CONSTITUTIONAL CONTROL OVER INTERNATIONAL AWARDS: A LATIN AMERICAN TREND

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Abstract

*Latin American jurisdictions have elevated arbitration to a constitutional level, meaning that arbitrators are conceived of as judges and awards are equivalent to court decisions. Within this context, the admissibility requirements of constitutional actions to vacate international awards for the protection of the fundamental rights of the parties have been debated as a secondary mechanism to the setting aside proceedings provided within the lex arbitri. In this regard, the purpose of this article is to study the relationship between international arbitration and constitutional control at the seat chosen by the parties for the proceedings. Therefore, the article aims to analyse one central question: should international awards be subject to constitutional control at the seat of arbitration? Accordingly, this investigation analyses whether the admissibility of constitutional actions would produce a different result from one obtained by initiating set aside proceedings based on the violation of the public policy of the seat. Further, the author also intends to study whether constitutional actions against international arbitral awards are contrary to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"]. To examine this question, the article shall study the application of these actions, particularly in Colombia and Peru.*

I. Introduction

It has been recognised in most jurisdictions that there are two ways in which an international award can be subjected to judicial control. The first manner is by opposing the recognition and enforcement of the award in the country where one party seeks to enforce it. The second is by initiating a claim to set aside the award before the courts of the country that was selected as the seat of arbitration. These mechanisms have been adopted worldwide in the interest of achieving harmonisation in international commercial arbitration. In that sense, there is global consensus as to the methodologies for challenging an arbitral award.

In this context, Article V of the New York Convention lays down the specific grounds for denying recognition and enforcement of international awards.[1] On the other hand, scholars such as Gary B. Born recognise that the New York Convention imposes limits over where the setting aside proceedings should be held, by requiring that the proceedings be held at the place where the award was made. Specifically, the author determines that "*[t]he New York Convention limits the jurisdictions in*

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 330 U.N.T.S. 473 [*hereinafter* "New York Convention"].

which annulment of an international arbitral award may be sought (in particular, to the place where the award was made or under the law of which the award was made)".[2]

However, with respect to the grounds under which an arbitral award may be set aside, there is no transnational treaty that provides a common global answer to the issue. For this reason, most national arbitration regimes have adopted similar approaches to the New York Convention by basing their *lex arbitri* on the UNCITRAL Model Law ["**Model Law**"].[3] The latter, within Article 36,[4] introduces the same grounds as the New York Convention for refusal of recognition and enforcement stated in Article V[5] as well as the procedure for the annulment of arbitration awards determined in Article 34[6] of the Model Law.

Notwithstanding the above, some jurisdictions, particularly in Latin America, have debated over the initiation of constitutional actions for the protection of fundamental rights and constitutional guarantees in arbitral proceedings. These actions have been initiated with the purpose of seeking annulment of awards. Hence, they are said to constitute a secondary mechanism to the set aside proceedings provided within the *lex arbitri*.[7]

Academics like Gónzales de Cossío argue that there is a growing tension between constitutional actions and arbitration proceedings. He describes this situation as:

> "*An interesting intellectual battle being fought in our region. The battle is important. The battle is transcendent: many things depend on its result. Currently, the battle holds both victories and defeats. Successes and failures. Heroes and wounded - also casualties. It consists of how the constitutional and the arbitral procedures coexist.*"[8] (translated from Spanish).

This phenomenon has occurred as part of the process known by international scholars as the constitutionalisation of international arbitration.[9] Various authors argue that constitutional actions constitute a major obstacle to the enforcement of decisions issued by international arbitrators.[10] By giving arbitration a constitutional status, it instantly becomes a part of the internal public order of a country and is subject to such control.[11] In light of the above, the author seeks to examine the

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2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3164 (2d ed. 2014).

3 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res. 40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006). [*hereinafter* "Model Law"].

4 *Id.* art. 36.

5 New York Convention, *supra* note 1, art. V.

6 Model Law, *supra* note 3, art. 34.

7 Mariano Tobias de Alba Uribe, *An Unusual Motion Against Arbitral Awards in Latin America*, KLUWER ARB. BLOG (June 27, 2013), *available at* http://arbitrationblog.kluwerarbitration.com/2013/06/27/an-unusual-motion-against-arbitration-awards-in-latin-america/.

8 Francisco Gónzales de Cossío, *Procesos Constitucionales y Procesos Arbitrales: ¿Agua y Aceite?*, 6 REVISTA ECUATORIANA DE ARBITRAJE 229 (2014).

9 Ronald Ralf Becerra, *The constitutional review of international commercial arbitral awards in Latin America and the challenges for legal certainty. Insights from Colombian jurisdiction*, 3(6) REVISTA TRIBUNA INTERNACIONAL 11, 14 (2014) [*hereinafter* "Becerra – Insights"].

10 Manuel A. Gomez, *Article 5 - Extent of Court Intervention*, *in* UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: A COMMENTARY 94 (Ilias Bantekas, Pietro Ortolani, Shahla Ali, Manuel A. Gomez & Michael Polkinghorne eds., 2020).

11 Ronald Ralf Becerra, *Judicial intervention in Colombia in international arbitration and legal certainty*, 42 DIÁLOGOS DE SABERES 119, 119-129 (2015), *available at* https://revistas.unilibre.edu.co/index.php/dialogos/article/view/193/145 [*hereinafter* "Becerra – Intervention"].

nature and extent of constitutional control over international awards in the context of Latin America. The article shall be divided into four main parts. The first part shall introduce the importance of the *lex arbitri* in challenging an award before the courts. The second part reviews how Colombia, as an example of a Latin American jurisdiction, has adjudicated upon constitutional challenges against arbitral awards. The recourses so analysed are *tutela* actions or constitutional protection recourses. The third part discusses and analyses the development that the Peruvian *lex arbitri* has had with respect to constitutional control over arbitration in Peru. In furtherance of this, the fourth part analyses whether constitutional actions against international arbitral awards are contrary to the New York Convention. Finally, the last part would examine the effects of the initiation of constitutional actions during the enforcement stage. The idea herein is to study whether constitutional proceedings that might be held at the seat of arbitration should be considered as an alternative during the recognition and enforcement stage.

The admissibility of constitutional actions as an alternative mechanism for annulment may have a major impact on the country to be chosen as the seat. This is because submitting to multiple setting aside mechanisms with various grounds can be highly unattractive since it encourages legal uncertainty as to when the award shall become binding.[12] Moreover, the result can be contrary to the main objectives of arbitration as an alternative dispute resolution mechanism by rendering the process ineffective.

In the words of A. Aljure,

> "*Although it is true that the awards may contain errors, even in the application of fundamental rights, the remedy is worse that the disease; it is greater the damage that is caused by trying to amend all awards than the one caused by prohibiting constitutional actions against them. At the international level, we believe that this is true, since a foreign company will prefer the certainty of an award that is only controlled by setting aside, to the Pandora's Box of Tutela actions.*"[13](translated from Spanish)

II. International arbitration and constitutional control at the seat

A. Lex arbitri and recourses against international arbitral awards

An issue of major importance in international arbitration is the place where the arbitral proceedings will be held. This location is known as the seat of the arbitration and can be defined as the "*legal or juridical home (domicile) of the arbitration*".[14] The seat should not be confused with the geographical location where the hearings are conducted, because such a physical place does not affect the location of the seat nor does it change the applicable *lex arbitri*.[15]

The choice of a seat implies the choice of the *lex arbitri* of that country. This means that the law applicable to the existence and procedure of the arbitration corresponds to the arbitral law enacted by the country selected as the seat.[16] This law provides for the means of judicial control over the

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12 Becerra – Insights, *supra* note 9, at 13.

13 Antonino Aljure Salame, *Comentario a la sentencia de anulación del laudo arbitral Bancolombia v. Gilinski*, 9 REVISTA INTERNACIONAL DE ARBITRAJE 170 (2008), *available at* https://xperta.legis.co/visor/temp_rarbitraje_945dd62c-a24b-4abd-ada1-a9aadface39c.

14 BORN, *supra* note 2, at 2052.

15 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 175 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 5th ed. 2009).

16 BORN, *supra* note 2, at 2056 ("Often most important, the arbitral seat must have both national arbitration legislation and courts that are supportive of international arbitration (….) both the arbitration legislation and the so-called

proceedings by providing the procedure for setting aside an arbitral award, the grounds for admissibility of setting-aside applications, and the competent national court.[17]

The Model Law, under Article 34, provides for an exclusive mechanism for setting aside international awards.[18] Therefore, the possibility to apply for the annulment of an award through an alternative recourse is forbidden. Moreover, countries in Latin America are no strangers to the world trend of adopting the Model Law, or, failing that, basing their arbitration legislation on it. Therefore, in principle,

> "*In the Latin American scenario, a large part of the international arbitration regulations has established the principle of limited intervention by the national courts as proposed in the Model Law. This principle supposes that the legislator clearly defines the instances in which judges may intervene, which generates greater certainty for the parties and the arbitrators about the scope of their interaction. In addition, it guarantees, to a certain extent, the exclusion of any residual power that the courts may have based on other domestic rules.*"[19](translated from Spanish)

Furthermore, when describing the arbitral systems in Latin America, one must highlight that both the monist model and the dualist theory are present in the continent.[20] The monist conception determines that all the provisions that exist within the *lex arbitri* apply equally to the national and international arbitration. For example, Peru is a country that has a monist system regulated by the Legislative Decree 1071/2008.[21] Other countries in the region, such as Colombia, have adopted dualism, which entails that there are specific rules that apply to international arbitral proceedings being held in Colombia, which differ from the rules provided for national arbitral proceedings also held in the same country. In Colombia, Law 1563/2012[22] regulates national and international arbitration and has specific rules depending on the nature of the tribunal. For example, Article 107 of this law provides for annulment as the sole recourse to challenge international awards, and

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procedural law of the arbitration (also sometimes referred to as the *lex arbitri* or curial law) are almost always that of the arbitral seat.").

17 As a consequence, a wide range of "internal" and "external" procedural issues relating to the arbitration will virtually always be governed by the law of the arbitral seat, including the annulment of awards. *See* BORN, *supra* note 2, at 2057.

18 The Model Law in Article 34 provides for specific grounds for annulment. These being: (a) there was no valid arbitration agreement; (b) a party was denied the opportunity to present its case; (c) the arbitration was not conducted in accordance with the parties' agreement or, failing such agreement, the law of the arbitral seat; (d) the award dealt with matters not submitted by the parties to arbitration; (e) the award dealt with a dispute that is not capable of settlement by arbitration; or (f) the award is contrary to public policy of the seat. These grounds replicate the grounds for refusing recognition and enforcement dictated by Article V of the New York Convention. *See* Model Law, *supra* note 3, art. 34.

19 Pablo Rey Vallejo, *El Arbitraje y los Ordenamientos Jurídicos en Latino América: Un Estudio Sobre la Formalización y Judicialización*, 126 VNIVERSITAS 199, 229 (2013), *available at* https://revistas.javeriana.edu.co/index.php/vnijuri/article/view/6125/4923.

20 Becerra – Insights, *supra* note 9, at 14–15. For the author, the distinction between monist and dualist arbitral models is relevant in order to determine whether the recourses available at the seat against national awards are also applicable to the international awards rendered in the same country when chosen as the seat. Particularly, clarifying that Colombia has a dualist model is important because by being dualist, in theory, it deems impossible to apply the same mechanisms provided for the annulment of national awards, in the same terms and grounds, to an international award rendered in Colombia. This is because the *lex arbitri* provides for only one annulment mechanism with its specific grounds. For example, if the law and the courts accept the applicability of constitutional actions against national awards, those should not be accepted in the same terms against international awards. Notwithstanding this, the constitutional courts analyse its applicability as explained through this article.

21 Legislative Decree Regulating Arbitration, Legislative Decree Nº 1071 (June 28, 2008) (Peru) [*hereinafter* "Decree 1071/2008"].

22 L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.] (Colom.).

expressly prohibits the competent judge from deciding upon the merits of the case submitted to arbitration. Section III,[23] on international arbitration, is based on the Model Law, meaning that the intervention of the judge in the arbitral proceedings is limited to very specific cases and dictates that the *only* available recourse against international awards is annulment.

However, regardless of the arbitration law being based upon the Model Law, "*an interventionist culture has been consolidating*,"[24] and is effectuated in both types of arbitral systems in Latin American countries. This means that due to the lack of receptivity of the jurisprudence regarding the principle of party autonomy as the cornerstone of alternative dispute resolution mechanisms, national courts are expanding their control over the awards.[25]

It is here that the author considers it appropriate to highlight the warning raised by Alan Redfern and Martin Hunter, who note that "*the choice of a particular place of arbitration may have important and unintended consequences. This is because the law of that place may confer powers on the courts or on the arbitrators that the parties did not expect*".[26] Consequently, the primary concern remains that if the seat provides for additional mechanisms to challenge the award by means of its jurisprudence, such mechanisms could be applied to vacate the award. This may be the case for Latin American jurisdictions which, even though they are based on the Model Law, have incorporated through their jurisprudence, the admissibility of constitutional actions as a means for annulment.

B. Constitutionalisation of international arbitration: The powers of arbitrators are conferred by the National Constitution

The idea of the supremacy of the National Constitution in Latin American countries has led to some legislations undergoing the phenomenon known by international scholars as the *constitutionalisation* of arbitration.[27] As earlier mentioned, this means that some jurisdictions conceive of arbitration as a constitutional right or grant the arbitrator the status of a public functionary for administering justice. Within this framework, the nature of arbitration has been described as *jurisdictional,* and therefore, the arbitrators are seen as *real justice administrators*. Thus, as one Latin-American author has noted:

> "*[T]he study of the nature of arbitration should not take as its starting point the relationship or contract existing between the parties and the appointed arbitrators, but rather the very function they perform. When the parties appoint arbitrators, they oblige themselves to accept the decision they make upon the dispute. The arbitrators resolve a legal controversy -not an economic one- in the same way and with the characteristics in which a judge does in a court decision, with the effect of full res judicata, a power that can only come from the national judges.*"[28] (translated from Spanish)

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23 *Id.* arts. 62–116.

