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ABSTRACT

International commercial arbitration has become regulated in an increasingly uniform manner through texts such as the UNCITRAL Model Law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Despite the apparent uniformity, state courts still encounter instances of unclear and incomplete regulations of arbitration-related matters.

This article focuses on the practice of courts in Latin America that interpret arbitration-related regulations and fill gaps with the help of a comparative jurisprudential analysis. The article reviews this jurisprudence to determine what impact, if any, landmark cases from France, Switzerland, the United Kingdom, the United States, and other prominent arbitral jurisdictions have had on those jurisdictions.

This review shows that state courts in Latin America are aware of the existence of foreign landmark cases in advanced jurisdictions in the area of international commercial arbitration and they apply them to craft their own national jurisprudence on these matters. Across Latin America, each national jurisdiction reviews and understands the jurisprudence from foreign countries in a different way and does not necessarily apply jurisprudential concepts or doctrines developed in foreign landmark cases in the same way. The study critically assesses the epistemological challenges related to the use of the comparative method, and the inherent challenges of the comparative law approach, which is not a source of law in civil law countries. To these methodological challenges add the linguistic barriers and the lack of access to the sources of knowledge of foreign judicial practices.

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I. INTRODUCTION

The contemporary growth of international arbitration law has led numerous scholars to recognize the existence or the partial existence of a transnational legal order in international arbitration.[1] Proponents of the transnational legal order often rely on international instruments such as the UNCITRAL Model Law[2] and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (referred to as "New York Convention"),[3] and the resulting national norms that reflect a homogeneous regulation of arbitration.

Admitting the existence of a transnational legal order presupposes that the courts of justice of a large number of states apply transnational rules and principles.

1. *See* ALBERT JAN VAN DEN BERG, ARBITRATION – THE NEXT FIFTY YEARS (ICCA 50TH ANNIVERSARY CONFERENCE) 66–73 (2011) (for more references); EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 207–08 (2010) (as part of a *representation* of international arbitration, but not as a dogma).

2. U.N. Commission on International Trade Law, *Model Law on International Commercial* Arbitration (1985) [hereinafter UNCITRAL Model Law], https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration (amendments to articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on July 7, 2006).

3. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Oct. 6, 1958, 330 U.N.T.S. 4739 [hereinafter 1958 New York Convention], https://treaties.un.org/pages/showDetails.aspx?objid=080000028002a36b.

However, in practice, courts of justice often face obstacles when applying rules of law that are not clearly codified within their own domestic legal system.[4] Despite increasingly uniform regulation in laws and international treaties, courts of justice continue to face instances of unclear and incomplete provisions. To fill these gaps, they may justify their decisions with references to comparative jurisprudence. While empirical research suggests that the use of other countries' judicial decisions is not considered an important form of legal authority by courts of justice,[5] courts sometimes resort to comparative jurisprudential analyses. Some authors have concluded that this limited practice of resorting to comparative jurisprudential analysis is inconsistent within the respective jurisdiction of the comparing court as well as across various jurisdictions.[6] The inherent risk of different courts applying comparative jurisprudence differently is an increased level of legal uncertainty.[7]

This research focuses on the jurisprudence of state courts across Latin America over the course of the past 20 years.[8] The objective of this jurisprudential review is to determine what impact, if any, the landmark cases from France, the United States, Switzerland, the United Kingdom, and other prominent arbitral jurisdictions have had on those jurisdictions. Latin American jurisdictions follow the civil law tradition, where comparative jurisprudence from foreign jurisdictions does not have the force of judicial precedent and where its application is a matter of "discretion" of the court.[9] The primary reason courts refer to foreign judgments in their reasoning is to build their own jurisprudence.[10] By applying legal concepts and doctrines

4. *See* Ole Lando, *Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonization to Unification*, 8 UNIF. L. REV. 123, 126 (2003) (for example, in a survey done by professor Rheinstein of 40 cases that were reported in a case book on conflict of laws where U.S. courts had applied foreign law, it was found that 32 cases applied foreign law wrongly; in four cases the result was highly doubtful, and in another four the result had been correct, but only by sheer coincidence).

5. *See* S. I. Strong, *Legal Authorities and Comparative Law in International Commercial Arbitration: Best Practices versus Empirically Determined Actual Practices*, 19 U. MO. LEGAL STUD. RSCH. PAPER SERIES (2019), http://ssrn.com/abstract=3452332 (these sources have only been rated at 2.44 out of 5.00 points and ranked as the ninth most important type of authority, out of ten).

6. *See* F. Bachand, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism*, 1 J. DISP. RESOL. 83, 83–84 (2012).

7. *See* H. A. Grigera Naón, *Unified National Legal Treatment of International Commercial Arbitration: A Continuing Challenge*, 2 ARB. BRIEF 1, 14 (2012).

8. *See Kluwer Arbitration,* KLUWER L. INT'L, https ://www.wolterskluwer.com/en/solutions/kluwerarbitration (last visited May 9, 2023) (the pool of cases are those from Latin American countries published in the online database *Kluwer Arbitration*).

9. *See* Haideer Miranda Bonilla, *La utilización de jurisprudencia constitucional extranjera por la Sala Constitucional,* 120 REV. JUD. COSTA RICA 257, 265 (2017) (for a Costa Rican example of a typical case of a civil law jurisdiction in Latin America); L. Galdámez Zelada, *El uso del derecho y jurisprudencia extranjera en los fallos del Tribunal Constitucional de Chile: 2006-2010*, 39 REV. CHILENA DE DERECHO 189, 223 (2012) (for Chile, another civil law jurisdiction in Latin America).

10. *See* Miranda Bonilla, *supra* note 9, at 282. This use of comparative jurisprudence in interpreting the domestic legal systems of Latin American countries is of course different from situations where courts directly apply foreign law (and jurisprudence) as the result of conflicts-of-law rules, *id.* These latter situations are not the object of the present study.

developed in foreign jurisprudence the courts take part in an exercise of legal transfer or transplant,[11] which constitutes a core application of the comparative method.[12]

This article focuses on a hitherto little studied field of the Latin American courts' application of comparative jurisprudence to determine the legal nature of specific concepts relevant for arbitration. The Latin American cases are organized in two parts: one group of cases are related to the evaluation of gateway issues relevant for the start of arbitration procedures (section II), and another group of cases deals with post-award issues that arise in setting aside and recognition and enforcement proceedings (section III). The final section (section IV) summarizes the main findings and conclusions that can be drawn from this judicial application.

II. RESOLVING GATEWAY ISSUES WITH THE SUPPORT OF COMPARATIVE JURISPRUDENCE

A. Kompetenz-Kompetenz and the Role of State Courts

The UNCITRAL Model Law, and with it a growing number of national jurisdictions, has promoted the idea that arbitrators have the power to rule on their own jurisdiction (referred to as the Kompetenz-Kompetenz principle).[13] In parallel, the Model Law and the New York Convention also recognize that state courts may have the power to decide if an arbitral agreement is "null and void, inoperative or incapable of being performed."[14] The coordination between the powers of arbitrators and state courts as to the competence to rule about the arbitral tribunal's jurisdiction is a matter of degree that jurisdictions have resolved differently.[15] In many jurisdictions, the approach to the review of this gateway issue has evolved from broad powers of the state courts to a more comprehensive recognition of the arbitrators' Kompetenz-Kompetenz.

