration statute expressly authorizes it, in compliance with the procedures codified in the statute (based on Article 5 of the UNCITRAL Model Law).

All of these new rules are modeled, to a great extent, on the UNCITRAL
Model Law: (i) appointment of arbitrators; (ii) grounds for challenge of an arbitrator; (iii) substitution of an arbitrator; (iv) enforcement of an arbitration agreement; (v) interim measures by a court before or during arbitral proceedings; (vi) authority of the arbitral tribunal to rule on its own jurisdiction; and (vii) other procedural rules.

The 2012 statute includes rules on a series of matters that were absent in the preceding arbitration statute. A major innovation of the 2012 arbitration statute is that it no longer allows courts to have recourse to local procedural rules as grounds upon which to deny recognition and enforcement of an award. The 2012 arbitration statute expressly provides that the New York Convention is the only legal instrument that governs enforcement and recognition proceedings of foreign arbitral awards. This was not always the case under the prior arbitral regime. In 1999, the Colombian Supreme Court relied previously on the grounds listed in Art. 694 of Colombia’s Civil Procedural Code to deny the recognition and enforcement of foreign arbitral awards, in addition to those grounds provided for in Article V of the New York Convention. Subsequently, in December 2011, the Colombian Supreme Court adopted a different position in *Drummond Ltda. v. Ferrovias en Liquidación and Ferrocarriles Nacionales de Colombia*. The court concluded for the first time that the *exequatur* of foreign arbitral awards should be analyzed only under the regime established in Article V of the New York Convention. This was a change from the Supreme Court’s prior jurisprudence, and this position was codified in the 2012 arbitration statute.

In sum, Colombia’s revisions to the existing arbitration law constitutes more of an “overhaul” than a “fine-tuning.” While overhauling a previously weaker body of law demonstrates commitment on the part of the jurisdiction towards arbitration, it also means that the new laws are relatively untested. It remains to be seen how the judiciary will respond to the overhauled laws. Only time will tell.

### III. ATTITUDE OF THE COURTS TOWARDS ARBITRATION

While legislative innovation is welcome to make arbitration more robust and effective, it is insufficient to simply scrutinize the law on the books. One must also assess how the courts apply those laws. A review of recent decisions from courts of various Latin American jurisdictions regarding the

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1. *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 12 mayo 2011, M: W. Vargas, Expediente 11001-0203-000-2011-00581-00 (Colom.); Corte Suprema de Justicia [C.S.J.] [Supreme Court], 1 marzo 1999, M.P: J. Ramirez Gomez, Expediente E-7474 (Colom.).

2. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 diciembre 2011, M.P: F. Gutierrez, Expediente 11001-0203-000-2008-01760-00 (Colom.).
arbitral process and recognition and enforcement of awards reveals a pro-arbitration trend. It is beyond the scope of this article to comprehensively review the recent decisions from all Latin American jurisdictions. However, the informal survey that has been conducted demonstrates sufficient evidence that the leading jurisdictions are in favor of the use of commercial arbitration as an alternative to courtroom litigation.

For example, recent decisions from the Chilean Courts interpreting Chilean Law No. 19971 (2004) show restraint on the part of the courts with interfering in the arbitral process. In these cases, the Chilean courts declined to annul an award when doing so would have improperly required the courts to scrutinize the merits of the award rendered by the arbitral tribunals. In the case *Ann Arbor Food S.A. v. Domino’s Pizza,* Ann Arbor Food S.A., the award debtor, sought to set aside an arbitral award rendered by an International Chamber of Commerce (ICC) arbitral tribunal on the basis that the award violated the public policy of Chile. The underlying dispute in the arbitral proceedings concerned the alleged breach by Ann Arbor Foods S.A. of a franchise agreement that granted it the exclusive right to exploit the Domino’s Pizza brand in specified areas of Chile. The ICC arbitral tribunal issued an award in favor of Domino’s Pizza. Ann Arbor Foods S.A. initiated set-aside proceedings before the Court of Appeals of Santiago. It claimed that the arbitral tribunal made substantive errors by enforcing allegedly punitive clauses of the franchise agreement that violated Chilean public order, including provisions of the Chilean Civil Code and Constitution.