24 Vallejo, *supra* note 19.

25 Sentencia Del Tribunal Constitucional [Judgment of the Constitutional Court], Tribunal Constitucional de Perú Expediente No. 6167-2005-PHC/TC, ¶11 (Feb. 28, 2006) (Peru), *available at* https://tc.gob.pe/jurisprudencia/2006/06167-2005-HC.pdf.

26 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 169 (Alan Redfern, Martin Hunter, Nigel Blackaby & Constantine Partasides eds., 6th ed. 2015).

27 Christian Albanesi, *Common Trends in International Arbitration in Latin America, ICCWBO* (Nov. 14, 2016), *available at* https://iccwbo.org/media-wall/news-speeches/common-trends-in-international-arbitration-in-latin-america/.

28 Vallejo, *supra* note 19, at 204.

For example, Article 116 of the Colombian National Constitution determines that individuals, when appointed as arbitrators by the parties, are temporarily invested with the public function of administering justice and therefore, are empowered to settle disputes and render binding decisions.[29] Likewise, Article 138 of the Peruvian National Constitution states that the power of administering justice is exercised by the judicial branch and is in accordance with constitutional provisions.[30] Article 139 of the Peruvian National Constitution states that "*no independent jurisdiction shall exist or can be established, with the exception of the arbitral*".[31] These two provisions imply that arbitration is considered as a proceeding independent of the judicial branch. However, it similarly administers justice like the judicial branch and should do so while respecting the National Constitution.

From this perspective, an arbitrator's power to decide upon disputes originates from the National Constitution of the seat and not directly from the arbitration agreement itself. The author believes that the system is structured in such a manner possibly because of the idea that party autonomy does not have any legal effect without the National Constitution recognising the ability of the parties to opt for arbitration.[32]

Since the National Constitutions are the cornerstone of judicial authority in Latin American jurisdictions, domestic judges and administrative authorities (irrespective of their specialty or field) are subject to constitutional control within each national system. Therefore, judges must apply all the constitutional guarantees and fundamental rights while administering justice.[33] To secure this aim, constitutional actions are admissible against court judgments to verify that the National Constitution has been applied correctly. Likewise, if the arbitrator is conceived to have the jurisdictional function of a judge, it is logical to say that awards equate to court judgments.

In this scenario, Colombia has questioned the possibility of applying constitutional actions to international awards rendered within the country when it has been chosen as the seat of arbitration. This would mean that arbitrators are subject to constitutional control and therefore, the awards they render might be annulled for constitutional reasons. Consequently, constitutional actions against international awards could be used as extraordinary mechanisms for setting aside arbitral awards. For this reason, commentators explain that "*the constitutionalisation of arbitration entails a series*

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29 CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 116 ("The CC, the Supreme Court of Justice, the Council of State, the tribunals and the judges administer justice. (…) Individuals may be entrusted temporarily with the function of administering justice as arbitrators authorised by the parties to issue verdicts in law or in equity in the terms defined by the law.").

30 CONSTITUCIÓN POLÍTICA DEL PERÚ 1993 [CONSTITUTION] Dec. 31, 1993, art. 138 ("The power of administering justice emanates from the people. The Judicial Branch exercises it through its hierarchical entities in accordance with the NC and laws. In all proceedings, when an incompatibility exists between a constitutional and a legal rule, judges shall decide based on the former. Likewise, they shall choose a legal rule over any other rule of lower rank").

31 *Id.* art. 139 ("principles and rights of the jurisdictional function are the following: 1. The unity and exclusivity of the jurisdictional function. No independent jurisdiction exists, nor shall it be established, except regarding the military and arbitration").

32 Sentencia Del Tribunal Constitucional [Judgment of the Constitutional Court], Tribunal Constitucional de Perú Expediente No. 6167-2005-PHC/TC, ¶ 11 (Feb. 28, 2006) (Peru), *available at* https://tc.gob.pe/jurisprudencia/2006/06167-2005-HC.pdf.

33 For example, Article 4 of the Colombian National Constitution specifies its primacy over all national regulations. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 4 ("The Constitution provides the norm of regulations. In all cases of incompatibility between the Constitution and the law or other legal regulations, the constitutional provisions will apply. It is the duty of citizens and of aliens in Colombia to obey the Constitution and the laws, and to respect and obey the authorities.").

of consequences in terms of the type of actions and the degree of judicial intervention that can take place within an international arbitration proceeding at a given jurisdiction"[34] that has been chosen as a seat.

This phenomenon has been criticised by academics, who argue that submitting arbitration to the control of the constitutional judge makes the overall procedure inefficient.[35] This is because it is assumed that the objective of the parties when concluding an arbitration agreement is to settle their disputes in a fast and cost-effective manner. However, further mechanisms to challenge the award imply that the award will have to undergo more stages of court review to become binding and enforceable. This prevents the system from becoming truly international and damages the expectations of the foreign business community by constructing a system where legal uncertainty prevails. Thus, constitutionalisation "*distorts the essence of arbitration as an alternative solution mechanism, conceived to provide an alternative, quick and accurate legal solution to the parties*".[36]

Following this doctrinal opposition, the author believes that, in fact, the constitutionalisation of international arbitration threatens the whole system. The parties (investors, contractors, and merchants) are left vulnerable and in legal uncertainty, not knowing when their award is final, while perspective of the country chosen as a seat may be viewed as highly unattractive for parties and unconducive to promoting arbitration.

III. Constitutional control over arbitration in Colombia

A. Tutela actions

Tutela actions are a legal recourse provided by the National Constitution of Colombia with the objective of seeking immediate protection of fundamental rights that are violated by the act or omission of any public authority.[37] This mechanism is established in Article 86 of the Constitution and grants every individual the right to initiate a claim before a constitutional judge who then analyses the extent and magnitude of the violation.[38] Through a preferential and summary proceeding, the judge grants protection and avoids irreparable damage by issuing an order to the authority concerned, compelling it to act in a certain manner or refrain from doing so.

Article 86 states that the recourse should be resolved within ten days of the filing of the action. Apart from this, one of the main requirements for the admissibility of a *tutela* action is that the claimants must be in such a position that they do not have access to other means of judicial defence. This means that this constitutional recourse is considered secondary and would only be successful if all other available recourses were exhausted without obtaining a positive result that rectified the violation.

Further, procedural aspects of a *tutela* action are regulated by Decree 2591/1991 ["**Decree**"]. The principles of such a protective action are established under Article 3 of the Decree and include: publicity of the proceeding, celerity, and efficiency. These principles are reflected in Article 14 of

34 Vallejo, *supra* note 19, at 204.

35 Gomez, *supra* note 10.

36 Becerra – Intervention, *supra* note 11, at 119.

37 Eduardo Zuleta & Maria Camila Rincon, *Colombia's Constitutional Court Declares that Constitutional Injunctions (Tutela) can be Upheld Against Awards in International Arbitration*, KLUWER ARB. BLOG (Nov. 4, 2019), *available at* http://arbitrationblog.kluwerarbitration.com/2019/11/04/colombias-constitutional-court-declares-that-constitutional-injunctions-tutela-can-be-upheld-against-awards-in-international-arbitration/.

38 CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 86.

the Decree, which states that the request for *tutela* actions has no formal requirements,[39] including the possibility of filing the recourse without legal representation. The claimant has to clearly explain the act or omission committed by the defendant, the fundamental rights that are being threatened or violated by such action, and the details of the counterparty for its notification.

The competent judge to decide upon the claim in the first instance is the judge of the place where the right is violated, exercising its constitutional powers.[40] This ruling may be challenged before a second instance judge,[41] and finally reviewed by the Constitutional Court of Colombia itself.[42] The latter occurs when the topic is of such constitutional and national relevance that it needs to be analysed by the highest constitutional authority who might revoke previous decisions, unify its jurisprudence regarding the matter or clarify the extent and content of protection of a particular right.

The order issued by the constitutional judge is to be implemented instantly by the defending party. For this, the Decree in Article 29(5) limits the maximum period for compliance with the order to 48 hours.[43] Failing this, the defendant must face criminal liability, disciplinary consequences, and fines.[44]

The fundamental rights that may be subject to protection are those within Articles 1 to 41 of the National Constitution of Colombia.[45] For the purpose of this article, the main fundamental right to be assessed is the right to *due process* contained in Article 29[46] of the Constitution. This right shall rein in all judicial and administrative proceedings, and its core elements include a fair trial conducted by a competent judge or tribunal following the appropriate procedure dictated by law, opportunity to present one's case, file evidence, and refute any presented by the counterparty. Also, this right entails that any evidence obtained in violation of due process is null and void and shall not be taken into account by the judge when deciding upon a case.

Moreover, as per Article 4 of the Decree, the interpretation of the contents of the fundamental rights subject to protection, should be done in accordance with the international treaties ratified by Colombia on human rights.[47] Therefore, *tutela* actions have been developed through constitutional jurisprudence and as a result, it is the judge who assesses how a right is being violated and considers this from a purely constitutional perspective and in terms of its imminent and unconditional protection.

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39 The *Tutela* action enshrined in Article 86 of the National Constitution is regulated by Article 14 of Decree 2591/1991. *See* L. 2591/1991, noviembre 19, 1991, DIARIO OFICIAL [D.O.], art. 14 (Colom.).

40 *Id.* art. 37.

41 *Id.* art. 31.

42 *Id.* arts. 35, 36.

43 *Id.* art. 29(5).

44 *Id.* art. 52.

45 The fundamental rights whose protection shall be guaranteed by the Constitutional Judge will be those located in the national constitution under Title II on "Rights, Guarantees and Duties", Chapter I. These rights include life, non-discrimination, freedom, privacy, due process, etc. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] ch. I.

46 CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 29.

47 L. 2591/1991, noviembre 19, 1991, DIARIO OFICIAL [D.O.], art. 4 (Colom.).

As part of this development, the Constitutional Court of Colombia, in Decision C-590/2005,[48] held that *tutela* actions are admissible against national court judgments, considering that national judges also perform a public function i.e. the administration of justice as per Article 228 of the National Constitution.[49] This landmark decision puts forth that even though court decisions are final and binding and all administrative and civil judges are trained to comply with all constitutional guarantees within their proceedings, *tutela* actions against these court decisions are admissible as an extraordinary recourse. The remedy exists in declaring the court decision as null or even ordering the judge to issue it again while respecting the fundamental right to due process.[50]

This reasoning is based upon a *tutela* action having two main aims within the legal system. *First*, it works as an instrument that ensures the protection of the rights when they are violated by an act or omission of a judge. *Second*, it also works as a mechanism to update the interpretation of the applicability of a fundamental right, making its content uniform and establishing a jurisprudential precedent that must be followed by all civil and administrative judges when deciding a case within their competence.[51] Additionally, the decision highlights that the *tutela* should not decide upon the merits of the case, but should guarantee the application of all fundamental rights in any judicial proceeding because the Constitutional Court is its *supreme interpreter*.[52]

In later decisions, the Constitutional Court opted to include national arbitration awards within the scope of *tutela* actions. As a result, national arbitration awards can be annulled by a constitutional judge if it is found to violate fundamental rights. The possibility of challenging a national arbitral decision through a *tutela* action is based upon the analogy between a court decision and an award, the latter being regarded as a judicial decision in essence. The Court Judgment T-244/2007 indicated that:

> "*In summary, an arbitral proceeding is materially a judicial proceeding, and the arbitration award is the equivalent of a judicial decision to the extent that it finishes the proceeding and definitively puts an end to the question under examination, additionally the arbitrators are temporarily invested with the public function of administering justice, which has also been legally qualified as a public service, for this reason there is no doubt that in their actions and in the decisions adopted by arbitration tribunals they are bound*

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48 Corte Constitucional [C.C.] [Constitutional Court], junio 8, 2005, Sentencia C-590/05, Gaceta de la Corte Constitucional [G.C.C.], ¶ 11 (Colom.).

49 CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 228 ("The administration of justice is a public function. Its decisions are independent. Its proceedings will be public and permanent and through its substantive rights will prevail. Legal limits will be diligently observed and failure to apply them will be sanctioned. The functioning of the judiciary will be decentralized and autonomous."). *See also* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 229 ("The right of any individual to have access to the administration of justice is guaranteed.").

50 The decision has origins in a request made by a citizen to the *Corte Constitucional* (Constitutional Court) seeking to declare as null Article 185 of the Criminal Procedural Code, Law 906/2004 (Colom.). The provision dictated that the decisions reached by the Supreme Court of Justice regarding Criminal proceedings shall be final and binding and without any recourse available for its challenge. The action initiated argued that this article was in violation of the National Constitution because Article 86 dictates that *tutela* actions shall be filed *whenever* a fundamental right has been violated, not excluding decisions issued under the Criminal Procedural Code from its scope. The decision reached by the Constitutional Court was that the *tutela* actions, as a constitutional action, had priority over the determinations of ordinary law, and therefore, were always admissible. *See* CÓDIGO DE PROCEDIMIENTO PENAL [C.P.P.], L. 906/04, DIARIO OFICIAL [D.O.] art. 185 (Colom.).

51 Corte Constitucional [C.C.] [Constitutional Court], junio 8, 2005, Sentencia C-590/05, Gaceta de la Corte Constitucional [G.C.C.] at 35, ¶ 5 (Colom.).