In the context of this inquiry about the respective powers of arbitrators and state courts, a Venezuelan case illustrates the influence jurisdictions such as France and the United States have on the recognition of the Kompetenz-Kompetenz principle in Latin America. In the case of *Astivenca Astilleros de Venezuela, C.A. v. Oceanlink Offshore III AS,* the Venezuelan Supreme Court inquired who is competent to rule about the validity of the arbitration agreement: the court or the arbitral tribunal.[16] This decision was adopted shortly before the modification of the French law

11. *See* Michele Graziadei, *Comparative Law, Transplants, and Receptions*, in MATHIAS REIMANN & REINHARD ZIMMERMANN, THE OXFORD HANDBOOK OF COMPARATIVE LAW 442, 444 (2nd ed. 2019) (this study will make use of the expressions "transplant," "transfer," and "reception" of foreign legal concepts in an indistinct way, following a general trend in comparative legal studies).

12. *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 6–7 (2nd ed. 1993) (in the U.S., the work of Alan Watson is extensively recognized as showing the importance of the legal transplants or transfers for the development of legal systems around the world).

13. UNCITRAL Model Law (amended 2006), *supra* note 2, at art. 16, para. 1.

14. *Id.* at art. 8, para. 1; *see also* Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter New York Convention], at art. 8, para. 1, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (for an equivalent provision).

15. *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 89 (Cambridge Univ. Press 3d ed. 2017).

16. *Astivenca Astilleros de Venezuela, C.A. v. Oceanlink Offshore III AS*, Tribunal Supremo de Justicia, 3 November 2010, 29 Y.B. Comm. Arb. 496–97 (ICC Int'l Ct. Arb. 2004), https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/kli-ka-1152079-n (hereafter Astivenca).

on international commercial arbitration, when the regime still allowed for broad judicial powers to assess the validity of the arbitration clause.[17]

The Venezuelan court recognized that:

> [F]rom the point of view of comparative law, there is no sole criterion about the type of review to be carried out as to the validity, efficacy or applicability [of the arbitration agreement]. Rather, there are two currents of thought, one favoring a direct review on the merits (the traditional criterion) and another—the majority one at present—which supports a preliminary and summary examination by the courts.[18]

For the direct review, the court referred to the 1995 U.S. Supreme Court case in *First Options v. Kaplan*,[19] and recognized that in the U.S. there has been a gradual pivot towards a merely preliminary review similar to that suggested in Article II(3) of the New York Convention.[20] Art. II(3) of the New York Convention established a presumption in favor of submission to arbitration, unless the "agreement is null and void, inoperative or incapable of being performed."[21] This preliminary review is the second approach identified by the court. It qualified this approach as the "French system," where the courts only carry out a prima facie examination of the arbitration clause to determine if the award is manifestly null and void.[22] The combination of the U.S. and French "systems," followed by the enumeration of precedents from various other jurisdictions that fit into either of these models, led the Venezuelan court to conclude that it should follow the prima facie examination model.[23] The court interpreted this to mean that the review (i) must be limited to the constatation that the arbitration agreement is in writing, and (ii) it should exclude all analysis of an eventual lack of consent that may result from the consideration of the written clause.[24] This conclusion that the Venezuelan court drew from the comparative analysis may not entirely reflect the complete regime in the United States and in France with all its nuances, but at least it allowed the Venezuelan court to give greater effect to the Kompetenz-Kompetenz principle.

In the case of *Petróleo Brasileiro S.A. Petrobras v. Tribunal Regional Federal da 2a Regiao* before the Brazilian courts, the claimant had initiated an ICC arbitration claiming the invalidity of a decision by the Brazilian petroleum, natural gas and biofuel agency, because it unilaterally changed several provisions of a contract in force between the two parties.[25] The state-owned agency applied for the dismissal

17. French Legislation on International Commercial Arbitration, May 12, 1981 (this law was extensively amended in 2011)*; see also* VÁRADY & BARCELÓ, DOCUMENTS SUPPLEMENT TO INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 113 (5th ed. 2012).

18. *Astivenca*, *supra* note 16, at 499.

19. *First Options of Chicago, Inc. v. Kaplan*, 19 F.3d 1503 (1995).

20. *Astivenca*, *supra* note 16, at 499.

21. New York Convention, *supra* note 14, at art. 2, ¶ 3 (1985).

22. *Astivenca*, *supra* note 16, at 499.

23. *Id*.

24. *Id*.

25. João Bosco Lee, *Petróleo Brasileiro S.A. Petrobras v. Tribunal RegionalFederal da 2ª Região, Arbitral Tribunal under theInternational Court of Arbitration of the InternationalChamber of Commerce – ICC and Juízo Federal da 5ª Varada Seção Judiciária do Estado do Rio de Janeiro, SuperiorCourt of Justice of Brazil, Conflito de Competência Nº139.519 - RJ (2015/0076635-2), 11 October 2017* 1,

of the arbitration with the argument that issues of validity of the contract had to be submitted to the courts of justice instead of to arbitration.[26] The Brazilian court found that the state courts had jurisdiction to determine if an arbitral agreement was null and void, ineffective, or incapable of being performed, in line with Art. II(3) of the New York Convention.[27] As part of its reasoning, the court made a brief reference to comparative jurisprudence. It noted that "the French methodology" follows the notion that issues of jurisdiction must first be decided by the arbitrator, with possible review "a posteriori" by the judge.[28] The court did not explain on what rules or specific cases this argument was based, and indeed this "methodology" may only be applicable when the arbitral tribunal is already constituted.[29] In addition, the court stated that another approach to Kompetenz-Kompetenz is the U.S.', and cited the Supreme Court case in *Prima Paint v. Flood & Conklin Manufacturing Co.* (1967).[30] According to this case, the courts of justice have the competence to evaluate the validity of the arbitration clause, as well as "other related issues" ("*validade da cláusula e demais temas correlatos*").[31] The Brazilian court used this U.S. judgment to uphold its restrictive decision as to the application of the arbitration agreement to decisions on the tribunal's own competence. The Brazilian court did not analyze in more depth the reasoning behind the *Prima Paint* case, nor did it analyze why the French differs from the U.S. approach, despite the fact that both are New York Convention countries and must comply with Art. II(3) of the Convention. The Brazilian doctrine criticized this judgment for being too lenient with the position of the public administration, and indeed, that it is not in conformity with the growing trend in Brazil to have public entities submit to arbitration.[32]

B. Consent to Arbitration

Various Latin American courts of justice have addressed the issue of consent to arbitration by state authorities. For the purposes of this study, a case resolved by the Constitutional Chamber of the Venezuelan Supreme Court is particularly noteworthy.

In this case from 2008, the Supreme Court's Constitutional Chamber was faced with the pressing request[33] to clarify if Article 22 of the national law on investment

KLUWER L. INT'L, https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/kli-ka-ons-17-50-004 (last visited May 17, 2023).

26. *Id*.

27. *Id*. at 28, ¶ 16-17.

28. *Id*.

29. FRENCH CODE CIV. P. art. 1448 (Decree No. 2011–48/2011). The French legal regime in this regard is laid out in Article 1448 of the reform of the French Code of Civil Procedure, provided for in the Decree number 2011–48, of January 13, 2011, *id.* This provision states in the first paragraph that "[w]hen a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable," *id.*

30. Lee, *supra* note 25, at 28.

31. *Id*.

32. *See e.g.,* Eliana Baraldi, *Note: Petróleo Brasileiro S/A – Petrobras v. Tribunal Regional Federal da 2a Região, Tribunal Arbitral da Corte Internacional de Arbitragem da Câmara de Comércio Internacional – CCI, Juízo Federal da 5a Vara da Seção Judiciária do Estado do Rio de Janeiro, Superior Court of Justice of Brazil, Case No. 139.519/RJ, 11 October 2017, in* 15 REV. BRASILEIRA DE ARB, no. 58, at 141 (João Bosco Lee & Flavia Mange eds).