The Court of Appeals rejected all of the claims. Of particular relevance, the court held that annulment is the only action allowed under Chile's Arbitration Statute – Law 19971 of 2004 – to set aside an award. Moreover, it cautioned that annulment may be initiated only in the limited circumstances set forth in Article 34 of Law 19971, which reproduces the grounds for denying recognition and enforcement of a foreign award specified in the New York Convention. The court also explained that not every alleged procedural deficiency in the arbitral process gives rise to a valid claim to annul an award. Against this background, the Court determined that Ann Arbor Foods’ arguments did not fall under any of the grounds to annul an award provided for in Law 19971. Rather, the arguments were styled more in the manner of seeking appellate review of a lower court’s decision, which the court declined to do.

The Court of Appeals of Santiago reaffirmed its non-interventionist approach regarding international arbitration in the case *Productos Naturales de la Sabana S.A. v. Corte Internacional de Arbitraje de la*

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An ICC arbitral tribunal ordered Productos Naturales de la Sabana S.A. ("Productos Naturales") to pay 50% of the claimant’s administrative fees and legal expenses. Thereafter, Productos Naturales sought partial annulment of the award on the basis of section 3.4(a)(iii) of Law 19971, alleging that the decision on allocation of costs dealt with a dispute not contemplated within the terms of the submission to arbitration. Specifically, the award debtor argued that the arbitral tribunal’s decision to allocate costs breached the arbitration agreement, which expressly provided that the parties would bear their own costs and legal expenses. Productos Naturales also argued that the arbitral tribunal erred when it reached the conclusion that the parties’ legal representatives modified the arbitration agreement when they requested the arbitral tribunal to order the other party to bear its costs.

The court rejected the argument advanced by the award debtor. The court concluded that the claimant and respondent both authorized the arbitral tribunal to rule on costs, having requested the arbitral tribunal in their written submission to order the opposing party to pay its costs. In particular, the court relied heavily on the fact that the Terms of Reference for the arbitration, agreed upon both parties, expressly included cost and expenses allocation as one of the issue that the arbitral tribunal would decide in the arbitration.

In addition, the court observed that, under Articles 4 and 16 of Law 19971, a party forfeits its right to challenge the arbitral tribunal’s authority if it fails to raise its objections during the arbitral proceeding at the appropriate time. Given that Productos Naturales had not raised this objection during the arbitral proceeding the court concluded that the party had waived its right to challenge the arbitral award on the grounds that the tribunal acted in contravention of the arbitral agreement regarding allocation of costs and expenses.

The court also rejected the requesting party’s claim that the formal amendment procedure provided for in the contract prevented its legal representatives from modifying the arbitration agreement, which expressly provided that each party would bear its own costs. The court determined that the formal amendment procedure was limited to modifications pertaining to “the material object of the contract,” relying on the language of Article 17 of the contract. The court reasoned that Articles 7 and 16 of Law 19971 espouse the principle of kompetenz-kompetenz, pursuant to which the arbitration agreement may be considered to be independent from the contract in which it is contained. To this end, the court concluded that the arbitration agreement was not part of the material object of the contract.

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and thus the formal amendment procedure did not preclude the parties from modifying the arbitration agreement by requesting the arbitral tribunal to rule on court fees and expenses. The court concluded that the arbitral tribunal was competent to decide on the court costs and expenses since it was an issue expressly requested by the parties in their submissions. Thus, the court exhibited a practical approach in declining to review the merits of the arbitral tribunal’s decision on costs and upholding the award.

Shortly after *Productos Naturales de la Sabana S.A. v. Corte Internacional de Arbitraje de la Cámara de Comercio*, the Supreme Court of Chile granted the application for recognition and enforcement of an award in the case *Laboratorios Kin S.A. v. Laboratorios Pasteur S.A.* The arbitral tribunal, seated in Spain, had concluded in its award that Laboratorios Pasteur S.A. had breached the exclusive distribution agreement it had entered into with Laboratorios Kin S.A. In this case, Laboratorios Kin S.A. initiated *exequatur* proceedings seeking the enforcement of an arbitral award issued pursuant to the Rules of the Chamber of Commerce of Barcelona, and the enforcement of a judicial decision of a Spanish Court that rejected the application for annulment of the award in Spain.