52 *Id.* at 43.

> *by fundamental rights, and that tutela action is appropriate when these are violated or threatened during an arbitration process*."[53](translated from Spanish)

The facts of the abovementioned case involve a dispute that arose between the Colombian Navy and Marinser Ltda. during the execution of a contract of transportation of goods by boat. The Navy filed a *tutela* action against the arbitral award arguing that the arbitrators neither applied the substantive law correctly nor correctly analysed the evidence attached to the file, issuing an award that directed the Navy to pay damages to the contractor without coherent legal basis. The Constitutional Judge decided to not grant the protection of the right to due process, explaining that the arbitrators are independent and free to give such value to evidence as they deem appropriate and that, in the present case, analysis of evidence was undertaken extensively, even though the decision reached was contrary to the interests of the Navy.[54] Furthermore, the Court sustained that a judge, when resolving a *tutela* action, does not replace the arbitrators upon the issuance of *tutela* actions.[55] This is because the arbitrator is the competent authority to decide upon the matter. Thus, this decision demonstrates that *tutela* actions cannot be used to challenge the substance of the arbitral award, but only the procedure adopted to arrive at this award.

Notwithstanding this, the Court recognised that *tutela* actions are admissible against national arbitral awards. This follows from Article 86 of the National Constitution, under which the legislature has been delegated the power to establish the cases in which *tutela* actions can be filed against individuals entrusted with providing public services. Moreover, Article 42 (3) of the Decree also declares this recourse admissible against individuals that carry out administrative functions. Therefore, bearing in mind that the arbitrators provide a public service, i.e. guaranteeing access to justice to the parties that have opted for an alternative dispute resolution mechanism, they fulfil an administrative function. The parties are thus provided with the opportunity to initiate a *tutela* action against arbitral awards that may have violated the fundamental right to due process.

B. Tutela actions against international arbitral awards

Exercising its leading role as the guarantor of constitutional order, the Constitutional Court has recently declared the terms on which the *tutela* action would be admissible against international awards. Its decision, which is binding upon all judges at the seat of arbitration, underwent three stages as identified by the author. The first stage, Decision SU-500/2015, is with regard to the admissibility requirements. The second, Decision SU033-2018, contains a recapitulation of the rules for admissibility. The third, T-354-2019, finally studies the specifics of international arbitration and establishes the admissibility of *tutela* actions against international awards.

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53 Corte Constitucional [C.C.] [Constitutional Court], junio 8, 2005, Sentencia T-244/07, Gaceta de la Corte Constitucional [G.C.C.], ¶ III.6 (Colom.).

54 *Id.* § 6, ¶¶ 14–16.

55 *See id.* ("It is reiterated that the protection in the matter of judicial decisions, within which arbitration awards are included, does not have the nature of an ordinary remedy nor does the judge for the protection of fundamental rights act in these cases as a higher instance of the organ that issued the examined decision, empowered to make new evidential assessments or to replace the factual and normative interpretation made by the competent judge (or arbitrator) in the specific case.") (transl. from Spanish and brackets added by author).

i. *Stage 1 – Decision 500/2015*

In Decision SU-500/2015,[56] the Constitutional Court established that *tutela* actions are also admissible against international awards rendered in Colombia, when Colombia is chosen as the seat of arbitration.[57] The Court also delved into what the admissibility requirements for such actions would be, and found that the requirements were similar to those for the admissibility of *tutela* actions against national awards. The aim was to ensure the correct application of the fundamental right of the parties to due process in the arbitral proceedings.[58] The abovementioned decision is a constitutional precedent that is to be applied uniformly by all constitutional judges within Colombia.[59] The Constitutional Court does not refer to the system being a dual one nor does it analyse that since national and international arbitrations are different in nature, they should be treated differently. However, as Colombia has a dual system where its *lex arbitri* has specific provisions for international arbitration proceedings[60] seated in Colombia which differ from the provisions to be applied by national arbitral tribunals,[61] the Constitutional Court should have made a particular analysis differentiating the nature of the international award under review from national awards which are subject to *tutela* actions. Nevertheless, the Constitutional Court overlooks this

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56 Corte Constitucional [C.C.] [Constitutional Court], agosto 6, 2015, Sentencia SU500/15, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) [*hereinafter* "SU500/15"]

57 *See id.* ¶ 5.1. Please note that the object of this court decision was to subject an international award rendered in Colombia – as this country was chosen as the seat for the proceedings – to constitutional control through a *tutela* action. In this case, the Constitutional Court highlighted that *tutela* actions are admissible against awards. However, the Constitutional Court did not mention that the nature of the award, being international and not national, would condition the admissibility of *tutela* actions. Therefore, it is inferred that the Constitutional Court in this decision declared that *tutela* actions were admissible against international awards rendered in Colombia in the same terms, and with the same procedural requirements as against national awards. However, it specifies that the procedural analysis must be more strict and rigorous in the face of arbitration awards than in the case of court decisions because it is understood that the parties have opted for an alternative dispute resolution mechanism, by showing opposition to the regular judicial mechanisms. In that sense, the decision determines that "[e]quivalence, however, does not operate directly in terms of verifying the admissibility grounds that the Constitutional jurisprudence has developed in the case of court decisions, since the special nature of arbitral justice implies for a more stringent procedural examination - both admissibility requirements and grounds for success".
See also id. ¶ 5.2 ("The reason why, in the case of *tutela* actions against arbitration awards, that particular and more restrictive reading of the procedural requirements established for the *tutela* action against court decisions is preached fundamentally, in the consideration that this is a scenario in which the will of the parties is to depart from the ordinary jurisdiction (…) This decision to depart from the ordinary justice, reaffirms the characteristic of awards as being a final of the decision adopted by the arbitral tribunal, which could not be conditioned to a subsequent ratification or questioning by an ordinary judge to which the parties have originally renounced. Such power of permanence is evidenced, for example, in the absence of an appeal before the ordinary courts, since submitting the award to the ordinary courts would mean ignoring the same will of the parties that provided for an alternative mechanism for the solution of their conflicts.") (transl. from Spanish).

58 *See id.* ¶ 4 ("It is up to this Corporation (Constitutional Court) to determine whether the international arbitration tribunal, on the one hand, and the Council of State, on the other, have violated Isagen's fundamental right to due process when rendering the international arbitral award issued by the former and the decision over the annulment recourse resolved by the second.") (transl. from Spanish).

59 The Constitutional Court has the faculty to decide upon issuing decisions classified as "*SU*" which means "*Sentencia de Unificación*" or *Present Unification Judgment*. This category of decisions unifies jurisprudential precedents to ensure that all the constitutional judges apply a legal concept uniformly. Failing to do so leads to a court decision being contrary to the national constitution, and, therefore, null. The Court has indicated this, while holding that "the need to give binding force to the precedents of the High Courts, also takes into account that the interpretation of the law is not a peaceful matter and, in that order, the precedents of these corporations constitute a transcendental tool in the solution of cases in which laws can admit diverse understandings in order to avoid contradictory decisions in identical cases." *See* Corte Constitucional [C.C.] [Constitutional Court], julio 5, 2018, Sentencia SU072/18, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

60 L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], arts. 62–166 (Colom.).

61 *Id.* arts. 1–58 (Colom.).

difference and provides a recourse that in principle was only available to national award, to an international award.

This judgment decided a *tutela* action that was filed against an award rendered by an arbitral tribunal of the International Chamber of Commerce ["**ICC**"] and the judgment of the Council of State which denied annulment of the award.

The dispute arose during the execution of a contract arising out of tender number MI-100, concluded in 1995 between the Colombian public entity ISAGEN as the contractee and the consortium, La Miel, as the contractor. The latter was an integration of five foreign companies, one of which at the moment of the conclusion of the contract was ABB Sae Sadelmi SPA ["**ABB**"] from Italy. The object of the contract was the construction and design of the operation centre of a hydroelectric development project in the river La Miel. The contract provided for an arbitration agreement in Clause 33, specifying the seat as Bogota, Colombia.

In 1998, ABB transferred its business unit for power generation to Alstom Power Italia SPA ["**Alstom**"], another Italian company. The transaction was made through the Italian legal figure of "*Conferimento di complesso Aziendale*". Furthermore, in 2001, ABB ceased to exist. None of these changes were communicated to ISAGEN.

In 2004, the designated representative of the consortium signed an amendment to Clause 33 of the contract, stipulating that participating in mediation prior to arbitration was no longer compulsory. Later that year, the members of the consortium filed a request for arbitration against ISAGEN. This was based upon the claim that ISAGEN introduced technical changes to the project, causing it to paralyse and generate extra costs. As a result, the consortium sought compensation for these damages and an extension of the execution period of the contract.

In its statement of defence, ISAGEN argued that the arbitral tribunal lacked competence and jurisdiction due to a null arbitration agreement that was amended when ABB ceased to existed. Therefore, neither the consortium nor ISAGEN had fully consented to arbitration. In 2010, the Tribunal rendered an award which declared ISAGEN liable and ordered it to pay damages.

Regarding its jurisdiction, the Tribunal held that the agreement was valid and the Tribunal retained jurisdiction since Alstom was legitimately part of the consortium. This conclusion was based upon the finding that the transaction had been performed correctly under Italian law, and the whole energy production unit had been transferred *ipso jure* to the new company. This transfer did not constitute an assignment of contract but a universal transfer of all assets and liabilities, which did not require the authorisation of the contracting party. Therefore, Alstom was legitimately part of the consortium and had validly consented to resort to arbitration.

ISAGEN filed an annulment recourse for vacation of the award, claiming that the Tribunal had no jurisdiction due to a null and void arbitration agreement.[62] The competent court that decided

[62] The recourse was based upon Article 163(1) of Decree 1818/98, which was the law in force at that moment. This ground corresponds to "*the nullity of the arbitration agreement*". This ground is equivalent to Article 108(1)(a) of Law 1563/2012, which is the *lex arbitri* currently in force at Colombia, based upon Article 34 of the Model Law for the application for setting aside an arbitral award. *See* L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], art. 108(1)(a) (Colom.).

the setting aside procedure was the Council of State, the highest administrative court. The decision of the Council of State was to deny the annulment of the award, upholding the validity of the amendment to the arbitral agreement concluded by the representative of the consortium, who had the power to bind all its member companies individually. Therefore, when ABB made a complete transfer of assets (including its energy unit and the MI-100 contract) to Alstom, the latter was also represented by the same person.

ISAGEN filed a *tutela* claim requesting the constitutional judge to set aside both the award and the decision that denied its annulment. They claimed that a grave violation of the fundamental right to due process had occurred during the arbitral proceedings because the Tribunal lacked competence to judge the parties, given that the members of the consortium that filed the request for arbitration were not the same that had amended Clause 33 of the contract. Moreover, the transactions that involved ABB were not notified to ISAGEN, which led the public entity to falsely believe that the amendment to the agreement and the execution of MI-100 was performed by ABB. However, in reality, the company that filed the request for arbitration was Alstom. Therefore, the parties never gave proper consent to arbitrate in accordance with Article 116 of the National Constitution that provides for the parties to opt for arbitration expressly and voluntarily.

The consortium filed a submission opposing the *tutela*, arguing that such action was not admissible because the setting aside recourse had been decided, which implied that the award was final and binding. Additionally, it argued that if the constitutional judge declared its admissibility, it would be contrary to the New York Convention which provides for setting aside as the sole mechanism to challenge an award.

The constitutional judge declared that, although the *tutela* was admissible against the award due to its nature being the same as that of a court judgment, it was not successful. The judge held that the reasons provided by the Council of State were sufficient and adequate to conclude that the arbitral agreement was valid. Hence, the parties were judged by a competent judge and violation of the right to due process was not proven.

Thus, the Constitutional Court reviewed the *tutela* decision and established a constitutional precedent regarding the admissibility of *tutela* actions against international awards rendered in Colombia, transcribing the admissibility requirements for *tutela* actions as being the same as those against national awards. The reasoning of the Court was as follows:

First, an arbitrator seated in Colombia performs a public service which is the administration of justice like a judge, and is, therefore, equally subject to constitutional control and must guarantee the correct application of the fundamental right to due process throughout the entire procedure. The competence of the arbitrator originates from the option given to the parties under Article 116 of the National Constitution to consensually opt for an alternative dispute resolution mechanism. Therefore, when consent is not validly given, thereby making the agreement void, the tribunal is not competent to administer justice and the right to due process is gravely violated.[63]

[63] SU500/15, ¶ 5.1 (Colom.). This part of the decision refers to Constitutional Court of Colombia court case T-244/2007. *See* Corte Constitucional [C.C.] [Constitutional Court], marzo 30, 2007, Sentencia T-244/07, Gaceta de la Corte Constitucional [G.C.C.], § 3 (Colom.).

Second, there are specific admissibility requirements for *tutela* actions to proceed. The admissibility requirements are:[64]

A) The claim should be based on the violation of a fundamental right. This is because the *tutela* should not become a means to examine the merits of the dispute but only the violation of fundamental rights during the procedure.

B) *Tutela* action is a subsidiary mechanism, available only after exhausting all the existing legal recourses to challenge the award. However, the Constitutional Court argued that it is possible to chance upon cases where the violation of fundamental rights would not fit under the scope of any of the grounds for annulment. In this situation, being obliged to exhaust all legal recourse would lead to inefficiency.[65] This means that a *tutela* action can be filed in parallel to the annulment recourse.

C) There is no limitation period to file a *tutela*. However, it must be initiated within a reasonable period.

D) The violation of the rights of the claimant must have a direct impact upon the decision reached by the tribunal in the award, meaning that they would have issued a different one in the absence of the same.