33. Alfredo de Jesús O., *Fermin Toro Jimenez v. Luis Britto Garcia, Sala Constitucional - Tribunal Supremo de Justicia, 97, 11 February 2009*, KLUWER L. INT'L 1, https://www-kluwerarbitration-

can be considered sufficient consent to investment arbitration in the sense of Article 25(1) of the ICSID Convention.[34] The Court held that Article 22 was not an autonomous acceptance of ICSID jurisdiction.[35] In the analysis that led to this outcome, the court stated that governments can submit to arbitration if they express consent to be bound by arbitration agreements.[36]

The Court made reference to French and United States cases in support of the argument that it is widely accepted that public authorities may submit to arbitration for international commercial matters, and that once a dispute arises, the governments cannot resist arbitration with the argument that their domestic legal system is opposed to that dispute settlement procedure.[37] The French case that was mentioned, the 1966 *Arrêt Galakis*, recognized the validity of an arbitration clause binding a public law entity to arbitration involving a transaction in maritime commerce.[38] The United States cases mentioned were only partially applicable to the situation at hand, as they referred to private arbitrations, without involvement of the United States' government.[39] The court mentioned these cases because they advanced the court's argument that the requirements of international commerce "prevailed" over domestic law.[40]

C. Extension of Arbitral Agreement to Non-Signatories

All major jurisdictions with extensive international arbitration practice have developed jurisprudential theories to explain the extension of an arbitration clause to non-signatories. One such theory is the French jurisprudence about the "group-of-companies" as formulated in the *Dow Chemical* case,[41] and recognized by French courts.[42]

In Latin America, this French jurisprudence was invoked in the case of *AES Andrés, B.V. et al.* before the Civil and Commercial Chamber of the First Instance

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com.eu1.proxy.openathens.net/document/ipn91352 (last visited May 16, 2023) (there had already been requests to the Supreme Court to interpret Article 22 of the Venezuelan law for the promotion and protection of investments prior to 2008, but the Court had dismissed those requests).

34. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 575 U.N.T.S. 159.

35. de Jesús O*., supra* note 33, at 36.

36. *Id*. at 16 (this holding was later confirmed in other Venezuelan cases, *see* Alfredo de Jesús O., *Bolivarian Republic of Venezuela v. X, Supreme Court of Venezuela - Constitutional Chamber, 1541, 17 October 2008*, KLUWER L. INT'L 10, https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/ipn91299?q=alfredo (last visited May 16, 2023)).

37. *See* de Jesús O., *supra* note 33, at 25.

38. Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., May 2, 1966, judgment No. 61-12255 (Fr.).

39. *See* de Jesús O., *supra* note 33, at 16. The cases mentioned were The Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972) (relating to a private barge-towing agreement); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (relating to the application of the Securites Exchange Act); Mitsubishi Motor Corp. V. Soles Chrysler-Plymouth Inc., 473 U.S. 614 (1985) (relating to the application of the Sherman Act)).

40. *See* de Jesús O., *supra* note 33, at 16.

41. Case No. ICC 4131, Interim Award (Sept. 23, 1982), 9 Y.B. Comm. Arb. 131 (ICC Int'l Ct. Arb. 1984).

42. Société Isover-Saint-Gobain v. Sociétés Dow Chemical France, Cour d'appel [CA][regional court of appeal] Paris, Oct. 21, 1983, 1984 Revue de l'Arbitrage 98–114.

Court of the Province of Santo Domingo in the Dominican Republic.[43] Certain parties in a dispute between power plant operators about the damages resulting from the explosion of a transformer in the Dominican Republic invoked the arbitration clause in the local supply management contract concluded between the operators.[44] Before the Dominican court, the parties resisting arbitration argued—first—that pursuant to Article II(3) of the 1958 New York Convention the courts of justice remain competent to evaluate whether the arbitration agreement is "null and void, inoperative or incapable of being performed."[45] Second, once the Dominican courts confirmed their jurisdiction (which they did),[46] the fact that the requesting parties are not a party to the arbitration agreement prevents extending that agreement to them.[47]

As to this issue of non-signatories, the court recognized that "there may be found some exception" to the general rules of "consensualism" in international arbitration, and referred to only one precedent in comparative jurisprudence, i.e., the "famous" *Dow Chemical* case.[48]

In particular, the court stated:

> [I]t is an essential condition for the application of the arbitration agreement and, therefore, of the extension of jurisdiction, that there is the consent granted by the parties to the dispute, in the exercise of the autonomy of their respective wills, to submit to arbitration. As a result, in this matter, the rule is consent, although—just like any rule—it could find some exception and extend the arbitration clause to non-signatory third parties, as in the case of the French doctrine of groups of companies as enshrined in the judgment about the award made in the famous Dow Chemical case […]. However, this court is unable to find any possibility of extension of the arbitration agreements, since the plaintiffs are true third parties with respect to the contracts containing the same […].[49]

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43. Stephan Adell, *AES Andrés, B.V. and Seguros Universal, S.A. v. Nynas AB, Nynas Naphtenics AB, Nynas USA, Inc., ABB Trafo, S.A., ABB Power Technology, S.A., ABB LTD., S.A., ABB, Inc. and ABB, S.A., Civil and Commercial Chamber of the Court of First Instance of the Province of Santo Domingo, 647/2014, 6 June 2014*, KLUWER L. INT'L, https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/kli-ka-15-46-004?q=AES%20Andres.

44. *Id*. at 7.

45. *See* New York Convention, *supra* note 14, at art. II(3); Resolution of the National Congress, March 27, 2001, Official Gazette No. 10109 (Nov. 8, 2001) (the Dominican Republic ratified the New York Convention by resolution).

46. Adell, *supra* note 43, at 25–26.

47. *Id.* at 27.

48. *Id.* at 27–28.

49. *Id.* at 14 (the original text in Spanish is the following: "… [C]onstituye una condición esencial para la aplicación del convenio arbitral y por ende, de la prorrogación de la competencia, el consentimiento otorgado por las partes en conflicto, en el ejercicio de la autonomía de sus respectivas voluntades, de someterse a la obligación de conocer sus eventuales diferencias por ante los árbitros; de manera que, en esta materia la regla es el consentimiento y aunque como toda regla, en principio la misma podría encontrar alguna excepción y hacer extensiva la cláusula arbitral a terceros no suscribientes, como ocurre en el caso de la doctrina francesa de los grupos de sociedades, constituida a partir del pronunciamiento del laudo que recayera sobre el famoso caso Dow Chemical […]; este tribunal se encuentra en la imposibilidad de admitir el concurso de posibilidad alguna de extensión de los convenios arbitrales, puesto que las demandantes son verdaderas terceras con respecto a los contratos contentivos de los mismos […]").

Arbitral awards adopted in the Dominican Republic have seemingly favored the French "group of companies" doctrine, according to which an arbitration agreement may be extended to non-signatories if they form part of the same group of companies.[50] In light of this practice, the *AES Andrés, B.V. et al*. case seems to be a contribution to a growing consolidation of this French doctrine in the Dominican Republic. The court did not perceive any need for a more nuanced comparative analysis of the theories that support the extension of these agreements. The court's statement that it relied on the "famous" *Dow Chemical* case may indicate that in its opinion the *Dow Chemical* case reflects the current status of the doctrinal development on the extension of arbitral agreements to non-signatories. If that were true, however, the court clearly made an incomplete analysis of the comparative approaches available.[51] The "group of companies" doctrine may also be a conscious policy choice of the Dominican legal system (and its actors), as it is reflected in other instruments, such as the Dominican Chamber of Commerce's international commercial arbitration rules.[52]

In the already mentioned[53] Brazilian judgment in the case of *Petróleo Brasileiro S.A. Petrobras v. Tribunal Regional Federal da 2a Regiao*, the Superior Court of Justice of Brazil made a general reference to "international doctrine and jurisprudence" [54] to affirm that arbitral agreements may be extended to non-signatories when these additional parties belong to "economic groups or there is an attempt to evade responsibility for breach of contract by hiding behind the company's legal personality."[55] The court described this reasoning with the English expression of "disregard doctrine."[56] The court in this case focused on a limited list of circumstances where the arbitral agreement may be extended to non-signatories. The focus on the economic groups and the attempt to evade liability sufficed for the court to resolve the specific issue of that case, i.e., the extension of the arbitral agreement to the state of Spirito Santo. That state had no relevant relationship with any of the parties to the dispute (the company Petrobras and the federal agency ANP, which is the Brazilian petroleum, natural gas and biofuel agency).[57] The court did not seem

50. *Id. See generally* NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 33 (6th ed. 2015) (discussing the group of companies doctrine); Alexandre Meyniel, *That Which Must not be Named: Rationalizing the Denial of U.S. Courts with Respect of the Group of Companies Doctrine*, 3 ARB. BRIEF 18, 26–31 (2013); Pietro Ferrario, *The Group of Companies Doctrine in Int'l Commercial Arb.: Is There any Reason for this Doctrine to Exist?*, 26(5) J. INT'L ARB. 647–73 (2009).