In the recognition and enforcement proceedings, Laboratorios Pasteur S.A. argued that the Court should refuse the enforcement of the arbitral award and judicial decision, which denied its annulment application, based on several of the grounds to deny enforcement set forth in Article 36 of Law 19971. Among its various objections, it argued that the arbitral tribunal had not been established in accordance with the arbitration agreement; the award dealt with a dispute not covered by the arbitration agreement; and the arbitration agreement was not valid.

The Supreme Court rejected Laboratorios Pasteur’s allegations on the basis that it had no authority to review neither the merits of the arbitral award nor the merits of the Spanish judicial decision that denied the request for annulment. The Supreme Court determined that these objections were timely raised and dismissed in both the arbitral proceeding and the annulment proceeding before the Spanish court. In particular, the Supreme Court pointed to the fact that the arbitral tribunal and the Spanish court had already found that the arbitration agreement was valid, the arbitral tribunal had properly been established, and that the dispute was covered by the arbitration agreement. Therefore, the Supreme Court refrained from reviewing these issues again.

In addition, the Supreme Court elaborated on the limits of Chilean courts

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to review the merits of arbitral awards. The Supreme Court cautioned that the ultimate objective of *exequatur* proceedings of an arbitral award “is to verify the fulfillment of certain minimum requirements and is not intended in any way to analyze the intrinsic justice or injustice of the decision, thus it does not constitute in any way an instance to review what [the decision] resolves.” The court also rejected Laboratorios Pasteur S.A.’s allegation that the decision of the Spanish court denying annulment could not be enforced pursuant to Law 19971, given that it was not a decision of an arbitral tribunal (but rather a judgment of a foreign court relating to an arbitral award). The court concluded that an arbitral award and a judicial decision that denies an annulment application against that award together constitute an “indivisible unit,” and thus decided to enforce both decisions under the recognition and enforcement procedure set forth in Law 19971. In sum, these decisions show a restraint on the part of the Chilean courts to avoid unduly interfering with the arbitral process.

There is also some positive case law from Peru where the Peruvian courts have rejected a request by the losing party seeking to vacate an award where such vacatur application essentially required them to review the merits of an arbitral award. In a decision dated April 17, 2015, the Superior Court of Lima refused to set aside an arbitral award in the case *Pure Biofuels v. Blue Oil*. Pure Biofuels and Blue Oil had entered into a contract for the storage of hydrocarbons, which provided for arbitration before Lima’s Chamber of Commerce. Pure Biofuels initiated arbitration proceedings, but the arbitration tribunal dismissed all of its claims and ordered it to pay the damages sought by Blue Oil.

Pure Biofuels sought annulment of the award on the grounds that (i) the arbitrators did not deliberate in the final decision because one of them (the dissenting arbitrator) allegedly had been excluded from deliberations; (ii) two arbitrators did not fulfill their duty of disclosure, undermining the impartiality of the tribunal; and (iii) the decision on damages was not reasoned. The Court rejected all of these claims.

Regarding the first ground, the Court pointed to the fact that neither the Peruvian arbitration statute nor the Rules of Arbitration of Lima’s Chamber of Commerce contained a detailed procedure for how an arbitral tribunal should conduct deliberations. Notwithstanding the fact that the dissenting arbitrator chose not to provide comments, the Court found that the parties and arbitrators acknowledged that all of the arbitrators received two drafts of the award and had ample opportunity to comment on them. Indeed, the allegedly excluded arbitrator had indicated that he disagreed with the draft award and, instead of making revisions to the draft award, would issue a

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dissenting opinion. On this basis, the court concluded that the dissenting arbitrator had sufficiently participated in the deliberations for due process purposes.