Third, the grounds for the success of a *tutela* against an award are:[66]

A) *Substantive Defect*, which occurs when the arbitrators make an incorrect application of the substantive law or the award lacks motivation, or its motivation is manifestly unreasonable.

B) *Lack of Competence or Organic Defect* of the arbitrators to resolve the matter submitted for their consideration, either because they have clearly acted outside the scope defined by the parties within the arbitration agreement or because they have ruled on non-arbitrable matters.

C) *Procedural Defect*, when the arbitrators violate the procedure established in the *lex arbitri* or the one agreed by the parties. For a procedural defect to be counted as a ground for the success of a *tutela* against an award, the defect or violation of procedure must be of such a magnitude that its absence would change the outcome of the award.

D) *Defect related to Evidence*, wherein the arbitrator fails to assess a crucial means of evidence or its analysis is supported by a manifestly unreasonable legal interpretation.

Fourth, *tutela* actions are admissible against international awards and/or against the judgment that decides whether an award should be set aside, the latter being a national court decision. Therefore, if the annulment action has been exhausted previously, the analysis of the constitutional judge will

64 SU500/15, ¶ 5.4.2.2 (Colom.).

65 *Id.* ¶ 6.2.1 ("Indeed, forcing a party to exhaust setting aside proceedings in such cases would imply starting a judicial process manifestly irrelevant and without possibilities of satisfying the claims filed."); *see also* Corte Constitucional [C.C.] [Constitutional Court], noviembre 15, 2007, Sentencia T-972/07, Gaceta de la Corte Constitucional [G.C.C.], § 6 (Colom.).

66 SU500/15, ¶5.4.3 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], junio 9, 2011, Sentencia T-466/11, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

centre around reviewing how the fundamental rights were guaranteed during both stages.[67] In case the motion to set aside an award has not been filed, the analysis at the constitutional level will be stricter since no national judge had exercised control over the award.[68]

When applying these criteria to the facts of the case, the Constitutional Court stated that the *tutela* action fulfilled all the admissibility requirements. The claim dealt with the possible violation of a fundamental right and the setting aside recourse had been exhausted and the *tutela* was filed within the reasonable period of seven months after the Council of State issued its decision denying the annulment.

However, when analysing if the award violated the right to due process because of lack of competence of the arbitrators, it concluded that this ground was not satisfied, and therefore, the *tutela* action was not successful. The Constitutional Court analysed all the arguments given by both the arbitral tribunal and the Council of State regarding the validity of the agreement. It concluded that the decisions reached in both stages were reasonable, coherent, and sufficiently motivated. The agreement was validly concluded by the consortium and the transfer of the energy unit from one of its members to the new company did not affect the previously given consent by the parties to arbitrate. Therefore, the award and the setting aside decision were made with complete and fair analysis of the validity of the agreement, addressed all the claims alleged by ISAGEN, and followed the due process.

The author finds it particularly interesting that the decision contains a dissenting opinion[69] signed by two court magistrates that disagree with the majority opinion of the Constitutional Court. The dissenting opinion argued that the award and the setting aside decision should be declared as null and void because they violate the right to due process for two main reasons.

First, the arbitral tribunal lacked competence because the members of the consortium that had concluded the arbitration agreement and its amendment were not the same as the ones that had filed the request for arbitration. Therefore, the consent of the real parties involved in the proceedings was not properly taken and the Tribunal was not constitutionally habilitated to administer justice.

Second, the Tribunal made an incorrect application of the substantive law. This is because it applied Italian law, when considering that the "*Conferimento di complesso Aziendale*" was validly executed and had *ipso jure* effects in Colombia, to a dispute that had to be solely settled under Colombian law.

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67 SU500/15, ¶ 6.2 (Colom.).

68 *Id.* ¶ 5.4.2.1 ("In other words, the *Tutela* action can be started in two scenarios, depending on whether or not it is necessary to exhaust the annulment recourse. This situation determines that the approach of the Constitutional judge, in both cases, is different. Although it is always based upon the respect of autonomous decision of the arbitrators over the case that should not be invaded by the Constitutional judge, who is not responsible for ruling on the merits of the matter submitted to arbitration, it is also true that in the cases in where it is not necessary to exhaust the annulment recourse, the *Tutela* action makes a first approach to the arbitral award, and in this sense the assessment of the direct violation of fundamental rights must be stricter. While in cases in which the annulment recourse has been exhausted, the award has already been subjected to a first examination, the Constitutional judge performs a more distant function, and proceeds to control whether, upon the resolution of the annulment recourse, no fundamental rights violation was noted.").

69 *See id.*

Therefore, as all the requirements were satisfied, the *tutela* had a high probability of being admissible and overturning the award, even though it did not in this particular case.

Figure: Relationship between the setting aside recourse and *tutela* action in Decision SU-500/2015[70]

The table below shows the relationship between the main characteristics of the annulment recourse provided by the Colombian *lex arbitri* and the *tutela* action against international arbitral awards rendered in Colombia, the applicability of which has been developed through constitutional jurisprudence:

Feature	Annulment recourse	Tutela Action	Comment
Legal provision	Articles 107 to 110 of Law 1563/2012.	Article 86 of the National Constitution, and its procedural aspects are regulated by Decree 2591/1991.	The admissibility of *tutela* actions in relation to international arbitral awards has been settled through constitutional case law (SU-500/2015).
Competent judge	Civil judge (Supreme Court of Justice) or the Administrative Judge (Council of State) if a party to the arbitration procedure is a Colombian public entity (Article 68 of Law 1563/2012).	The judge of the place where the violation of the fundamental rights took place, exercising a constitutional role (Article 37 of Decree 2591/91). It can also be reviewed by the Constitutional Court itself (Articles 35 and 36 of Decree 2591/91).	Different judges decide upon the recourses.
Means of appeal	The setting aside mechanism has only one stage with no provision of a means of appeal (Article 107 of Law 1563/2012).	The decision of a *tutela* action can be appealed to a second instance constitutional judge (Article 31 of Decree 2591/91). Moreover, the Constitutional Court may review the decision taken over the *tutela* action	

[70] *Id.*

Feature	Annulment recourse	Tutela Action	Comment
		(Article 35-36 of Decree 2591/91).	
Grounds	The grounds for annulment are those established under Article 108 of Law 1563/2012, which correspond to Article 34 of the Model Law and therefore, to Article V of the New York Convention for denying recognition and enforcement of international awards.	Substantive defect, lack of competence, procedural defect, and defect related to evidence, as stated in SU-500/2015, all of which are designed to protect the fundamental right to due process (Article 29 of the National Constitution).	
Stages	Filed against the award	In principle, it is a subsidiary mechanism that should be filed against the award only after having previously exhausted the annulment recourse.	The Constitutional Court argued that a *tutela* can be filed even if the action for annulment has not been exhausted. This occurs when "*matters excluded from the scope and grounds of the setting aside mechanism* " violate constitutional rights that have special protection. (SU-500/2015)
Procedural terms	Initiated within one month from the date on which the party making the application has received the award, its correction or interpretation. The procedure includes one month for the notification and submission of any opposition by the counterparty and two months for the issuance of the decision by the judge (Article 109 of Law 1563/2012).	The action has no limitation period but should be filed with immediacy. This should be understood as within a reasonable term initiated from the moment when the violation to the right began (SU-500/2015). The judge should decide within ten days. The appeal should be filed during the three days following the notification of the	*Tutela* actions are expeditious, but the author believes that the expression "*reasonable term*" is ambiguous and subjective, as is "*from the moment in which the violation began*" since it might be interpreted to include not only the notification of the award but also any interim, preliminary, or procedural decision rendered by the tribunal.

Feature	Annulment recourse	Tutela Action	Comment
		court judgment, with the second instance judge having 20 days to settle the claim (Articles 29-32 of Law 1563/2012).	
Effect sought	Annulment of the arbitral award.	Protection from the violation of the fundamental right to due process through the declaration of nullity of the award.	Both actions seek to vacate the award.

ii. Stage 2 – Decision SU033/2018

In Decision SU033/2018[71], the Constitutional Court recapitulated the rules for admissibility of *tutela* actions against awards[72]:

a) The constitutional judge, when deciding upon a tutela action, should never review the decision of the tribunal regarding the substantial rights of the parties but restrict himself to studying the procedural aspects of the tribunal and the award. This means that only the arbitrator shall decide upon the merits of the case.

b) *Tutela* actions should be admissible especially when a violation of the fundamental rights of the parties, specifically the right to due process, is derived from the award.

c) *Tutela* actions are admissible against awards but the analysis by the Constitutional Judge over the specific grounds for success *(substantive defect, lack of competence/organic defect, procedural defect and defect related to evidence)* shall be performed bearing in mind the main characteristic of arbitration, this being an alternative dispute resolution mechanism.

d) *Tutela* actions are subsidiary to other legal recourses available to the parties to vacate the award. This means that the annulment recourse should be exhausted. However, when the violation of the fundamental rights cannot be reviewed under any of the grounds of the setting aside mechanism, *tutela* actions can be initiated without the exhaustion of annulment recourse.

Given these rules, recapitulated from those established as the admissibility requirements and grounds described in Decision SU-500/2015,[73] it can be observed that, until this point, a *tutela* action could be filed against an international award rendered in Colombia. However, its

[71] Corte Constitucional [C.C.] [Constitutional Court], marzo 3, 2018, Sentencia SU033/18, Gaceta de la Corte Constitucional [G.C.C.], ¶ III (Colom.).

[72] *Id.*

[73] SU500/15 (Colom.).

admissibility requirements would have been the same as for national awards notwithstanding that the arbitral system in Colombia is dualist.

iii. Stage 3 – Decision T-354-2019

Decision T-354-2019[74] highlights that *tutela* actions against awards are admissible against national awards, but rarely against international awards. This occurs due to the nature of international arbitration and its differences from the national procedure. To arrive at this conclusion, the Constitutional Court revealed that there are three unique characteristics of the international arbitral system that make constitutional actions against awards possible but extremely exceptional.

The Constitutional Court, when deciding upon the case, established the differences between national and international arbitration that make *tutela* actions against awards rendered in the latter more exceptional than the former. These characteristics are:[75]

A) The express will of the parties to opt for arbitration as an alternative dispute resolution mechanism, therefore, banning judicial control and intervention in international arbitral proceedings and the award rendered. However, this does not mean that the admissibility of *tutela* actions is forbidden by Law 1563/2012 when stating that annulment is the only recourse against the award. This is because Law 1563/2012 is an ordinary law, which does not condition the authority of the National Constitution, which provides for constitutional control over judges and, by interpretation, over arbitrators.[76]

B) International arbitration permits parties to choose the substantive law applicable to the dispute. This means that when Colombia is the seat of arbitration, but the law chosen to solve the dispute is foreign (not the Colombian substantive law), the *tutela* action does not proceed against the award.[77]

C) The Colombian *lex arbitri* provides for specific grounds for setting aside an international award (based on the Model Law), which differ from the grounds of vacation of a national award.[78] The clearest distinction is the ground for vacating an award when it violates the

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74 This decision has been rendered by one of the chambers of the Constitutional Court, and, therefore, it is not a *unifying decision*. *See* Corte Constitucional [C.C.] [Constitutional Court], agosto 9, 2019, Sentencia T-354/19, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) [*hereinafter* "T-354/19"].

75 *Id.* ¶ 3 ("This Chamber, therefore, will study the elements that stand out from the regulations that govern international arbitration, in particular: (i) the express prohibition of judicial intervention; (ii) the freedom to choose the applicable rules of law; and (iii) the international grounds for annulment; which affect the constitutional jurisprudence on the exceptional admissibility of the Tutela action against national awards.").

76 *Id.* ¶ 3.1.

77 *Id.* ¶ 3.2.

78 L. 1563/12, julio 12, 2012, Diario Oficial [D.O.], art. 41 (Colom.). Article 41 of the Colombia *lex arbitri* provides for the grounds of annulment of national awards, the same being: 1) the non-existence, invalidity, or unenforceability of the arbitration agreement; 2) limitation of the action, lack of jurisdiction, or competence; 3) the tribunal has not been legally constituted; 4) improper representation of the appellant or lack of legal notification; 5) have been denied a piece of evidence or having failed to practice a piece of evidence dully received by the tribunal; 6) the award or the decision on its clarification, addition, or correction has been rendered after the expiration of the term set for the arbitral proceeding; 7) the decision of the arbitrators was made in conscience or equity, when it had to be made based on the law; 8) the award contains contradictory provisions, arithmetic errors, or errors by omission or change of words or alteration of these, provided that they are included in the final decision; 9) the award decides matters that fall out of the scope of the agreement, it grants more than requested by one of the parties or not having decided on matters subject to the arbitration.

> international public order of Colombia.[79] Analysis regarding the same must be conducted by the setting aside judge automatically (even without the petition of the party that initiated the annulment). The Constitutional Court explained that the international public order of Colombia includes fundamental rights.[80] It is important to clarify the main components of the international public order of Colombia as recognised by the jurisprudence of its Supreme Court of Justice,[81] which in turn is applied by the Constitutional Court. In that sense, it has been established that the concept of international public order is restricted to those fundamental principles for the Colombian legal system, which include fundamental rights, which are of such importance that the enforceability or recognition of the international arbitration award in Colombian territory cannot be allowed when vulnerating them.[82]

Therefore, bearing in mind that the international public order in Colombia includes fundamental rights, the setting aside judge would have to seek their protection. This results in the *tutela* actions being completely and necessarily subsidiary to the annulment recourse.[83]

As a matter of fact, and bearing in mind these characteristics, the Constitutional Court decided upon the case by rejecting the *tutela* action, leaving the parties to wait for the decision of the setting aside judge who had been reviewing the annulment recourse in parallel.