51. *See generally* GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1643–44 (2020) (for example, in the United States the theories of assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel are used).

52. *See e.g.,* Fabiola Medina Garnés, *Extensión del convenio arbitral a partes no signatarias y la intervención de terceros en el arbitraje*, MEDINA GARRIGÓ ABOGADOS, https://www.mga.com.do/extension-del-convenio-arbitral-a-partes-no-signatarias-y-la-intervencion-de-terceros-en-el-arbitraje (last visited Apr. 27, 2023) (the "group of companies" doctrine has influenced the rules of arbitration of the Center for Alt. Dispute Res. of the Chamber of Commerce and Production of Santo Domingo); *see also* Adell, *supra* note 43, at 27–28 (these rules include Additional Rules to the Rules of Arb., effective January 1, 2012, that remit to the practice of the ICC as to the joinder of third parties).

53. *Supra* Section 2.A.

54. *See* Lee, *supra* note 25, at 31.

55. *Id*.

56. *Id*.

57. *Id*.

to develop a jurisprudence on the question of extension of arbitral agreements to non-signatories, but instead only used the reference to international doctrine and jurisprudence to add legitimacy to its holding in the specific case.

In another case involving non-signatories, *Langostinera Caleta Dorada et al. v. TGS Peru*,[58] a local court of justice in Peru distanced itself from the comparative approach and reaffirmed the primacy of the interpretation and application of the local law. The case was about a dispute that arose in the performance of a supply contract between the fish processing companies TGS Peru SAC, as claimant, and Harinas Especiales SAC and Pesquera Industrial Chicama SAC, as defendants.[59] The contracts that bound these companies provided for ad hoc arbitration.[60] The arbitral tribunal joined five additional companies as defendants, with the argument that they had helped or benefited from a fraud scheme that caused damages to claimant.[61] The arbitral tribunal argued in the award that the theories of "alter ego" and "lifting the corporate veil," as recognized in the United States case of *Thomson-csf S.a.*,[62] allowed to extend the arbitration clause to non-signatories.[63]

In its judgment to annul the arbitral award, Lima's Superior Court of Justice explained that the comparative approach followed by the arbitral tribunal was not useful for the resolution of the issue before the Peruvian court:

> [The arbitrators] tacitly accepted in the award that the doctrine of extension of the […] effects of the arbitration agreement to third parties did not find support in Law No. 26572, which was applicable to the specific case [note omissis]; however, to justify their decision, they appealed to the fact that in international jurisprudence, as well as in national doctrine, there are positions that advocate for this possibility. And it is not the intention of this Court in this resolution to ignore the quality of both the doctrine and the jurisprudence of dogmatic sources of law, which are necessary references of illustration when studying a legal institution. However, it cannot be lost sight of the fact that the arbitration to which we have been referring is not one of equity, but one of law. When the parties give the arbitrators the power to resolve a conflict, with the precision that their decision must be based on the applicable law (Article 3 of Law No. 26572), the arbitrators are rightly expected to resolve the case respecting the State regulations, and not base their decision on what they believe our nation's law should be, or according to what in their understanding is fair or unfair, but based on what the law says for the specific case at issue." (translation is ours)[64]

The court's explanations show that under Peruvian law the parties cannot validly use a comparative law approach to tacitly modify the law applicable to the

58. Fernando Cantuarias Salaverry, *Langostinera Caleta Dorada SA, CPesquera Caleta Dorada SA and others v. TGS Peru SAC, First Commercial Chamber of the Superior Court of Justice of Lima, 00451-2009, 10 August 2010*, KLUWER L. INT'L, https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/kli-ka-1123124?q=salaverry.

59. *Id*.

60. *Id*.

61. *Id*.

62. 64 F.3d 773, 777 (2d Cir. 1995).

63. Cantuarias Salaverry, *supra* note 58, at 11.

64. *Id*. at 12.

arbitration. At the time of the arbitration, the Peruvian Law N° 26572 was in force.[65] Article 3 of that Law required the expression of consent to bind a party to an arbitration agreement, with very limited exceptions that were not applicable to the case at hand.[66] Even the subsequent reform of the Peruvian arbitration law by way of the Legislative Decree 1071 continued to reject extending arbitration agreements by lifting the corporate veil.[67] This clear position of domestic law vis-à-vis the extension of arbitration agreements to non-signatories explains the rejection of using comparative analyses to arrive at a different legal outcome.

III. Resolving Issues of Post-Award Proceedings with the Support of Comparative Jurisprudence

A. The Determination of Arbitral Awards for the Purpose of Recognition and Enforcement, and Setting Aside

Courts in Latin America have applied comparative jurisprudence to the question of whether a certain document constitutes an arbitral award for the purpose of recognition and enforcement under the New York Convention, as well as annulment proceedings under their national laws on international commercial arbitration.

a) Enforceability of Partial Awards

The enforceability of partial awards was raised in the Paris-seated ICC arbitration between Vestas Perú SAC and Montealto Perú SAC.[68] This case was a consolidation of cross-claims between the two companies.[69] Both of these companies also requested to add additional parties to the arbitration, including Energía Eólica S.A.[70] The arbitral tribunal dismissed this request of joinder with a partial award.[71] That partial award ordered Montealto to pay Energía the sum of 150,000 Euro, plus interest, for costs. Energía filed for recognition of this partial award before the Second Commercial Chamber of the Superior Court of Justice of Lima.[72]

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65. Peruvian General Arbitration Law No. 26572, Dec. 20, 1995, https://docs.peru.justia.com/federales/leyes/26572-jan-3-1996.pdf.

66. *Id*. (for domestic arbitrations, art. 10 provides that parties that have not signed the arbitration agreement may become bound by the arbitration clause only if they subsequently accept the arbitration procedure; for international arbitrations, the Law provides explicitly the writing requirement of the arbitration clause in art. 98.2).

67. *See* The Peruvian Arbitration Law, Legis. Decree No. 1071, in force since September 1, 2008. Article 14 of this Law states that an "arbitration agreement extends to those whose consent to submit to arbitration, in good faith, is determined by their active and effective participation in the negotiation, celebration, execution or termination of the contract that includes the arbitration agreement or to which the agreement is related, *id.* It also extends to those who intend to derive rights or benefits from the contract, according to its terms" (translation is ours), *id.*

68. *See* Fernando Cantuarias Salaverry, *Energia Eolica S.A. v. Montealto Peru and Vestas Peru, Superior Court of Justice of Lima, 0045-2016-0, 19 October 2016*, Kluwer L. Int'l, https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/kli-ka-ons-17-12-001?q=Salaverry.

69. *Id*. at 1.

70. *Id*.

71. *Id*.

72. *Id*.