Next, on the duty to disclose, the court determined that the requesting party failed to demonstrate how the undisclosed fact, that two arbitrators had served together in previous arbitral tribunals, was sufficient to conclude that the two arbitrators were biased or partial in favor of one of the parties. Finally, regarding the lack of proper reasoning of the award, the court was careful not to second-guess the methodology adopted by the arbitral tribunal to determine the amount of damages. After a careful examination of the arbitral tribunal’s reasoning, the court concluded that the procedure to calculate the damages was reasonable and equitable. Throughout its decision, the court was cautious not to overstep its boundaries given its limited role in enforcing an award.

Thus, we have seen examples of courts from various jurisdictions, such as Chile and Peru, exercising restraint and adopting a practical approach that results in the recognition and enforcement of arbitral awards. Admittedly, we cannot conclude from these examples that Latin American courts inevitably, or as a matter of course, will remain within their limited remits when reviewing applications to annul or deny recognition and enforcement of an award. However, these recent examples point towards a pro–arbitration trend whereby courts are cautious to overstep their roles, especially given how those roles have been more narrowly demarcated in recent amendments to national arbitration laws.

IV. INSTITUTIONS AND ARBITRATION IN LATIN AMERICA

In addition to the law on the books and the attitude of the courts, another indicator of the health of an arbitral regime is the vitality of national arbitral institutions. Generally, there has been an increase in the number of arbitral institutions worldwide, with some of these institutions, at least regionally, competing with each other. For example, there is a healthy rivalry between the Singapore International Arbitration Center and the Hong Kong International Arbitration Center to become the institution of choice for administering international arbitrations seated in Asia. Likewise, there is a healthy rivalry between the London Court of International Arbitration, headquartered in London, and the ICC Court of Arbitration, headquartered in Paris, with regard to arbitrations seated in Europe. The question that arises then is which of the institutions based in the various Latin American jurisdictions will rise to prominence with regard to international arbitrations seated in Latin America. The answer to this question will depend, in part, on the aims of each individual institution.

Does it seek to cater to disputes of a particular nature? For example, the
World Intellectual Property Organization Arbitration and Mediation Center focuses on disputes concerning intellectual property. Does it cater to domestic arbitrations? Does it seek regional prominence? International prominence?

It is beyond the scope of this article to explore and discuss all of the arbitral institutions found in all of Latin America. But the informal survey undertaken of several jurisdictions suggests that there is healthy competition among arbitral institutions in each jurisdiction. For example, here are some of the national institutions found in Peru alone: American Chamber of Commerce of Peru; Center of Arbitration of the Lima Chamber of Commerce; Center of Arbitration and Mediation of the Arequipa Chamber of Commerce and Industry; Center of Mediation and National and International Arbitration of the Piura Chamber of Commerce; and Center of Mediation and Arbitration of the Pontificia Universidad Católica del Peru.

Now this is just a list of some of the leading arbitration institutions in Peru. But to really find out about the vibrancy of the system, one needs to dig deeper into the details of each institution. How many arbitrations does the institution handle per year? Do those arbitrations primarily involve domestic, regional or international parties? When did the institution last revise its arbitration rules? Do the rules contain provisions found in more recent versions being promulgated by the leading institutions, such as the ability to obtain provisional measures from an emergency arbitrator prior to the constitution of an arbitral tribunal? What are the institution’s fees to administer an arbitration? For example, with regard to the Mexican Arbitration Center, statistics for the year 2012 (the most recent year for which this information is publicly available) indicate that ninety-seven percent of the arbitrations it administers are conducted in Spanish, eighty-one percent of the arbitrations are seated in Mexico City, and ninety-eight of the arbitrators appointed in its arbitrations have Mexican nationality. Clearly, there is a strong national flavor to the arbitrations that the Mexican Arbitration Center administers. Thus, local disputes are its specialty.