In conclusion, the current position regarding constitutional control over international arbitration in Colombia permits the admissibility of *tutela* actions as a mechanism to ensure that fundamental rights of the parties were respected through the proceedings and the award rendered. However, all the admissibility requirements described must be fulfilled and they shall be analysed by the constitutional judge keeping in mind that international arbitration has specific particularities and characteristics that makes it different from national arbitration or national court decisions. As a result, the admissibility of *tutela* actions against international arbitration awards is very exceptional and strict.

IV. Constitutional control over arbitration in Peru – Another Example

A. Constitutional protection: Recourse against awards

Peru is another Latin American jurisdiction that has debated the admissibility of constitutional actions against awards rendered within the State when it is chosen as a seat. However, the treatment has differed from that of Colombia. Traditionally, the Peruvian Constitutional Tribunal has declared *recurso de amparo*[84] or constitutional protection recourses as admissible against arbitral awards. The aim of this recourse is to ensure the guarantee of a fundamental right that is being violated by a public authority or individual. Therefore, the constitutional judge can order such

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79 *Id.* art. 108(2)(b).

80 T-354/19, ¶ 3.3 (Colom.) ("The international procedural public order includes the fundamental guarantees that ensure the defense and a fair trial, such as the right to receive adequate notification, a reasonable opportunity for defense, equality between the parties and a fair procedure before an impartial judge."); *see also* Corte Suprema de Justicia [C.S.J.] [Supreme Court], Civil Chamber, marzo 23, 2018, Expediente 2017-00080-00, Gaceta Judicial [G.J.] (Colom.).

81 *Id.*

82 *See* T-354/19, ¶ 9 (Colom.).

83 *Id.* ¶ 3.3.

84 CONSTITUCIÓN POLÍTICA DEL PERÚ 1993 [CONSTITUTION] Dec. 31, 1993, art. 200.

individual to cease the action or rectify the omission that is causing the damage. In failing to do so, the individual or authority will attract the imposition of fines and criminal liability.[85.]

For the specific court decisions and arbitral awards that are subject to constitutional control, the judicial protection consists of declaring such decisions null and void.[86] The argument developed by the Peruvian Constitutional Tribunal in its jurisprudence to declare this constitutional action constitutionally admissible is based upon the rationale that arbitration is an independent jurisdiction that administers justice. Therefore, it is obliged to comply with all constitutional guarantees within the procedure. This includes preventing any violation of the parties' fundamental rights.

In this sense, it has been said that:

> "*The special nature of arbitration, that requires the consent of the parties, and at the same time, being an independent jurisdiction as per established in the national constitution, never implies its disengagement from the constitutional scheme, much less from the task of applying all rights and principles recognized by the constitution (…) On the contrary, it must observe these principles as any other organ that administers justice.*"[87] (translated from Spanish).

Following this train of thought, the Constitutional Tribunal in Case STC 189-1999-AA/TC concluded that:

> "*[T]he possibility of challenging an award through constitutional actions cannot be considered as a choice that is contrary to the law of the Constitutional system given that, if under certain circumstances, such constitutional actions are admissible against court decisions, there is no reason to prevent the use of these legal mechanisms against the arbitral jurisdiction.*"[88] (translated from Spanish).

However, in Case 00142-2011-PA,[89] the Constitutional Tribunal established precedent that the constitutional protection recourse would no longer be admissible against awards. The decision has its origin in a constitutional action filed by Sociedad Minera Maria Julia against the arbitral tribunal composed of a sole arbitrator (Luis Humberto Arrese), for the vacation of the award rendered on the count that it violated the right to due process and access to justice. This was because the award was based upon an incorrect interpretation of the substantive law and an insufficient analysis of the facts and evidence of the case.

At the first instance, the Constitutional Judge declared the action as being inadmissible because the claimant did not use the annulment recourse provided by the *lex arbitri* to challenge the award,

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85 CÓDIGO PROCESAL CONSTITUCIONAL [CONSTITUTIONAL PROCEDURAL CODE], Ley 28237, art. 1 (Peru).

86 *Id.* art. 4.

87 Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. 6167-2005-PHC/TC, ¶ 20 (Feb. 28, 2006) (Peru), *available at* https://tc.gob.pe/jurisprudencia/2006/06167-2005-HC.pdf.

88 Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. STC 189-1999-AA/TC, ¶ 3 (Oct. 26, 1999) (Peru), *available at* https://www.tc.gob.pe/jurisprudencia/2000/00189-1999-AA.html.

89 Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. 00142-2011-PA/TC (Sept. 21, 2011) (Peru), *available at* https://www.tc.gob.pe/jurisprudencia/2011/00142-2011-AA.html.

implying that the Judge understood the constitutional action as being a subsidiary mechanism. Sociedad Minera Maria Juliathen filed an appeal, which was decided by the Constitutional Tribunal.

The Constitutional Tribunal reasoned that the annulment recourse is a satisfactory mechanism through which constitutional control can be achieved. Thus, fundamental rights should be guaranteed through the setting aside mechanism because the competent judge that resolves the dispute has the capacity and is under the obligation to grant their full application. Yet, the decision establishes three scenarios for the extraordinary admissibility of constitutional actions against the award (even when the annulment recourse has not been initiated). These are:[90]

i) The award violates any constitutional precedent issued by the Constitutional Tribunal,

ii) The arbitral tribunal does not apply a legal provision provided in the law applicable to the case, considering such legal provision as unconstitutional when analysed against the Peruvian National Constitution (such consideration arises from an analysis performed solely by the arbitrators), or

iii) The recourse has been filed by a third party to the proceedings whose fundamental rights were violated by the award.

Thus, the Constitutional Tribunal dismissed the constitutional action, considering that the allegations submitted by the claimant did not correspond to any of the new requirements for its admissibility but most importantly, because the annulment recourse was the more appropriate mechanism to seek such protection.

Figure: Relation between the setting aside recourse and constitutional protection recourse

The table below shows the relation between the main characteristics of the annulment recourse provided by the Peruvian *lex arbitri* and the constitutional protection recourse against arbitral awards rendered in Peru, the applicability of which has been developed through constitutional jurisprudence:

Feature	Annulment recourse	Constitutional Protection recourse	Comment
Legal provision	Articles 62 to 65 of Legislative Decree 1071/2008.[91]	Code of Constitutional Procedure, Law Nº 28237.[92]	The admissibility and applicability of constitutional protection recourse to arbitral awards has been developed through the jurisprudence of the Constitutional

90 *Id.* ¶ 21.
91 Decree 1071/2008, arts. 62–65.
92 CÓDIGO PROCESAL CONSTITUCIONAL [CONSTITUTIONAL PROCEDURAL CODE], Ley 28237 (Peru).

			Tribunal (N 00142/2011-PA).[93]
Competent judge and means of appeal	Superior Court. The decision can be appealed in the Supreme Court (Article 64 of Legislative Decree 1071/08).[94]	Constitutional Judge of the district where the right has been violated (Article 12 of the Code of Constitutional Procedure, Law Nº 28237). The decision can be appealed in the Constitutional Tribunal through the recourse known as "*Agravio Constitutional*" (Article 18 of the Code of Constitutional Procedure, Law Nº 28237).[95]	Different judges that decide upon the recourses.
Grounds	Contained in Article 63 of the Legislative Decree 1071/08, which is based upon Article 34 of the Model Law and therefore, upon Article V of the New York Convention for denying recognition and enforcement of international awards.	In principle, not admissible. However, they are available when: (i) the award violates any constitutional precedent issued by the Constitutional Tribunal; (ii) the arbitral tribunal does not apply a legal provision, considering it as unconstitutional; or (iii) the recourse has been filed by a third party to the proceedings whose fundamental rights were violated. The Constitutional Tribunal determines that the annulment recourse is appropriate for the protection of the fundamental rights of the parties in all other scenarios.	

93 Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. 00142-2011-PA/TC (Sept. 21, 2011) (Peru), *available at* https://www.tc.gob.pe/jurisprudencia/2011/00142-2011-AA.html.

94 Decree 1071/2008, art. 64.

95 CÓDIGO PROCESAL CONSTITUCIONAL [CONSTITUTIONAL PROCEDURAL CODE], Ley 28237, art. 18 (Peru).

Stages	Filed against the award.	Follows in principle, subsidiarity and is an extraordinary mechanism that should be filed against the award only after the exhaustion of the annulment recourse (Article 5 (2) of the Code of Constitutional Procedure, Law Nº 28237).	
Effect sought	Annulment of the arbitral award.	Protection from the violation of the fundamental right to due process through the declaration of nullity of the award.	Both actions seek to vacate the award.

V. Analysis: Should tutela actions be declared as admissible against international awards?

A. Are arbitrators judges and awards court decisions?

The reasoning provided by the Colombian Constitutional Court and the Peruvian Constitutional Tribunal in the above discussed cases shows that in practice, it has been debated whether to declare constitutional actions against international awards as admissible. As described, the idea is based upon recognizing that the power conferred upon the arbitrator to decide upon a dispute corresponds to the faculty of administering justice, which is rooted in the National Constitutions.

Following this, the courts hold the view that arbitrators are judges because they perform judicial functions and therefore, awards are equivalent to court decisions.[96] This means that the awards and proceedings should accord due importance to constitutional guarantees and rights, always remaining under the purview of constitutional control.

However, arbitration is an alternative dispute resolution mechanism through which two or more parties give power to a panel of arbitrators to settle a defined set of disputes by rendering a final

[96] The most important court cases in Colombia that have the above-mentioned points discussed are those discussed within Part II of this article. The same being: (i) Constitutional Court of Colombia court case T-244/2007, Colombian National Navy v. Marinser Ltd.; (ii) Constitutional Court of Colombia court case: SU-500/2015; (iii) Constitutional Court of Colombia court case: SU033/2018; (iv) Constitutional Court of Colombia court case: T-354/19. *See* Corte Constitucional [C.C.] [Constitutional Court], junio 8, 2005, Sentencia T-244/07, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); *see also* SU500/15, 6; Corte Constitucional [C.C.] [Constitutional Court], marzo 3, 2018, Sentencia SU033/18, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); T-354/19 (Colom.).
The most important court cases in Peru that have the above-mentioned points discussed are those discussed within Part III of this article. The same being: (i) Constitutional Tribunal of Peru, court case: STC 6167-2005-PHC/TC (Feb. 28, 2006); (ii) Constitutional Tribunal of Peru, court case: STC 189-1999-AA/TC (Oct. 26, 1999); (iii)Constitutional Tribunal of Peru, court case: EXP. N 00142-2011-PA/TC (Sept. 21, 2011). *See* Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. 6167-2005-PHC/TC (Feb. 28, 2006), *available at* https://tc.gob.pe/jurisprudencia/2006/06167-2005-HC.pdf; *see also* Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. STC 189-1999-AA/TC (Oct. 26, 1999) (Peru), *available at* https://www.tc.gob.pe/jurisprudencia/2000/00189-1999-AA.html; *see also* Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. 00142-2011-PA/TC (Sept. 21, 2011) (Peru), *available at* https://www.tc.gob.pe/jurisprudencia/2011/00142-2011-AA.html.

and binding award. Therefore, arbitral proceedings abide by the principle of party autonomy, which means that the power of the arbitrator to decide upon the disputed matters is conferred exclusively by the will of the parties through a contract.[97]

Although it is true that arbitration is constitutionalised under Article 116 of the Colombian Constitution, the author believes that this constitutional authorisation would only constitute an intermediate foundation of the arbitration, with the immediate or direct basis of arbitration being the principle of party autonomy. Therefore, the author would like to emphasise that the authority of the arbitrators shall always have origins in the existence of an agreement concluded by the parties, through which they decide to dislodge a dispute from the permanent system of administration of justice and submit it to a tribunal.

Contractualism explains that the keystone of arbitration is the arbitration agreement,[98] therefore, party autonomy itself is the foundation of the authority of the tribunal as well as the legitimacy of the binding award. Scholars explain that arbitrators obtain their power from a private contract, not from the authority of a State and that they must solve such disputes based only on such agreement.[99]

Some authors also argue that arbitrators do not have a forum and therefore, should not be made subject to invasive control in any jurisdiction. This is known as the delocalisation theory,[100] and infers that when solving an international commercial dispute, the tribunal "*has its own autonomous system*" which is "*detached from stringent abusive state control*".[101] Following this idea, authors such as Zaherah Saghir and Chrispas Nyombi describe the relevance of the delocalisation theory by emphasizing that the award rendered is the product of the choices made by the parties distant from the procedural national dispositions of the seat. In the words of the authors,

> "*[t]he importance of delocalised arbitration is established upon certain distinct arguments. The first is the parties' autonomy to arbitrate. Their choice to select arbitration rather than being subject to national laws is an imperative feature (…) On this basis, delocalisation views the arbitral procedure and any award as originating autonomously and independently of the national legal systems. Furthermore, the arbitral*

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97 Both the Colombian *lex arbitri* in Article 101 and the Peruvian lex arbitri in Article 57 provide for the arbitrators to conduct the proceedings accordingly to what has been consented by the parties in the arbitration agreement. *See* L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], art. 101 (Colom.); *see also* Decree 1071/2008, art. 57.

98 TIBOR VÁRADY, JOHN J. BARCELÓ III, STEFAN KROLL & ARTHUR TAYLOR VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE (2015) ("Irrespective of the form of the arbitration agreement, there must be a certain minimum content: the parties must express the clear will that they want their disputes – or at least a particular dispute of a group of disputes – to be decided by arbitration in place of court litigation.").