In its 2016 judgment on the motion for recognition and enforcement, the Superior Court of Justice answered several questions, one of them was which type of awards may be enforced under the New York Convention.[73] In its reasoning, the Peruvian court referred to the U.S. and French jurisprudence on the substantive approach to the notion of "award" used in the New York Convention. The two decisions cited were the French Appeals Court decision in *Baspetro Oil Services Co. v. The Management and Implementation Authority of the Great Man-Made River Project*[74] and the U.S. case of *Publicis Communications et al. vs. True North Communications*.[75] Both decisions found their way into the Peruvian decision by an indirect citation from a book written by a leading Colombian law professor and practitioner.[76] It is not apparent that it reviewed the original texts of these judgments.[77]

The Peruvian court further supported its reasoning by referring to a similar debate that had happened before the Colombian courts, and where the jurisprudence had been changing. The Peruvian judgment explained that in the 1999 case of *Merck & Co. Inc. y otros c/ Tecnoquímicas S.A*., the Colombian Supreme Court of Justice had stated that only final awards may be enforced under the 1958 New York Convention.[78] Since this judgment had received criticism in Colombian academic writings,[79] the Colombian Supreme Court of Justice reversed its jurisprudence twelve years later in the case of *Drummont Ltd. v. Instituto Nacional de Concesiones – INCO, et al*.[80] These developments in the Colombian jurisdiction led the Peruvian court to affirm that:

> In conclusion, this Court considers that the word "award" does not necessarily have to be identified with "final award," that is, the one that resolves the substantive controversy between the parties, only because there exist arbitration pronouncements qualified as 'final awards' and 'partial awards'…[81]

Specifically addressing the question about partial awards deciding on costs, the Peruvian court referred to the Swiss judgment of the Federal Supreme Court from 18

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73. *Id*.

74. Braspetro Oil Servs. Co. v. The Mgmt. and Implementation Auth. of the Great Man-Made River Project (Cayman Islands v. Libya) 44 French Int'l Arb. Rep. 369 (1999).

75. 206 F.3d 725, 728 (7th Cir. 2000) (specifically, the Peruvian court cited textually the statement in that judgment that the "treatment of 'award' as interchangeable with final does not necessarily mean that synonyms such as decision, opinion, order, or ruling could not also be final. The content of a decision—not its nomenclature—determines finality").

76. EDUARDO ZULETA, EL CONCEPTO DE LAUDO 44–45 (2012).

77. *See* Cantuarias Salaverry, *supra* note 58, at 9–10.

78. *See* Cantuarias Salaverry, *supra* note 58, at 8.

79. *See id.* at n. 20 (the Peruvian judgment refers to an article of a Colombian lawyer published in Perú).

80. Supreme Court of Justice, Colombia, 19 December 2011 and 3 May 2012, XXXVII Y.B. COM. ARB. *See* also Julio César Rivera , *La aplicación de la Convención de Nueva York sobre Reconocimiento y Ejecución de Sentencias Arbitrales Extranjeras por parte de los tribunales de América Latina*, http://www.colabogados.org.ar/larevista/pdfs/id18/la-aplicacion-de-la-convencion-de-ny.pdf (last visited Mar. 22, 2023); *see also id.*

81. *See id.* at 10 (Spanish original text: "Entonces, el Colegiado estima que el vocablo "laudo" no ha de ser identificado necesariamente con "laudo final", esto es, el que resuelve la controversia de fondo entre las partes, por la razón acotada, de la existencia de pronunciamientos arbitrales calificados de "laudos finales" y "laudos parciales", además de otros pronunciamientos arbitrales …").

January 2007[82] to explain that awards ordering costs (which was the question specifically at issue in the Peruvian case) can be presented for setting aside, independently of whether the award is final, or partial.[83]

b) Enforceability of Final Awards

In the 2018 case of *D.P. Trade S.A. v. Metalyck S.A.C.,* the Lima Superior Court of Justice in Peru recognized and enforced an award made in Lugano (Switzerland) upon showing the text of the award alone, as provided in Article 74 of the Peruvian arbitration law.[84] The case originated from an international commercial arbitration in which the defendant party did not participate.[85] When claimant D.P. Trade S.A. obtained an award in its favor for damages and costs, it submitted that award to the courts of Lima for recognition and enforcement, where the defendant also opted to not participate.[86] While deciding to recognize and enforce the Swiss award, the Peruvian court evaluated whether the award presented was indeed an award for the purpose of recognition and enforcement.[87] The Court responded in the affirmative after stating that the legal characterization as "award" is a task of the recognizing court.[88] Similarly to the 2016 judgment in *Energia Eolica S.A. v. Montealto Peru and Vestas Peru,*[89] as a basis for this interpretation the court used French and United States' jurisprudence as manifested in the *Baspetro Oil Services* and *Publicis Communications* cases, also taken from the same doctrinal source.[90]

The analysis based on the comparative jurisprudence helped the court to determine whether the document at issue was an arbitral award for the purpose of the New York Convention.[91] However, while the comparative jurisprudence may have helped establish what criteria had to be considered in determining an arbitral award, the courts lacked any reasoning applying these criteria to the specific contents of the award at hand. This lack of reasoning may cast some doubt about the effective usefulness of the comparative jurisprudence in enhancing the legal quality of the court's judgment.

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82. *Id.* at 12 (referring to Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 18, 2007, Case No. III ZB 35/06 (Ger.)).

83. *Id*.

84. Fernando Cantuarias Salaverry, *D.P. Trade S.A. v. Metalyck S.A.C., Superior Court of Justice of Lima, 352- 2017, 05 March 2018*, KLUWER L. INT'L, https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/kli-ka-ons-18-39-001?q=salaverry.

85. *Id*. at 1 (factual summary).

86. *Id*.

87. *Id.* 9–10.

88. *Id*.

89. *See supra* Section 2.A.

90. Cantuarias Salaverry, *supra* note 85. The cases that were mentioned were Cour d'Appel [CA] [regional court of appeal] Paris, *Baspetro Oil Services Co. vs. The Management and Implementation Authority of the Great Man-Made River Project*, Jul. 1, 1999 and *Publicis Communications et al. vs. True North Communications Inc*., 206 F 3d 725 (7th Cir. 2000) (a judgment adopted on March 14, 2000T, *id.* The Court referenced both cases based on the comments in the book by E. Zuleta, *El concepto de laudo*, *see id.* at n. 9*; see also supra* Section 3.A.a (regarding the explanations about the *Energía Eólica S.A*. case in the pervious sub-section about enforcement of partial awards).

91. Cantuarias Salaverry, *supra* note 85, at 10.

B. The Competent Court to Set Aside or Annul an Arbitral Award

The issue of the competent court to set aside or annul an arbitral award has been considered in a number of cases before Latin American courts. In some of these cases, the courts of justice applied a comparative jurisprudential approach. For instance, in *Isolux Ingeniería S.A. v. Bioenergy Zona Franca S.A.S.,* the Colombian Council of State mentioned the *Karaha Bodas* case[92] to distinguish the two post-award procedures of setting aside and recognition and enforcement.[93] In another case before the Colombian Council of State, a Colombian state-owned railway company requested the setting aside of a partial arbitral award rendered against it in Paris on June 24, 2003.[94] The claim referred to a Colombian state-owned company trying to annul the arbitral award only on the basis that the respondent (now claimant in annulment) had its corporate seat in Colombia and the underlying transaction referred to that country.[95]