More recent figures are available with regard to the number of arbitrations administered by the leading institutions in Brazil. The statistics for the year 2014 are as follows: Center for Arbitrations and Mediation of the Chamber of Commerce Brazil–Canada: ninety-five arbitrations; Center for Arbitration and Mediation of the American Chamber of Commerce for Brazil: eighty-two arbitrations; Business Arbitration Chamber – Brazil: thirty-two arbitrations; Chamber of Conciliation, Mediation and Arbitration of São Paolo: forty-one arbitrations. These statistics are helpful in that they allow comparison of the relative caseload of each institution, which can guide a user seeking to choose one of the institutions to administer the arbitration.
The growing number of arbitral institutions in Latin American jurisdictions indicates that the trend is in favor of using arbitration to resolve commercial disputes. After all, these institutions would not have been created unless consumers anticipated that a market would exist for their use. That being said, one cannot conclude that the presence of a relatively large number of arbitral institutions in a specific jurisdiction means that jurisdiction is arbitration-friendly, or that it is a destination of choice for international parties to seat their arbitrations. Rather, one must dig beneath the surface to assess the true vitality of each individual institution. Thus, when advising a client about where to seat an arbitration, one must look to the arbitration laws as well as the recent judicial decisions to determine whether the jurisdiction is pro-arbitration. Thereafter, when choosing a particular institution’s rules, one must canvass the available options, which requires reviewing the latest versions of each institution’s rules; the case law to assess whether there is anything unfavorable in the judicial record about the institution’s rules and procedures; the case load of each institution; and the composition of the parties to the arbitration and the kinds of disputes being resolved (in particular, to get a flavor for whether the institution is chosen for primarily national, regional or international disputes). Certainly, a lot of options exist now in Latin America to choose among arbitration institutions. However, some more vetting needs to be done as these institutions, for the most part, are relatively young and are still finding their footing in the arbitration landscape.

V. MEDIATION IN LATIN AMERICA

Arbitration is better developed as a means of alternative dispute resolution in Latin America than mediation, which relatively is in its infancy. The current trend is in favor of increased use of mediation to resolve disputes, especially given the backlog of cases in the judiciaries of several Latin American jurisdictions, and the high costs of binding dispute settlement (both litigation and arbitration). Recently, the International Development Bank helped create or strengthen around 230 mediation centers throughout Latin America, and has trained more than 2,000 mediators since 2004. The national chambers of commerce in the various jurisdictions tend to be one of the strongest supporters of mediation throughout Latin America.

Here are some observations that can be made about the use of mediation to resolve commercial disputes in Latin America. First, some jurisdictions have adopted legislation whereby mediation or conciliation must be exhausted before a party is able to continue with a lawsuit. Such legislation usually provides that the settlement agreement that results from mediation or conciliation should have the same effect as an arbitral award.
for purposes of enforcement and *res judicata*. Such countries include Bolivia, Colombia, Ecuador, and Peru. In the United States, it is not uncommon for a judge to require the parties to mediate a dispute before trial in the hopes that the parties will settle the litigation. It is possible that in addition to mediation that is statutorily mandated, court–ordered mediation may become more popular in Latin America as well.

Second, an increasing number of Latin American jurisdictions are focusing on mediation as a viable means of dispute settlement. For example, Brazil enacted the Mediation Statute, Law 13,140, which will enter into force in January 2016. The Mediation Statute promulgates rules for mediation between individuals as well as disputes with public, State–owned entities. The Mediation Statute also outlines the basic requirements of due process in a mediation: (a) impartiality of the mediator; (b) equality between the parties; (c) verbal communication between the parties and the mediator; (d) free will of the parties (they cannot be coerced into a decision); (e) a focus on obtaining consensus; (f) confidentiality of the mediation proceedings; and (g) good faith. The Mediation Statute will be interpreted hand–in–hand with the revised Brazilian Code of Civil Procedure, which will go into effect in March 2016. The Civil Code provides for mandatory mediation or conciliation hearings in the early stages of major lawsuits. It is expected that the Mediation Statute and the revised Civil Code will boost the use of mediation in Brazil.