99 Vallejo, *supra* note 19, at 205.

100 *See* Jose Manuel Álvarez Zárate & Camilo Valenzuela*, Recognition and Enforcement of Arbitral Awards Annulled in Their Own Seat: The Latin American Experience Interpreting the New York Convention's 'Sovereign Spaces'*, *in* 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES 208 (Katia Fach Gómez & Ana Mercedes López Rodríguez eds., 2019) ("In sum, the foundation of this concept is that given that international arbitration focuses on resolving international commercial conflicts, it should have and benefit from its own principles and rules developed in a dossier, which should be detached from the standards used for other intra-State level legal procedures.").

101 *Id.* at 207.

> *agreement is central to the arbitral process from which the right to arbitrate arises rather than from lex loci arbitri, the law of the seat.*"[102]

It is also argued that the delocalisation theory agrees with the pro-arbitration philosophy of the New York Convention. In line with this idea, every interpretation of the New York Convention should aim at the recognition of the legitimacy of the award. "*For this reason, it is regarded as a 'pro-enforcement' principle that results in the arbitral award being placed above the State's laws and power*".[103] Therefore, this pro-enforcement principle inhibits all intrusive national court processes as much as possible.

These two theories imply that the tribunal should never be considered a court, the power of which is sourced from the National Constitution. Its obligation arises from an agreement between the parties that have the faculty to decide upon the procedural aspects of the proceedings. Therefore, arbitrators are not bound directly to constitutional orders, and *tutela* actions and constitutional protection recourses are not compatible with the nature of arbitration. As a result, the author believes that the analogy between judges and arbitrators made through the jurisprudence studied above is incorrect. Thus, the constitutional law of the seat of arbitration should not have direct applicability over the arbitral proceeding. This means that the arbitrator should not be subject to constitutional control and the awards should not be annulled by constitutional actions.

This analysis is consistent with the position of Latin American scholars who oppose the constitutionalisation of arbitration by arguing that international commercial arbitration is not part of the constitutional system. This is because they are not specialised constitutional courts, or even organs of the State.[104]

There are two additional arguments identified by the author, which reveal that the reasoning of the constitutional courts in the above-discussed cases is incorrect. *First*, it is common in most arbitral regulations that arbitrators possess less powers than those conferred upon judges. In that sense, arbitrators usually seek the cooperation of national courts at the seat of arbitration for actions such as taking of evidence, interim relief, and enforcement of arbitral decisions.

For instance, the *lex arbitri* in Colombia, in Article 88,[105] dictates that any party can request a national judge for the execution of an interim relief order granted by a tribunal. Article 100[106] also provides for the taking of evidence within the national territory, with the cooperation of national judges by entrusting them with the task under the provisions of the General Code of Procedure. Similarly, under Article 8,[107] the *lex arbitri* in Peru provides for judicial collaboration and control for obtaining evidence and interim relief orders as well as for the execution of arbitral decisions.

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102 Zaherah Saghir & Chrispas Nyombi, *Delocalisation in International Commercial Arbitration: A Theory in Need of Practical Application*, 8 INT'L CO. COM. L. REV. 269, 270 (2016).

103 Zárate & Valenzuela, *supra* note 100, at 207.

104 Alfredo De Jesús, *La autonomía del arbitraje comercial internacional a la hora de la constitutionalización del arbitraje en América Latina*, 2(1) REVISTA DE ARBITRAJE COMERCIAL Y DE INVERSIONES 29–80 (2009).

105 L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], art. 88 (Colom.).

106 *Id.*

107 Decree 1071/2008, art. 8 (Peru).

Second, arbitrators may decide upon a matter *ex aequo et bono* if parties have consented to it.[108] Judges are prohibited from doing so, since they must always perform an exhaustive analysis of all aspects of the case based on substantive law. The irony is created by the system itself when it creates the possibility for the arbitrator to render an award *ex aequo et bono* but at the same time has the discretion to nullify a decision that lacks motivation based on the correct application of substantive law.

The above-mentioned reasons portray how the core reasoning of Colombian and Peruvian constitutional jurisprudence is incorrect when comparing the origin and faculties of an arbitrator to the obligations and powers of a national judge. Therefore, subjecting the former to constitutional control is excessive and inappropriate.

Lastly, it is evident that even though both branches of law have a common aim i.e. to seek the respect of the law, there is also an unmistakable difference. This difference is that the constitutional judge defends fundamental rights while the arbitrator has the objective to defend private and economic rights that have been acquired contractually. For this reason, the author opines that since participating in arbitration is a contractual obligation that rests upon private consent, its adoption into constitutional provisions leads to a contradictory relationship between two areas of law that have distinct objectives and origins.

B. Are constitutional actions as a secondary mechanism to set aside awards at the seat of arbitration contrary to the New York Convention?

i. Obligations imposed by the New York Convention

Notwithstanding the arguments described above, other scholars debate that arbitration is not delocalised and that the law of the seat of arbitration plays a pivotal role which cannot be overlooked. For these scholars, the New York Convention is based upon the principle of territoriality, which means that the tribunal must conduct the proceedings in accordance with the will of the parties but only to the extent that the *lex fori* does not enter into conflict with it.[109] This principle provides a strong base for national courts to exercise supervisory powers over the arbitration.[110]

The author recognises that the principle of territoriality is evidenced within two levels of control by the seat. The first is the capacity of the State to recognise the validity of the arbitration agreement. This is derived from Article I(1) of the New York Convention which demonstrates that each State makes a sovereign decision to give effect to an agreement within their territory when reviewing the decision of a tribunal that decides its competence, showing that no one in the international arbitration system is delocalised.[111] Moreover, when arbitrators declare their

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[108] This faculty is expressly granted to the parties under Article 101(3) of Law 1563/2012 and Article 57(3) of Legislative Decree 1071/08. *See* L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], art. 101(3) (Colom.); *see also id.* art. 57(3).

[109] William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L COMP. L. Q. 21 (1983); Michael Mustill, *The New Lex Mercantoria: The First Twenty Five Years*, 4 ARB. INT'L 86 (1988); MICHAEL J. MUSTILL & STEWART CRAUFORD BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 66–68 (1989).

[110] Sai Ramani Garimella, *Territoriality Principle in International Commercial Arbitration – The Emerging Asian Practice* (May 29, 2014) (unpublished), *available at* https://ssrn.com/abstract=2584332.

[111] *See* Zárate& Valenzuela , *supra* note 100, at 209 ("In other words, the Convention has not provided the freedom for the different parties in a dispute to make *contra legem* meaningful interpretations or to make exceptions that evade States' control in its jurisdiction and territory.").

competence, it is done on the basis of the *lex arbitri,* which implies that they will never be wholly disconnected from the State.

The second level refers to the authority of courts to review the awards issued by a tribunal. In this case, the principle of territoriality is found in Articles V(1)(e) and VI of the New York Convention, which recognise that setting aside is a faculty entrusted only to the "*competent authority of the country in which the award was made*". This principle implies that the *lex arbitri* is competent to choose the mechanisms as well as the grounds for setting aside arbitral awards.[112]

In that sense and from this perspective, since the legislature at the seat of the arbitral proceedings has the autonomy to decide which actions are admissible to annul arbitral awards, the author concludes that constitutional actions for setting aside would not be contrary to the New York Convention in principle. This is because neither are there any direct limits imposed upon the seat regarding the possibility of creating multiple legal mechanisms to challenge the award, nor does it prohibit the seat from according competence upon different national judges to annul an award through parallel recourses. Likewise, if the arbitrator is always bound by the *lex fori* when declaring his competence, nothing within the New York Convention excludes constitutional principles from this test.

ii. Implied limits imposed by the New York Convention on the mechanisms and grounds to annul awards

However, to the author's understanding, accepting that a State has such broad authority to create various annulment mechanisms with multiple grounds to set aside an award is certainly contrary to the obligation imposed by Article II of the New York Convention.[113] This provision directs Contracting States (without differentiating between States chosen as seat for the arbitral proceedings or as the place for the enforcement of the award) to recognise that the parties have consented to arbitrate. This, in turn, implies that the seat should respect the desire of the parties to reach a binding and easily enforceable award. This means that the whole arbitral system would only be effective when no invasive judicial intervention is exercised in the State that has been chosen as the seat.

Moreover, constitutional control would also be contrary to the overall purpose of the New York Convention. Article 31 of the Vienna Convention on the Law of Treaties[114] determines that a treaty has to be interpreted in good faith, in light of its object and purpose and considering its preamble and annexes. The New York Convention indicates in its introductory note that the aim of the Convention is to ensure the non-discrimination of awards and safeguard their enforcement.[115] This allows the interpretation that the motive of the New York Convention is to achieve the full effect of arbitration as an alternative to litigation.

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112 *See* BORN, *supra* note 2, at 3165 ("The grounds which are available for annulling an international arbitral award in the place of arbitration are defined principally, and arguably entirely, by national law. The New York has frequently been interpreted as imposing no limits on the substantive grounds that may be invoked to annul an international arbitral award, thus leaving the subject entirely to national law.").

113 New York Convention, *supra* note 1, art. II ("Art. II (1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.").

114 Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 311.

115 New York Convention, *supra* note 1, at 1.

Given that the New York Convention indirectly imposed limits to the scope of review of awards during the setting aside stage,[116] the question remains as to what States must keep in mind while dealing with annulment proceedings. The answer is the obligation of States not to undermine and ignore the parties' basic agreement to arbitrate. Therefore, annulment proceedings should be structured to allow courts a supervisory function over only the procedural aspects of the arbitral proceedings. Annulment should not include the possibility of starting judicial analysis of the merits of the dispute *de novo*.

For example, permitting the annulment of an award by a secondary mechanism such as a *tutela* action, based upon a so-called procedural defect, would violate the principle of party autonomy. The parties can choose the rules applicable to the dispute, but conferring constitutional judges the power to decide whether the rules chosen have been correctly applied, implies that the court would evaluate whether the tribunal's errors had such an impact as to have resulted in a different decision. This review would be done under the garb of protecting the fundamental right to due process of the parties, but ultimately would result in a *de novo* analysis of essential matters submitted to the arbitrator's discretion.

This analysis is coherent with the position adopted by scholars who argue that the annulment recourse provided within the *lex arbitri* shall suffice for the purpose of exercising procedural control over the award. Any further control, such as constitutional control through other recourses, strikes at the heart of arbitration:

> "*I predict that this position will irritate some people: the arbitrators shall not be subject to the procedural mechanisms of constitutional control? Answer: yes. Reason: because the award is final; because that was the desire of the parties when they opted for an alternative dispute resolution mechanism. Alternative to what? - To the judicial system. Any other position would be contrary to the will of the parties. If a party submits its dispute to arbitration, which only takes place in one instance, it is because it wants everything to be resolved in a single instance.*"[117]

Having implied limits to annul awards means that *tutela* actions are contrary to the New York Convention and to the essential function of arbitration, which is to settle disputes in an efficient and binding manner. Not only do such actions result in a double review of the award from the national courts (done by the civil or administrative judge and the constitutional judge through different actions), but also create legal uncertainty as to when the award becomes final and binding.

Therefore, having multiple recourses available with multiple alternative grounds affects the enforcement stage directly, even if there are extremely exceptional situations for their admissibility. Instead, providing for a single expedited annulment procedure which is rooted in pre-established grounds as stated in the *lex arbitri* and not as developed though ever-evolving constitutional jurisprudence, will provide for easy enforcement of awards.

iii. The grounds for annulling awards through tutela actions

Bearing in mind the arguments discussed above, it is interesting to examine whether grounds for the success of *tutela* actions are contrary to the obligation imposed by Article II of the New York

116 BORN, *supra* note 2, at 3163–3392.
117 de Cossío, *supra* note 8, at 238.

Convention. Accordingly, in this part, the author will comment upon each defect established through Colombian constitutional jurisprudence, proving that they indeed might violate the commitment of the State to recognise arbitration agreements concluded on the basis of party autonomy.

The first ground is substantive defect, which occurs when the arbitrator incorrectly applies the law to the resolution of the case or reaches a decision that lacks motivation. Fortunately, the Constitutional Court determined that this ground is inapplicable to international awards rendered in Colombia when a foreign law is chosen to decide upon its merits.[118] Any understanding to the contrary would have opened the door for constitutional judges to decide upon the merits of the dispute because it implies that the Court has to analyse whether the law has been correctly interpreted as well as its effects upon the parties. It also implies that the parties cannot consent to an award being rendered without motivation, extensive reasoning, or a part that analyses all the arguments presented by the parties within every submission. Most importantly, it implies that the Constitutional Court judges, trained in Colombian law, would have to decide matters under laws that are foreign to them.

The second ground is defect related to evidence, which occurs when the arbitrator renders an award and fails to assess a means of evidence that a party believes has fundamental impact upon the outcome of the case. It may also be a defect on the ground of the analysis being unreasonable. This gives the opportunity to the constitutional judge to interfere in the analysis carried out by the arbitral tribunal regarding the admissibility, relevance, materiality, and weight of evidence. Furthermore, the adjective "*unreasonable*" is a subjective concept, which will be left to the individual understanding of the judge to assess. Therefore, the judge would have to undertake the task of the arbitrator if the latter has either chosen not to give weight to a particular means of evidence because he autonomously considered it superfluous or when the arbitrator believes that other evidence is sufficient to decide upon the case. In this scenario, the judge would analyse and give weight to the evidence as the arbitrator does when assessing the merits of the dispute.

The third ground is defect for the lack of competence, which implies that the award has been rendered on the basis of an agreement that is void, or where the dispute involves non-arbitrable matters, or where the arbitrator decides upon matters that are outside the scope consented upon by the parties for its permitted action. The author believes that this ground violates the principle of party autonomy and *kompetenz-kompentenz* of the tribunal.