The requesting party argued that cases such as *Norsolor, Hilmarton, Chromalloy, Sonatrach*, and *Radenska* show that different courts of justice grant recognition and enforcement, on the one hand, and annulment, on the other.[96] The requesting party invoked the exercise of sovereign rights of the Colombian jurisdiction to annul the foreign award by its own courts, and in compliance with its own laws.[97] The Council of State, however, rejected these arguments, and explained that in those foreign cases the annulment was made by the courts at the seat of arbitration.[98] The Council of State thus clarified an apparently wrongly invoked comparative jurisprudential argument, and reiterated—when rejecting the exceptional appeal from the state party—that those foreign judgments had no application in the case at hand.[99]

In the case of *Yacimientos Petrolíferos Fiscales (YPF) v. AES Urugaiana Emprendimientos*, the issue was that the parties had expressly agreed that while the seat of arbitration be in Uruguay, any annulment procedure would take place in and

92. Karaha Bodas Co., LLC v. Perushahaan Pertambangan Minyak Dan Gas Bumi Negara et al., 364 F.3d 274 (5th Cir. 2004).

93. *See Colombia No. 15, Isolux Ingeniería S.A. v. Bioenergy Zona Franca S.A.S., Consejo de Estado, Administrative Chamber, Third Section, File No. 11001-03-26-000-2019-00015-00(63266), 17 April 2020*, Y.B. Comm. Arb. 1–32 at n. 11 (ICC Int'l Ct. Arb. 2021), https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/kli-ka-icca-yb-xlvi-509-n?q=Isolux.

94. *See Colombia No. 4, Empresa Colombiana de Vías Férreas (Ferrovías) (Colombia) v. Drummond Ltd. (US), Consejo de Estado, Sala de lo Contencioso Administrativo, Seccion Tercera [Council of State, Administrative Chamber, Third Section], 25,261, 22 April 2004*, 29 Y.B. COMM. ARB. 643–56 (ICC Int'l Ct. Arb. 2004), https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/ipn25969?q=Colombia%20No.%204,%20Empresa%20Cobiana%20de%20V%C3%ADas%20F%C3%A9rreas%20(Ferrov%C3%ADas)%20(Colombia)%20v.%20Drummond%20Ltd.%20(US).%20Consejo%20de%20Estado,%20Sala%20de%20lo%20Contencioso%20Administrativo,%20Secci%C3%B3n%20Tercera.

95. *Id*.

96. *Id*. at 655.

97. *Id.*

98. *See Astivenca*, *supra* note 16, at 655.

99. *Id*.; *see also Empresa Colombiana de Vías Férreas (Ferrovías) (Colombia) v. Drummond Ltd (United States), Consejo de Estado, 11001-03-26-000-2003-0003401 (25.261), 27 April 2004*, KLUWER L. INT'L, https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/ipn80447?q=ferrov%C3%ADas.

according to Argentine law.[100] In its reasoning, the court considered the notion of delocalization as a potential way to argue that the seat of arbitration has no relevance any more in the context of the distinction between recognition and enforcement, and setting aside of arbitral awards.[101] However, while that may be something being discussed in the French legal system, the court did not address any potential implications of this statement, and instead emphasized the consensual character of arbitral jurisdiction and used this argument of contractual freedom to confirm the choice made about the competent court for annulment procedures.[102]

C. The Scope of Annulment of Arbitral Awards

Article 34 of the UNCITRAL Model Law allows for the total or partial annulment of arbitral awards. One issue that may arises is the question about whether the annulment should affect the whole award or only certain parts, without restricting the validity of the remaining decisions contained in that award. The Paraguayan Court of Appeal was asked to annul an arbitral award that had set a 3% monthly interest rate for the debt payment in the case of *Julio Galiano Moran-Empresa Constructora c/ Estado Paraguayo–Secretaría de Acción Social*.[103] The Paraguayan government filed for annulment of the award because of a 2.1% limit for monthly interest payments pursuant to Paraguayan public policy.[104] The Court of Appeal interpreted Article 40(a)(3) of the Paraguayan arbitration law (which is the equivalent to Article 34(2)(a)(iii) of the UNCITRAL Model Law) to conclude that annulment of an arbitral award may be in full or in part.[105] The Court followed a threefold approach, first asking if partial annulment was compatible with Paraguayan law. To assess this first question, the court already followed a comparative law approach, because Article 365 of the Paraguayan Civil Code was taken from Article 1418 of the 1948 Italian Civil Code, and the Italian Court of Cassation has extensive jurisprudence allowing for the conservation of the legal act if it is held partially null

100. Federico Godoy, *Yacimientos Petrolíferos Fiscales (YPF) v. AES Urugaiana Emprendimientos (AESU) y otros, Court of Appeals in Federal and Contentious Administrative Matters of the Federal District, Chamber IV, 41255/2013, 22 December 2015*, KLUWER L. INT'L, https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/kli-ka-16-2-002?q=Godoy.

101. *Id.* at 52 (there, the Court cited Thomas Clay with the following excerpts: "This is the new meaning of history, the one that accompanies globalization. Arbitration is today completely detached from any reference to the jurisdiction of a national legal order." And this, because international arbitration has no jurisdiction. "Certainly, in private international law the notion of 'fuero' implies a State location, that is, the idea of investiture by the State and therefore respect for the police or procedural laws of this seat. Here the notion of 'fuero' is confused with that of 'seat.' But if the arbitrator does indeed have a seat, he is not invested by the State in which this seat is located, and he is not under the obligation to respect the police or procedural laws of said seat." (cfr. Clay, Thomas. "La importancia de la sede del arbitraje en el arbitraje internacional: ¿es todavía relevante?" in "Arbitraje Internacional. Tensiones actuales". Comité Colombiano de Arbitraje. Legis Editores S.A. 2007, at 194/95)").

102. *Id*. at 53.

103. José A. Moreno Rodríguez, *Recurso de Nulidad interpuesto por el Abg. Roberto Moreno en representación de la Procuraduría Gral. de la República c/ proceso arbitral: 'Julio Galiano Moran c/ Estado Pyo', Court of Appeal in Civil and Commercial Affairs of Asunción, 79/2018, 28 August 2018*, KLUWER L. INT'L, https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/kli-ka-ons-20-36-003?q=rodriguez.

104. *Id*.

105. *Id*. at 7.

and void.[106] The second question was to determine if the arbitration law allows for partial annulment of arbitral awards. To answer this question, the court again followed a comparative jurisprudential approach, and cited the 1993 Paris Court of Appeal's decision in *European Gas Turbines SA v. Westman International Ltd.*,[107] which discussed partial annulment.[108] The third and last question was if the annulling Court of Appeal should decide about the correction of the award, or just annul without further deciding the matter and leaving any additional decision to a reconstituted arbitral tribunal.[109] The Court of Appeal reasoned that the arbitral agreement excluded the court's jurisdiction over the dispute, and hence it can only decide about annulment, but not about any new decision to substitute for the annulled portion of the award.[110] The court again based its decision on a comparative analysis using French jurisprudence as laid out in the two judgments of *Thalès Air Defence* and *Sté Linde Aktiengesellschaft*.[111]

In this case, questions remain about the reasons why the Court of Appeals used French jurisprudence to determine the scope of annulment. Since the applicable Paraguayan provision in the Civil Code was inspired in the Italian Civil Code, it may have been more systematic to review Italian jurisprudence to ascertain if the Italian doctrine of conservation of the legal act extends to arbitral awards. The selection instead of French precedents may be a sign of a pro-enforcement approach of arbitral awards. Be it as it may, the judgment did not discuss in greater detail the underlying rationale for the comparative jurisprudential choice.

D. The Standards for the Due Process Breach as a Ground for Rejecting Recognition and Enforcement

A comparative jurisprudential approach has also been used to determine the scope of the due process violation pursuant to Article V(1)(d) of the New York Convention. While the New York Convention indicates that a breach of a rule of procedure during the arbitration may be grounds for refusing recognition and enforcement, and while the UNCITRAL Model Law applies the same criterion for annulment,[112] in practice many arbitration laws have added that only fundamental breaches of procedural rules that have an impact on the outcome of the arbitration or the validity of the arbitral award, may lead to annulment or rejection of recognition and enforcement.[113] In an annulment proceeding against an international

106. *Id.* at 8.