Third, it appears that the rate of recovery of disputed amounts of money in mediation (and arbitration) is higher than the recovery rate in judicial proceedings. In 2006, the Multilateral Investment Fund of the Inter–American Development Bank conducted a study of alternative dispute resolution methods in Latin America. The study surveyed owners of small and medium–sized enterprises about the effectiveness of recovering credit through alternative dispute resolution procedures (i.e. arbitration, mediation and conciliation) *vis–à–vis* traditional judicial proceedings. The study revealed that sixty–two percent of those surveyed admitted recovering less than fifty–percent of the amounts in dispute through traditional judicial proceedings. However, this percentage dropped to thirty–eight percent of those surveyed when the proceedings used were either arbitration or mediation. This statistic suggests that mediation (as well as arbitration) may be more effective when it comes to recovery of damages in Latin America than proceeding through the national courts. This may be another reason why mediation (and arbitration) will be on the rise in Latin America.

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8. *Id.* at 41.
CONCLUSION

Generally, it appears that Latin American corporate counsel are keen to use other means of dispute resolution as an alternative to litigation in the national courts. In particular, there is growing use and acceptance of international commercial arbitration in Latin American jurisdictions. In part, this development reflects stronger national arbitration laws, and courts that are more friendly towards arbitration, as exhibited by their recent decisions. Recent amendments to national arbitration laws have focused on issues that previously made arbitration more cumbersome, and have clarified the limited role of courts with regard to arbitration-related litigation. For example, some amendments have developed a summary procedure for a court to decide an application to enforce or vacate an award. Other amendments have focused on provisional measures, clarifying both that arbitrators have the power to issue interim measures, and then providing that such interim awards are judicially enforceable. Thus, recent changes and amendments to national arbitration laws tend to make clear that the judiciary should support the arbitral process.

However, there is still work to be done. This section discusses two issues that need to be assessed—likely through the passage of time—to determine the true attitude of Latin American jurisdictions towards commercial arbitration. The first is the use of the *amparo* procedure and the second is the manner in which national courts will enforce adverse awards against State or State-owned entities. The two topics are discussed in turn.

A. The Continued Use of Amparo

Although there are positive decisions from various courts indicating that the judiciary will be respectful of the arbitral process, some uncertainty remains. For example, in the past, courts have granted *amparo* as an extraordinary remedy that could be invoked to annul arbitral awards. The question remains whether courts will continue to do so in the aftermath of amendments to the national arbitration laws in various jurisdictions.

Colombia is a jurisdiction that illustrates this uncertainty. Colombia’s 2012 arbitration law provides that annulment is the only means to set aside an award. This might indicate that the procedures of *amparo* (called *acción de tutela* in Colombia) are no longer available to a party seeking to annul an award. However, no court has decided this issue. It may be possible that a party will argue that, in addition to the grounds provided for in the 2012 law, it is still possible to use the constitutional remedy to annul an award in order to safeguard a party’s constitutional rights.

Indeed, prior to the enactment of the 2012 arbitration statute, the Constitutional Court had repeatedly confirmed that *amparo* was available
to annul arbitral awards. In *Departamento del Valle del Cauca v. Arbitral Tribunal* (SU–174/07), the requesting party had already sought to annul the arbitral award before the Council of State, but the court refused to grant annulment. Subsequently, the requesting party filed an *amparo* against the arbitral award and the Council of State’s annulment decision alleging that both of them violated its due process rights.\(^9\) The court assessed whether *amparo* was available to challenge arbitral awards. The court determined that *amparo* could be used to annul arbitral awards to protect fundamental constitutional rights of the requesting party. Nonetheless, the court restricted recourse to *amparo* to exceptional cases where arbitral awards and annulment decisions are patently arbitrary or the product of *voie de fait* (via de hecho).\(^10\)