The principle of *kompetenz-kompetenz* has both positive and negative effects, as described by international scholars[119] and recognised by the Constitutional Court of Colombia.[120] The positive effect is that the tribunal determines the limits of its own competence based on the arbitral agreement. The negative effect of *kompetenz-kompetenz* is related to the positive one i.e. if the power to decide on competence is conferred upon the arbitrator, the interference of the judges must be

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118 *See* T-354/19 (Colom.).

119 *See* Andre Luis Monteiro, *The Kompetenz-Kompetenz Rule in Brazilian Arbitration Law*, KLUWER ARB. BLOG (May 29, 2019), *available at* http://arbitrationblog.kluwerarbitration.com/2019/05/29/the-kompetenz-kompetenz-rule-in-brazilian-arbitration-law/("The positive effect of the *Kompetenz-Kompetenz* rule ensures that the arbitral tribunal can rule on its own jurisdiction, while the negative effect implies that that courts cannot decide on arbitral jurisdictional challenges before the arbitrators (chronological priority).").

120 *See* SU500/15, ¶ 5.4.3.1 (Colom.).

limited. Therefore, "*a presumption of chronological priority for the tribunal with respect to resolving jurisdiction questions is established*," imposing a "*negative or restraining effect on the court, whose role is generally deferred to subsequent review of the tribunal's decision*".[121]

The author considers that initiating a *tutela* action based on the defect of lack of competence violates the autonomy of the tribunal to establish its jurisdiction, since it transfers the analysis of the validity and existence of the arbitration agreement as well as the interpretation of its content to the judge. Therefore, this defect conflicts with the *kompetenz-kompetenz* principle in both its positive and negative sphere.

Moreover, regarding procedural defects, Law 1563/2012 in Colombia already states the grounds for setting aside an award and holding the arbitral agreement void where "*the party was unable to present the case*" due to procedural violations.[122]

Having analysed the grounds for success of the *tutela* action, the author considers that such constitutional action violates Article II of the New York Convention. This is because such grounds for success of the action overlook the main objective that parties seek to fulfil when consenting to arbitration. Thus, ignoring the will of the parties to exclude the jurisdiction of the national courts (which is unequivocally established by the arbitration agreement), but in turn opening a gate for jurisdictional control through a constitutional mechanism is contrary to the obligation of the State to recognise such agreement and refer the parties to arbitration.

iv. *Sufficiency of the annulment recourse*

The conclusion is that the grounds for success of *tutela* actions not only violate the principle of party autonomy but also cause inefficiency in the arbitral system, resulting in double control over the award. The Constitutional Court of Colombia also recognises that the competent judge who decides upon the annulment is suited to exercise constitutional control. The Constitutional Court has stated that "*the annulment recourse is a legal mechanism suitable to correct the violations of fundamental rights that have taken place when rendering the arbitration award*".[123] As a result, the Constitutional Court determined that one of the tasks of the judge whilst deciding upon setting aside proceedings is to verify whether the procedure followed during the arbitration was in accordance with the National Constitution.

The author believes that this implies that the annulment recourse is, in itself, enough to protect the fundamental right of the parties to due process. Notwithstanding this, the Constitutional Court upholds the admissibility of a retrospective constitutional review.

In contrast, although the position adopted by the Constitutional Tribunal of Peru also accepts that setting aside proceedings are a satisfactory scenario for the protection of fundamental rights, the huge difference is in that the Peruvian Constitutional Tribunal decided to declare constitutional actions inadmissible against awards.[124] The author believes that this is because it is clear that one

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121 Amokura Kawharu, *Arbitral Jurisdiction*, 23(2) N. Z. UNIVERSITIES L. REV. 238, 243 (2008).

122 L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], art. 108(2)(b) (Colom.).

123 SU500/15 (Colom.).

124 Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. 00142-2011-PA/TC, ¶ 20 (Sept. 21, 2011), *available at* https://www.tc.gob.pe/jurisprudencia/2011/00142-2011-AA.html.

disease does not require many medicines. Meanwhile, the Colombian Constitutional Court has determined that constitutional control may be exercised after exhaustion of the annulment recourse. The competence for strict constitutional control lies with the constitutional judge, thus making the cure worse than the disease. This happens because the power exercised by the Constitutional Judge becomes problematic when it is considered that its control is undertaken from a constitutional perspective, perhaps invading the scope of competence of the arbitral tribunal and permitting double review over the award by two national judges, first during the annulment recourse stage and then the subsequent *tutela* action.

Even though the author believes that the decision reached by the Peruvian Constitutional Tribunal is appropriate, the author deems it fit to make two comments upon the three extraordinary grounds that still permit the admissibility of the constitutional protection recourse against awards. *First*, from the author's perspective, permitting constitutional actions when the award violates any precedent issued by the Constitutional Tribunal, is a subjective ground that may encompass numerous alternative scenarios within its scope. This may become problematic at the setting-aside or any other subsequent stage given that: (1) arbitrators will be required to keep abreast with constitutional developments; (2) courts may have alternative interpretations of fundamental rights and precedents may not be congruous to each other, in which case the determination of the applicable precedent will be a consideration for the tribunal; and (3) awards will have to be worded similarly to court judgments, and there may be situations where the parties have agreed that the award need not be a speaking award. This alludes a greater degree of responsibility upon the arbitrator than what is entrusted through the arbitral agreement.

Second, the tribunal must also not apply a provision of law which is considered unconstitutional, necessarily implying that the arbitrator fulfils the role of a judge. This is because one of the core obligations of national judges in Peru is to exercise constitutional control when rendering a decision, by excluding the application of a legal provision of law that is incompatible with a constitutional mandate and hierarchically inferior to it.[125] This is known as *control difuso de constitutionalidad*. Therefore, by transferring to the tribunal the duty of exercising such control, it is essentially envisioned as a judicial authority.

In this sense, the author believes that while the principles determined by the Constitutional Tribunal are a cure to double review, they still remain deficient. As a result, the author considers that all fundamental constitutional procedural rules are already protected, and should be, via setting aside proceedings.

VI. Is it possible to protect constitutional fundamental rights through public policy violation grounds?

So, if there are two recourses with the same purpose, why not choose only one? Will the annulment recourse be adequate to exercise constitutional control, per the reasoning of the Peruvian Constitutional Tribunal? Or will setting aside proceedings not suffice in granting the correct application of fundamental rights during arbitration, as opined by the Colombian Constitutional Court?

[125] CÓDIGO PROCESAL CONSTITUCIONAL [CONSTITUTIONAL PROCEDURAL CODE], Ley 28237, art. 6 (Peru).

As it will be argued in this part, public policy as a ground for annulment should be enough to assess whether an award violates the constitutional guarantees of the parties. This also implies that constitutional actions in international arbitration not only make the whole system inefficient but are also unnecessary.

Both, the Peruvian and the Colombian arbitration regimes provide for setting aside proceedings to vacate an international award due to the award being in violation of the public policy of the State.[126] From an elementary approach, one could argue that this ground would cover all the constitutional guarantees of the State. However, this could only be true if public policy is understood as the "*most fundamental rules and values which are of utmost importance for that States society*".[127]

Yet, in this scenario, the concept of public policy is understood as national public policy. This concept has a broad scope and is shaped by each particular nation's sources of law.[128] Therefore, it would comprise only of each State's particular constitutional mandates, because their application depends exclusively upon their jurisprudential development.

Nonetheless, both the Colombian and Peruvian arbitration regimes determine that it is not domestic public policy that is the standard of review,[129] but international public policy.[130] Moreover, the Constitutional Court does not address the question of international arbitration specifically in its jurisprudence i.e. it does not specifically address what the relationship between the application of the fundamental rights provided by the National Constitution and the concept of international public policy in international arbitration is. Nevertheless, the Constitutional Court, in Decision SU-500/15, held *tutela* actions to be admissible when the violation of constitutional rights occurs on "*matters excluded from the scope of the setting aside mechanism*" or "*outside of its scope*".[131] The author believes that this implies that the Constitutional Court understands that none of the grounds for

126 L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], art. 108(2)(b) (Colom.); Decree 1071/2008, art. 63(1)(f) (Peru).

127 Margaret L. Moses, *Public Policy under the New York Convention: National, International and Transnational*, *in* 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES 173 (Katia Fach Gómez & Ana Mercedes López Rodríguez eds., 2019).

128 *See* HELENA HSI-CHIA CHEN, PREDICTABILITY OF 'PUBLIC POLICY' IN ARTICLE V OF THE NEW YORK CONVENTION UNDER MAINLAND CHINA'S JUDICIAL PRACTICe 11–26 (2017); ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 360–61 (1981) ("It may suffice to draw attention to the important distinction between domestic and international public policy. According to this distinction what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. It means that the number of matters considered to fall under public policy in international cases is smaller than that in domestic cases.").

129 L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], art. 108(2)(b) (Colom.); Decree 1071/2008, art. 63(f) (Peru).

130 Authors differentiate national public order, composed of all norms of a particular system, from international public order, composed of only the main principles of a system. In that sense, it has been said that the enforceability of an award will vary depending upon the standard of review chosen by the State. *See* Margaret L. Moses, *Public Policy: National, International and Transnational*, KLUWER ARB. BLOG (Nov. 12, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational/ (Particulary refering to Article V(2)(b) of the New York Convention, the author states "[t]he plain language of the clause and the drafters' intent indicate that public policy means national public policy, the public policy or ordre public of the State of the enforcing court. This interpretation is warranted because the purpose behind the exception was to permit a country to refuse to enforce an award that was contrary to its own system. However, in practice, courts have varyingly used national, international and even transnational interpretations of the public policy exception (…) A State's international public policy tends to be interpreted more narrowly than its domestic public policy, such that a foreign arbitral award is less likely than a domestic one to be refused enforcement.").

131 SU500/15, ¶ 5.4.2.3 (Colom.).

setting aside (not even the violation of public policy) are sufficient for the protection of all constitutional rights and their jurisprudential development.

Also, this reasoning provided by the Constitutional Court opens the door to the filing of a *tutela* action not only as a subsidiary remedy but also as an alternative to setting aside proceedings, even when the latter has not been exhausted. The author interprets that if the Constitutional Court is reluctant to declare *tutela* actions inadmissible against awards and instead it gives them the status of the primary alternative to annul awards, it may be because the Court considers that the National Constitution cannot be adequately protected under the ground of international public order.

Fortunately, the Constitutional Court, in Decision T-354-2019,[132] corrects this mistake and establishes that since the annulment judge is able to review the protection of fundamental rights in the setting aside stage on the ground of the integrity of the international public policy of Colombia, the *tutela* action will be inevitably subsidiary.

Notwithstanding this scenario, the author believes that filing a *tutela* action against an award would necessarily result in double control, performed by two different national judges. This would only make the system unproductive and inefficient because the result sought from both the constitutional action and the set aside claim (based on the violation of the public policy) is the protection of the fundamental rights of the parties before the arbitration. Both actions having the same purpose, causes a double review of the award at different levels and moments in time. The author would base the hypothesis on the following premise:

Fundamental rights and constitutional guarantees such as the right to fair trial are a part of the international public order of Colombia,[133] which indicates that the setting aside recourse is necessary and enough for its protection. This means that no extra analysis by means of a constitutional action would be required. Moreover, what makes the annulment recourse even more convenient is the fact that it permits judges to analyse the international public policy violations *motu proprio*.

On the other hand, the Supreme Court of Justice of Colombia (civil court competent to decide upon annulment recourses where the parties involved in the arbitration are of a private nature) has explained the meaning of international public policy applicable to setting aside proceedings and to the recognition and enforcement of international awards. The case cited has its origin in an annulment recourse initiated by the international consortium Ferrovial-Sainc against an award rendered by an ICC tribunal seated in Colombia. The dispute originated due to the termination of

[132] This decision, unique in its analysis, content and conclusion is not a *Sentencia de Constitucionalidad* or *Sentencia de Unificación*, meaning that it is only binding upon the parties to the dispute. However, it is extremely relevant because it reveals the evolution upon the treatment of the topic by the Constitutional Court. Moreover, it works as an auxiliary criterion of judicial proceedings. This view has been expressed in Council of State of Colombia Case 11001-03-15-000-2020-03234-00. *See* Consejo de Estado, Sección Quinta [C.E.] [Council of State], Septiembre 24, 2020, Sentencia 11001-03-15-000-2020-03-234-00 (AC), § 2.6.2 (Colom.).

[133] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Civil Chamber, marzo 23, 2018, Expediente 2017-00080-00, Gaceta Judicial [G.J.] (Colom.).

a contract for the construction of a project at a port, concluded with the multinational company, Cerrejón Ltd.[134]

The annulment recourse was resorted to on the allegation of violation of the international public policy of Colombia, on the ground that the Tribunal did not take into account the testimony of an expert witness whilst rendering the award and thus violated the fundamental right to due process. The Supreme Court of Justice denied the annulment, concluding that Colombia's international public policy was not violated since "*all procedural guarantees were granted, along with the right to due process*", and because the Tribunal analysed all the available and relevant evidence it had at hand, issuing a decision that was not arbitrary.

While reaching this decision, the Court defined international public policy as "*the basic principles of morality; a set of legal, economic, political, private and moral principles that are absolutely obligatory for the social conservation of a people at a given time*" and also "*a dynamic, constructive and tolerant public order for the international community*".[135]

Additionally, the Supreme Court of Justice highlighted that it was the witness who had not presented himself at the hearing without a valid excuse. Most importantly, it determined that the consortium did not prove that the omissions of evidence had the magnitude to alter the decision reached by the Tribunal on merits, and therefore, the claim for annulment lacked constitutional relevance.