107. *Société European Gas Turbines S.A. v Société Westman International Ltd*., Cour d'appel [CA] [regional court of appeal] Paris, 1 ch., Sept. 30, 1993.

108. Moreno Rodríguez, *supra* note 104, at 8.

109. *Id*.

110. *Id*. at 9.

111. *Id.* (the cases mentioned were *SA Thalès Air Défense v. GIE Euromissile*, Cour d'appel [CA] [regional court of appeal] Paris , 1re ch. c, Nov. 18, 2004; *Sté Linde Aktiengesellschaft et autres v. sté Halyvourgiki – AE*, Cour d'appel [CA] [regional court of appeal] Paris, pole 1 ch. 1, Oct. 22, 2009).

112. UNCITRAL Model Law, *surpa* note 2, at § 34.

113. *See* Eduardo Zuleta Jaramillo, *China United Engineering and Donfang Turbine Co. Ltda. [Consortium CUC-DTC] v. Generadora y Comercializadora de Energía del Caribe – GECELCA S.A. E.S.P. and GECELCA 3 S.A.S. E.S.P., Council of State of Colombia, Administrative Law Chamber, Recurso Extraordinario de Anulación Contra Laudo Internacional, Radicación Número 11001-03-26-000-2018-00012-00 (60714), 27 February 2020*, KLUWER L. INT'L, https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/kli-ka-ons-20-25-018?q=Jaramillo [hereinafter China United v. GECELCA]. For example, Section 68 of the English Arbitration Act 1996; Article 1717(3) (a)(ii) of

arbitration award rendered in Colombia, the Colombian Council of State explained that even when the domestic arbitration law did not require taking into account the seriousness and materiality of the alleged procedural violation, several judgments from other jurisdictions have required those criteria.[114] The Council of State mentioned several examples: *Williams v. Nat'l Football League*,[115] where the court allowed the award to be made after the time limit set for rendering the award; *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*,[116] where the court stated, "it is adequate to annul an award based on a procedural violation only if that violation produced substantial harm to claimant;" *Dan River, Inc. v. Cal-Togs, Inc*.,[117] which stated that to annul an award it was necessary to prove that the violation of procedural rules had an impact on the "substantive rights" of the parties; *Rhéaume v. Société d'Investissements L'Excellence Inc*.,[118] which established that the court had to "determine if the procedural violation was of such nature as to undermine the integrity of the procedure and evaluate if the violation had some relation with the award itself;" and *Tusculum BV v. Louis Dreyfus Holding SAS*,[119] which held that the annulment of the award required a material violation of procedural rules "to avoid the trivialization of the judicial review in situations where the procedural breach was of minor relevance."[120]

The Colombian Council of State applied this jurisprudence to interpret the Colombian arbitration law to allow annulment of an award if it was made in gross violation of the procedural rules as laid out in the first procedural order (PO1).[121] According to that PO1, each party had the same number of rounds to submit evidence for their case. However, in practice, the claimant was granted two additional opportunities to submit new evidence.[122]

The first was a round of written evidence where only the claimant was allowed to submit documents.[123] The second was when only claimant was allowed to submit new evidence during the oral hearing, after the written phase had already been concluded.[124] Each of these instances were considered sufficient to justify the annulment of the award.[125]

E. Public Policy as a Ground for Rejecting Recognition and Enforcement

Several international arbitration texts (i.e., the UNCITRAL Model Law and the New York Convention) refer to public policy in the context of recognition and

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the Belgian Judicial Code; and Article 1065(1)(c) in combination with para. (4), of the Netherlands' Judicial Code, *id.*

114. *Id.*
115. *Id.* at n. 42.
116. *Id.* at n. 43.
117. *Id.* at n. 44.
118. *Id.* at n. 45.
119. *Id.* at n. 46.
120. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer L. Int'l, 2nd ed. 2014).
121. *China United v. GECELCA, supra* note 114, at 91 (other grounds for annulment submitted in this case were rejected).
122. *Id*.
123. *Id*.
124. *Id*.
125. *Id*.

enforcement, and setting aside. However, none of these texts offer a precise definition of public policy. Comparative analyses have helped local courts of justice to assess the meaning of public policy and increase legal security. As one Court in Colombia put it:

> As the standards of the New York Convention are vague and imprecise in respect of these issues, courts seized with an exequatur procedure have opted in several cases, when deciding on the recognition or enforcement of awards, for carrying out this scrutiny in the light of the procedural principles of their country, [*nota omissis*] without applying specific rules but rather fundamental procedural guarantees.[126]

For the identification of these fundamental procedural guarantees, some courts of justice in Colombia and elsewhere have used a comparative jurisprudential approach.

In a Peruvian case, the question was raised as to the standard that should be applied to review an award for potential annulment based on a public policy violation.[127] The Lima Superior Court of Justice relied on the European Court of Justice decision in *Eco Swiss*[128] to hold that a "very high standard" applies to the public policy exception to the recognition and enforcement of arbitral awards.[129] Applying these high standards to the case at hand, the court concluded that the parties had full opportunity to participate in the procedural stage that led to the partial award, that the parties could express their positions as to the extension of the arbitration to non-signatories, and that the arbitral tribunal provided reasons for its decision based on law.[130]

Similarly, in two other decisions of the same Superior Court of Justice, the justices referred, among others, to a comparative jurisprudential approach in concluding that the public policy standard was very high, as it referred to international public policy of each respective state.[131] These courts also indicated that in comparative jurisprudence there is some debate about the very existence of the distinction between public policy and international public policy.[132]

Other Colombian court decisions have applied the concept of fundamental notions of morality and justice as laid out in U.S. case law, notably *Parsons &*

126. E. Zuleta Jaramillo, *'Petrotesting Colombia S.A. v. Southest Investment Corp., Ross Energy S.A*., Supreme Court of Justice, Ref: exp. 11001-0203-000-2007- 01956-00, 27 July 2011', A contribution by the ITA Board of Reporters, Kluwer Law International, Kluwer Law International, section 6, at para. 51. This case was relevant because it made clear, for the first time in Colombia, that the notion of public policy as a barrier for recognition and enforcement of a foreign award under the New York Convention in Colombia is "international public policy," that is, it is limited to the basic or fundamental principles of Colombian law: "prohibition of abuse of rights; good faith; impartiality of the arbitral tribunal and due process" (see Commentary by E. Zuleta Jaramillo, *id*., at p. 203).

127. *See* Cantuarias Salaverry, *supra* note 68.

128. Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int'l NV, 1999 E.C.R. I-03055.

129. *Id*.

130. *Id*.

131. *See generally* Cantuarias Salaverry, *supra* note 85, at n. 40.

132. *Id.* Interestingly, one of these courts affirmed the preference of comparative jurisprudence for interpreting that Article V.2.b of the New York Convention refers to international public policy based on an Appeals Court decision from Milan, Italy, with a double-indirect citation, *id.* at n. 22. The court mentioned the "Judgment of the Milan Appeals Court" [without date], cited by Rubino-Sammartino, and referred to in the book of J.A. Moreno Rodríguez, 'Orden público y arbitraje: algunos llamativos pronunciamientos recientes en Europa y el Mercosur,' *id.* at n. 20.