The court did try to impose some limitations on when a party could use *amparo* to annul an award. First, courts may not review the merits of the arbitral award in *amparo* proceedings. Second, the arbitral award must directly damage or threaten fundamental rights of the requesting party for *amparo* to be available. Third, the requesting party must have exhausted all other legal actions available to challenge arbitral awards (i.e. annulment proceedings) before invoking *amparo*. Fourth, *amparo* is only available where the arbitral tribunal’s decision is patently arbitrary or the product of *voie de fait*.\(^11\) In addition, the court further explained that an arbitral award is patently arbitrary or the product of *voie de fait* only in the following four cases: (i) the arbitral tribunal exercised its legal powers for a purpose that does not correspond to the purposes for which these powers have been conferred (e.g. the award is based on a legal or contractual provision that is not applicable to the case); (ii) the arbitral tribunal has no competence to decide the subject matter of the dispute; (iii) the arbitral tribunal issued its award by completely deviating from or disregarding the applicable legal procedure; and (iv) the arbitral tribunal issued a decision without evidentiary support.\(^12\)

The court reaffirmed the availability of *amparo* against arbitral awards in *Municipality of Turbo v. Arbitral Tribunal* (T–466/11). In that case, the Municipality of Turbo invoked *amparo* against an arbitral award alleging that the arbitral tribunal had violated its constitutional due process rights. The requesting party claimed that the arbitral award was the product of *voie de fait* because the tribunal failed to consider legal rules applicable to the dispute (via de hecho por defecto sustantivo) and had assessed some

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10. *Id.* ¶ 5.4.
11. *Id.* ¶ 5.4.
12. *Id.* ¶¶ 5.4.1 – 5.4.4.
The court considered that the arbitral tribunal had breached the requesting party’s due process rights, having supported its decision on the isolated assessment of documentary evidence that other evidence in the record showed was not reliable. The court considered that such error in the assessment of evidence was material to the outcome of the case, and thus the requesting party’s due process rights were affected. The court issued its decision revoking the arbitral award.

Considering the use of amparo to annul arbitral awards in Colombia prior to the enactment of the 2012 arbitration laws, it remains to be seen whether courts will continue this tradition notwithstanding the new legislation.

The Peruvian Constitutional Court has left the door open to invoke amparo to protect constitutional rights. In the case Sociedad Minera de Responsabilidad Ltda. Maria Julia, decided in 2011, the court confirmed that amparo against an arbitral award was available, but in exceptional and limited circumstances. The requesting party filed an amparo against an arbitral award on the grounds that the arbitral tribunal had violated its due process rights and other procedural rights. In particular, the requesting party argued that the arbitral tribunal erroneously interpreted contract provisions, having relied on legal provisions that did not apply to the dispute, and failing to adequately examine all facts and evidence in the proceeding.

The Peruvian Constitutional Court determined that the general rule is that amparo proceedings are not available to challenge arbitral awards. The court reasoned that annulment proceedings against arbitral awards under Peruvian legislation were “a true procedural option with a purpose that, technically speaking, may substitute amparo in cases where the defense of constitutional rights is sought.” Nonetheless, the court identified three exceptional circumstances where amparo may still be invoked against arbitral awards, namely in cases where: (i) the basis to request amparo is the direct contradiction by the arbitral tribunal of binding legal precedents of the Constitutional Court; (ii) the arbitral tribunal does not apply a legal provision, which the Constitutional Court has found to be constitutional, on the basis that its application would produce unconstitutional results (control difuso); and (iii) a third party to the arbitration agreement initiates amparo proceedings against an arbitral award that directly impinges on its constitutional rights. To be able to

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14. Id.
16. Id. ¶ 17.
invoke *amparo* in the first two situations, the requesting party must first raise the objection before the arbitral tribunal.\(^{17}\) Ultimately, the court reached the conclusion that the requesting party’s arguments for requesting *amparo* against the award were not valid grounds to invoke this action, and thus dismissed the complaint.\(^{18}\)

These cases from Colombia and Peru show that, in the past, recourse has been made to *amparo* as a basis to annul an award, even if such a procedure is not recognized by national arbitration laws (which tend to limit the grounds upon which the losing party can seek to annul an award, usually to those grounds specified in the UNCITRAL Model Law). It remains to be seen whether courts will resort to this procedure to annul arbitral awards, notwithstanding recent amendments to national arbitration laws that expressly specify – and limit – the grounds upon which an award can be annulled. It may be difficult to put an end to the recourse to the *amparo* procedure to annul an award given the relatively long tradition of making such applications in a number of Latin American jurisdictions.