From the author's perspective, the analysis made by the Supreme Court of Justice indicated that it considers fundamental rights (such as that of due process) as part of the international public policy of Colombia. Moreover, it shows that the Court is aware that its position requires it to evaluate which claims are constitutionally relevant, and consequently, protect them through a setting aside decision.

Besides, the Constitutional Court indicated that the concept of international public policy includes the protection of procedural guarantees such as a fair trial, the right to receive adequate notification, a reasonable opportunity for defence, equality between the parties and a fair procedure before an impartial judge.[136]

Moreover, the definition of international public policy given by the Supreme Court of Justice is coherent with how scholars traditionally define international public policy to be the minimum and fundamental standards that comprise *jus cogens*.[137] The content of international public policy is believed to include the prohibition of bribery, corruption and abuse of rights,[138] and the protection of principles such as freedom and equality.

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134 Corte Suprema de Justicia [C.S.J.] [Supreme Court], Civil Chamber, diciembre 19, 2018, Expediente SC5677-2018, Gaceta Judicial [G.J.], at 58-59 (Colom.)

135 *Id.* at 33.

136 T-354/19, ¶ 3.3 (Colom.).

137 *See* CHEN, *supra* note 128, at 21 ("Truly international public policy has a fairly narrow scope that includes fundamental rules of natural law, principles of universal justice, ius cogens in public international law, and the general principles of morality accepted by what are referred to as civilized nations.").

138 *See* Moses, *supra* note 130 ("International public policy, however, can be considered a subset of internal public policy. It is generally narrower than domestic public policy and includes only the most fundamental norms of a State's domestic public policy.").

From the author's perspective, the scope of international public policy allows it to overlap with the concept of fundamental rights granted by the National Constitution, not only because fundamental rights are the *core* or *most fundamental norms of Colombia's public policy*,[139] but also because they are comparable to the rights preserved through human rights law. The latter is considered as *jus cogens*, meaning that legal sources such as the General Comments of the Human Rights Committee[140] cannot be overlooked by any Colombian judge or authority.

This means that the judge that adjudicates upon the setting aside proceedings will undertake a complete and full analysis of any violations of human rights when deciding upon a case and ensure their protection if necessary. As a result, the aim of the *tutela* action would also be achieved through the filing of a set aside motion based on international public policy grounds.

This, in turn, means that if the Constitutional Court shared the definition of international public policy by the Supreme Court of Justice, it would result in the inadmissibility of *tutela* actions against international awards. The analysis gets support from Article 93 of the Colombian National Constitution, which incorporates all international human rights treaties into the internal constitutional system and gives them priority within the national legal system.

Moreover, the Constitutional Court has stated, in Decision C410/2001, that any international humans rights treaty recognised by the Colombian Congress whose objective is "*the protection of the dignity of any human*," like "*the Declaration of Human Rights of 1948, which has been considered as fundamental for the international community, makes it an essential principle for International Law of the Human Rights, and a norm that cannot be violated by the States, acquiring the character jus cogens*".[141] (translated from Spanish).

As a result, we can conclude that fundamental rights, as part of the international human rights treaties ratified by the Congress in Colombia, are recognised as *jus cogens*, and therefore, are a part of the international public policy of Colombia. Therefore, the competent judge that decides upon an annulment recourse, based on the violation of public policy, against an arbitral award in Colombia should grant protection to all human rights of the parties.

Following the same train of thought, even though *tutela* actions are not admissible against awards rendered at a seat which is not Colombia, in practice, the defence of public policy violations to refuse the recognition of an award in Colombia should produce the same effect as to the annulment of an award by a *tutela* action.

However, the Constitutional Court maintains the position that, although extremely exceptional, *tutela* actions should be admissible against international awards. This analysis is interesting because it shows how Latin American countries retain judicial control over arbitration, to indicate the ascendancy of the Constitution. Therefore, some Latin American authors who have studied the relationship between public policy and fundamental rights argue that these two concepts are like oil and water, meaning that they are so different, that the danger is materialised when the judge

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139 T-354/19, ¶ 3.3 (Colom.).

140 Observaciones generales aprobadas por el Comité de Derechos Humanos, *available at* https://conf-dts1.unog.ch/1%20SPA/Tradutek/Derechos_hum_Base/CCPR/00_2_obs_grales_Cte%20DerHum%20%5BCCPR%5D.html.

141 Corte Constitucional [C.C.] [Constitutional Court], abril 5, 2001, Sentencia C-410/01, Gaceta de la Corte Constitucional [G.C.C.], ¶ 3.3.2 (Colom.).

makes the mistake of using the concept of fundamental rights as an "*analytic shortcut to refer to the concept of public policy*".[142]

VII. Enforcement of an award that is subject to constitutional control at the place of arbitration

As stated earlier, the New York Convention imposes specific grounds on Contracting States to refuse the recognition and enforcement of awards based on Article V. Specifically, Article V(1)(e) provides two grounds for this purpose: the award has not yet become binding on the parties or it has been set aside or suspended by the competent authority at the seat of the arbitration.

A relevant issue is raised by commentators, who centre their critique around the position taken by the Constitutional Court of Colombia in the case SU-500/2015,[143] arguing that it did not address the relationship between *tutela* actions and the New York Convention. Specifically, the Constitutional Court did not state whether Article V(1)(e) of the New York Convention "*should be construed as including tutela judgments when successful*".[144]

In this context, one must examine whether the enforcing state will consider the filing and resolution of constitutional actions against an award, when the seat chosen by the parties provides for its admissibility as a means to annul an award. To the author's understanding, there are two possible alternative interpretations.

The *first* is that the country of enforcement will consider the decision given by the Colombian constitutional judge in the *tutela* claim regarding the award. This is because Article V(1)(e) was expressly included to secure the finality of arbitration awards. In this sense, if the seat of arbitration has included the possibility to resort to constitutional actions to challenge the award as part of the *lex arbitri*, the award would be final only when such determination has been reviewed by the constitutional judge.

From this perspective, the *tutela* action should be understood as a legitimate means to set aside or suspend the award, more so when the *lex arbitri* of the seat has granted *tutela* action the same nullification effects such as that of the annulment recourse.

The supporters of the doctrine that endorse the impossibility of recognizing and enforcing awards that have been vacated by the court of the seat base their conviction upon the principle of "*ex nihilo nilhil fit (nothing comes from nothing), that is, once an arbitral award is annulled at the seat, there is simply nothing to be recognized and enforced anywhere*".[145]

Supporters of this thesis argue that the seat has primary jurisdiction over the award, meaning that its review and control is legitimately conferred upon the courts of the seat, whose decisions will have *erga omnes* effects, restricting any review done by any other secondary jurisdiction to situations where the primary jurisdiction has not annulled the award. Some scholars go even further:

142 de Cossío, *supra* note 8, at 224.

143 SU500/15 (Colom.).

144 Daniela Corchuelo Uribe, *Tutela in International Arbitration in Colombia*, 30 REVISTA DEL CLUB ESPAÑOL DEL ARBITRAJE 49, 67 (2017).

145 Clifford J. Hendel & María Antonia Pérez Nogales, *Enforcement of Annulled Awards: Differences Between Jurisdictions and Recent Interpretations*, *in* 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES 189 (Katia Fach Gómez & Ana Mercedes López Rodríguez eds., 2019).

according to Pieter Sanders, if the seat of arbitration declares the award as null, its enforcement is no longer possible because it would be against the public policy of the country of the seat.[146]

Therefore, from this first perspective, if the *tutela* action is a legitimate recourse that the seat has provided for the setting aside or suspension of the award, then the country of enforcement should consider that the decision issued by the appropriate constitutional judge is with the aim of securing the *finality* of the award.

The *second* option is to recognise that the country of enforcement is independent to choose which effect it wants to give to the *tutela* action. This means that the enforcing state "*may*" rely upon the verdict of the constitutional action to conclude that the award is not binding, which, in turn, implies that it can recognise and enforce the award without taking into account the filing and resolution of the *tutela* award.

This idea leads to the possibility of enforcing awards that might have been declared as null and void at the seat. However, commentators have established that "*Article V(1) of the New York does not oblige state courts to refuse enforcement of foreign awards but instead provides for their potential rejection*".[147] They do so by relying upon the literality of the Article that provides for the word "*may*". Moreover, supporters of this idea say that "*once issued and irrespective of eventual subsequent annulment at the seat, awards are part of a free-floating autonomous legal order. Therefore, their existence does not cease once annulled by the court of the seat of the arbitration*".[148]

In conclusion, from this second perspective, the court of enforcement is not obliged to consider the decision made by the Colombian constitutional judge, but it has the discretionary power to determine the recognition and enforcement of the award based upon its autonomous analysis of whether the award is in order.

Another issue that must be highlighted regarding the enforcement of awards that are subject to constitutional control at the seat of arbitration, is the status of a *tutela* action when its resolution is ongoing parallel to a request of the other party for the enforcement of the award in another jurisdiction. This scenario might occur when the constitutional judge at the seat has not decided the outcome, or it has yet not been resolved completely due to a pending appeal before a second instance judge or review before the Constitutional Court.

In this situation, it is debatable if the award rendered in Colombia has become binding as required by Article V(1)(e) of the New York Convention. One way in which the term 'binding' can be understood is by interpreting the word in accordance with the law applicable to the procedure i.e. the Colombian law (when chosen as the seat). This result establishes that the award would only

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146 *Id.*; Fernando Cantuarias Salaverry, *Reconocimiento y ejecución de laudos arbitrales anulados en el lugar del arbitraje*, 56 DERECHO PUCP 583, 602 (2003).

147 Hendel & Nogales, *supra* note 145.

148 *See* Salaverry, *supra* note 146, at 192 ("Supporters of the free-floating argument stress the idea of the NY Convention as an open instrument, where Article (V)(1) acts as a status of minimums for the enforcement of awards. As a result, Article (V)(1)(e) should not be interpreted by courts as a mandate but as a suggestion or recommendation." (…) "As sustained by some authors, preventing enforcement courts from enforcing annulled arbitral awards would run against the sovereign power of this court to rule on the efficacy of the arbitral award.").

become binding when the *tutela* action has been decided upon by the constitutional judge (and even after a review by the Constitutional court itself).

In this sense, an ongoing *tutela* claim would prevent an enforcing court from recognizing the award in its jurisdiction because it has not yet become binding. The country of enforcement should adjourn recognition proceedings and wait for the competent judge at the seat to decide upon the constitutional actions, as prescribed in Article VI of the New York Convention.

The proposed solution for this debate requires an interpretation of Article V(1)(e) to mandate that all possible proceedings offered by the law of the seat need to be exhausted for the award to become final and therefore enforceable. However, this would not be in accordance with the overall purpose of the New York Convention.

As discussed above, the aim of the New York Convention is to construct a system that ensures fast and easy enforcement of awards. However, unless enforcing states are able to independently decide whether to take into account ongoing tutela actions, the arbitral system would become more complicated and slower, consequently losing its intended place as an efficient alternative to litigation.

VIII. Conclusion

International arbitration is a creature of party autonomy, which means that it is a dispute resolution mechanism shaped almost entirely by the will of the parties who, in order to settle their disputes, opt for an alternative mechanism to litigation.

The author uses the term 'almost entirely' because, while it is true that one of the advantages of arbitration is the possibility for the parties to choose the rules applicable to both the procedure and the merits of the dispute, selecting the seat of the arbitration implies that they have expressed their will to be bound by its domestic rules on international arbitration. The most important feature governed by the seat of arbitration is the recourse and grounds for challenging the award. Therefore, when the parties consent to the seat, they are also choosing the rules by which the annulment of the award can be sought and declared.

This means that if parties choose a seat that provides for multiple mechanisms to set aside the award, they will either rejoice with the ample possibilities they have to challenge the award, or will have to pull through, facing a situation riddled with legal uncertainty, especially with regard to when the award becomes binding and enforceable.

According to the author, this is the scenario in countries that have undergone constitutionalisation of arbitration – jurisdictions where the system is structured around the power of the arbitrator being recognised by the National Constitution as a public function of administering justice. The consequence of this is constitutional control over the award in order to verify whether the arbitral tribunal correctly applied all constitutional guarantees and fundamental rights available to the parties.

The author considers such a rationale incorrect. Arbitrators should not be subject to constitutional control, since neither are they judges nor is the award a court decision. This is because the power

to settle disputes is conferred directly upon the arbitrator by the parties through a contract (the arbitral agreement). As a result, party autonomy is the real basis of arbitration.

In principle, the New York Convention does not impose mandatory grounds and mechanisms upon its Contracting States for setting aside proceedings, as it does for recognition and enforcement. Therefore, one could say that the seat of arbitration has discretionary power that allows it to create multiple mechanisms to review and control the award, such as *tutela* actions and constitutional protection recourses. Notwithstanding this, the author believes that such an approach is inappropriate because the admissibility of such secondary mechanisms is adverse to the overall purpose of arbitration. It results in double control over the award, preventing an expedient and efficient proceeding.

Conversely, the author understands that the New York Convention imposes implied limits upon annulment recourses, these being, *first*, the obligation to recognise the consent given by the parties to choose arbitration over litigation by concluding an arbitral agreement and *second*, the duty to ensure easy enforcement of awards. Therefore, these limits create various grounds with various mechanisms to set aside awards stands are contrary to the New York Convention.

Either way, the annulment recourse inspired by the Model Law is sufficient to challenge an award that has violated fundamental rights through the ground of international public policy violations of the seat. This is because human rights are part of *jus cogens* and therefore, a part of international public policy. Moreover, human rights equate to fundamental constitutional rights. Hence, they cannot be overlooked by a competent judge when deciding upon setting aside proceedings.

Thus, there is only one conclusion – constitutional actions against awards makes a country unattractive as a choice of seat for arbitral proceedings.