**B. Arbitrating Against State or State-Owned Latin American Entities**

Latin American jurisdictions have shown themselves to be more hostile towards arbitration when one of the parties in the arbitration is a State or State-owned entity. Here, it is important to distinguish between investment treaty arbitration – where one of the parties (in the vast majority of cases, the respondent) is a State or State-owned entity – and international commercial arbitration, where the majority of arbitrations will concern private parties, and only occasionally involve public entities. There has been a considerable backlash against investment treaty arbitration in some Latin American jurisdictions. Some countries, such as Bolivia, Ecuador and Venezuela, have denounced the Convention on the International Centre for Settlement of Investment Disputes (the “ICSID Convention”). In addition, some countries, such as Ecuador, have terminated some of their bilateral investment treaties (“BITs”) with other trading parties on the basis that the BITs have not brought in sufficient foreign direct investment when measured against potential liabilities for which the government may be accountable under those BITs. Other countries, such as Argentina, have refused to pay awards owed to claimants that have prevailed in arbitrations initiated under these BITs. What these States – Argentina, Bolivia Ecuador and Venezuela – have in common is a sense that the regime of investment arbitration is unfairly stacked against developing States. Some of these States have taken this view because they

\(^{17}\) *Id.* ¶ 21.

\(^{18}\) *Id.* ¶ 29.
have been the respondents in a relatively large number of arbitrations (Argentina, for example). And others have taken this position because, in their view, relatively large damages awards have been rendered against them. For example, ExxonMobil has been awarded US$1.6 billion by an arbitral tribunal in *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, and Ecuador has very recently partially annulled the award in *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, reducing the damages award from US$1.7 billion to US 1.1 billion, which is still a considerable amount given Ecuador’s GDP.

For purposes of this article, it is sufficient to note that there is a distinction between the attitudes of these jurisdictions towards investment arbitration versus their attitudes regarding international commercial arbitration. While States may not like being hauled before arbitral tribunals constituted under BITs and MIAs to be held accountable for alleged violations of these international law instruments, nonetheless, as has been discussed throughout this article, Latin American jurisdictions remain keen to develop arbitration as a means of dispute resolution, especially for private disputes. Thus, we see the changes in the laws and the attitudes of the courts towards international arbitration, discussed in the preceding sections.

That being said, the test for the true receptivity by Latin American jurisdictions to the systematic use of commercial arbitration will be assessing how the judiciaries respond when the award debtor is a State or State-owned entity. There remains some concern on the part of commercial parties that the odds will be stacked against them if they choose to seat an arbitration against a State-owned entity in a Latin American jurisdiction, and, in particular, in the jurisdiction of the adverse entity. In some cases, this may be inevitable if the private party wishes to do business with the State-owned entity. The laws of some countries require that contracts between a commercial party and a State-owned entity call for dispute resolution in the host country (usually, before the courts of that country, but occasionally through arbitration seated in that country). We have seen repeatedly that the national courts have bent the rules when it comes to enforcing adverse awards against State-owned entities. Consider, for example, the case of *Corporación Mexicana de Mantenimiento Integral v. Pemex–Exploración y Producción*, where the District Court for the Southern District of New York concluded that the Mexican courts violated basic notions of justice when they retroactively applied Mexican statutory law that was not in effect at the time a private party, COMMISA, entered into a contract with the Mexican state agency that controlled Mexican hydrocarbons, to annul an arbitral award rendered by an arbitral tribunal seated in Mexico. So, one question that arises is, even if investment arbitration and commercial arbitration are viewed differently by Latin
American governments, will an international party be unfairly disadvantaged if it arbitrates against a State-owned entity in Latin America? Fair resolution of such disputes will be the true test of the attitude of Latin American governments towards the use of arbitration to resolve commercial disputes. It should not be the case that attitudes differ depending on whether arbitration concerns private parties only or a State or State-owned entity as well.