Whittemore, and in other decisions from tribunals in Germany, Spain, and Switzerland.[133]

In addition, the *Parsons & Whittemore* case was used to explain the distinction between national public policy and international public policy. International public policy was interpreted as being part of basic or fundamental legal principals.[134] This led the Colombian courts to reject a public policy argument based on the fact that the dispute related to hydrocarbons located in the nation's subsoil, for which Colombian legislation establishes the exercise of exclusive sovereign rights and jurisdiction.[135] The court also rejected the allegation of linguistic difficulties of the respondent during the procedure due to the fact that the procedure did take place in English and not in Spanish.[136] The respondent demanded that, among others, the preliminary conference be held in Spanish, which the arbitral tribunal rejected with a reference to the arbitration agreement that established English as the sole procedural language.[137] The Colombian court rejected these arguments of procedural fairness, although it recognized that *Parsons & Wittamore*, as expression of U.S. judicial practice, put particular emphasis on procedural fairness as a requirement of public policy.[138]

The case of *Parsons & Wittamore* was also used as a comparative precedent to hold that in public policy cases, when in doubt about the standard, a pro-enforcement approach shall always prevail.[139] The Colombian court held up this U.S. judgment as an example to follow in the most distinct manner:

> To concretize the notion of public policy, it is necessary to refer to the pro-enforcement principle, in order to avoid extensive hermeneutics and limit its scope to the essential minimum [aspects], as well as resolve doubtful cases in favor of recognition. This is the internationally admitted rule of interpretation, whose most emblematic precedent is the decision of 23 December 1974 of the Court of Appeals for the Second Circuit of the United States [in *Parsons & Wittamore*] [*nota omissis*], in which it was held that the pro-enforcement bias implies a narrow reading of the public policy exception, because the contrary would mean ignoring the basic effort of the

133. *See Parsons* & *Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA*), 508 F.2d 969; Zuleta Jaramillo, *supra* note 114; *Commercial Arbitration 2020 - Volume XLV Colombia No. 13, AAL Group Limited v. Vertical de Aviación SAS, Corte Suprema de Justicia, Civil Cassation Chamber, SC17655-2017 and SC17655-2017, 30 October 2017*, KLUWER L. INT'L, https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/kli-ka-icca-yb-xlv-205-n?q=AAL%20Group%20Limited; *Colombia No. 14, Innovation Worldwide DMCC v. Carboexco C.I. Ltda., Corte Suprema de Justicia, Civil Cassation Chamber, SC877-2018, 23 March 2018,* KLUWER L. INT'L, https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/kli-ka-icca-yb-xlv-206-n?q=innovation%20worldwide; *Colombia No. 10 / P2, HTM LLC v. Fomento de Catalizadores – FOCA S.A.S., Corte Suprema de Justicia, SC8453-2016, 24 June 2016,* KLUWER L. INT'L, https://www-kluwerarbitration-com.eu1.proxy.openathens.net/document/kli-ka-icca-yb-xli-162507-n?q=HTM%20LLC.

134. Zuleta Jaramillo, *supra* note 114, at Section 6.5.

135. *Id*.

136. *Id*. at Section 6.6.

137. *Id*.

138. *Id*.

139. *See Beverages Inc. v. Productos Naturales de la Sabana, S.A. Alquería, Supreme Court of Justice of Colombia, Case No. 11001–02–03–000–2014–01927–00, 12 July 2017,* KLUWER L. INT'L, https://www.kluwerarbitration.com/document/kli-ka-raci-201702-018-n at p. 552.

> New York Convention, "to remove preexisting obstacles to enforcement"[140]

This application of *Parsons & Whittemore* in Colombia shows the case's impact beyond its home jurisdiction. However, as a case resolved by U.S. courts, it is rather an example of the application of an international treaty in a jurisdiction that follows a dualist approach to the integration of international law into the domestic legal order. Colombia, in contrast, is a monist country, where judges directly apply ratified, international treaties such as the New York Convention.[141] As a potentially more convincing approach, the Colombian court could have referred to jurisprudence from monist countries that have recognized a pro-enforcement bias of the New York Convention even without statutory enactment. Such a choice would enable the local court to build a jurisprudence based on a direct interpretation of the New York Convention. Omitting any reference to the policy choices of the ratifying government avoids rapid changes in the jurisprudence as a consequence of changes in government or new government policies.

IV. CONCLUSIONS

This study of the use of comparative jurisprudence in the determination of important questions of international arbitration law and practice has provided a unique insight into how the rules on international arbitration are expanding globally. The example of Latin America shows that state courts are aware of the existence of landmark cases in some advanced jurisdictions regarding international commercial arbitration. At least in some cases, the courts make active use of these foreign landmark cases to justify their decisions.

However, several challenges remain. One of the first and most obvious is the very fact that courts use comparative jurisprudence. Some judges use this comparative approach; others do not. This inconsistency is hardly something for which the local judges could be criticized, as neither comparative law nor comparative jurisprudence are a formal source of law in any of the Latin American countries. For this reason, it is up to the discretion of the individual judge or tribunal to decide if they employ a comparative jurisprudential approach to the determination of a question not explicitly resolved in the applicable arbitration law. This broad judicial discretion carries the risk of additional fragmentation. Only solidly engrained jurisprudential practice may provide stability and legal security within the domestic legal system. The occasional use of a comparative jurisprudential approach to solve a legal problem in the field of arbitration is not helpful to the development of a national jurisprudence. A more systematic approach to the comparative jurisprudential

140. *Id*. at para. 72.

141. *See*, Colombian Constitutional Court judgment No. C-1189 of 2000 (where the Court describes the system in place as "based on the principle of modified monism, [where] international norms have limited primacy in domestic law, in that they cannot negate the validity of national provisions simply because they conflict with those provisions; what happens is that, in each specific case, national law will have to yield to the higher-ranking law"); *see also Legal considerations concerning the scope and application of the principle of universal jurisdiction*, MINISTRY FOREIGN AFFS. (Apr. 11, 2011), https://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Colombia%20(S%20to%20E).pdf.

method when faced with inherently transnational or international issues such as arbitration would be necessary in each judicial system to strengthen the communication of legal concepts across borders. As a positive example, the reiterated application of the French "group of companies" doctrine in the Dominican Republic may illustrate such a widespread or broad recognition of comparative jurisprudential analyses as a tool to create a genuinely domestic jurisprudence.[142]

The exercise of the judges' discretion to use a comparative jurisprudential approach may sometimes be dictated by the knowledge of foreign languages and legal cultures. Not all judges master American legal English or French legal language sufficiently enough to grasp the nuances of the rich jurisprudence produced in the United States, the United Kingdom, France, Switzerland, and other jurisdictions that may be considered framers of universally applicable landmark cases. Some tribunals overcome this linguistic and cultural hurdle by citing foreign judgments indirectly, through domestic doctrinal sources.[143] Of course, this indirect citation practice carries its own risks of converting comparative jurisprudential analysis into a merely decorative element that is added only for convenience, and because some prominent local author has written about it. The risk exists that such an approach does not grasp the individual nuances of the foreign case and converts local jurisprudence into a pure formalistic exercise without an original analysis of the direct legal sources applied to substantiate a ruling.

Another observation is that in situations where judges use comparative jurisprudence, they rarely undertake a comprehensive analysis following a comparative approach that studies all the various jurisprudential approaches to the issue at hand.[144] This carries at least three challenges and risks:

First, judges may find it difficult to put into context one foreign landmark case with other jurisprudence or doctrinal sources in that country. For example, in one case, the court analyzed the French notion of delocalization of the arbitration in the context of the determination of the law applicable to the arbitration agreement and the arbitration procedure. However, the Latin American court did not attribute any particular legal consequences to this delocalized character, although it may have been relevant or useful in the case before it, which related to a choice of forum for the setting aside procedure explicitly agreed upon between the parties.[145]

Second, courts in Latin America focus on one or several landmark cases of one jurisdiction without comparing with approaches to the same issue in other jurisdictions.[146] This leads to situations where courts sometimes focus their attention on

142. *See id*. at Section 2.C.

143. *See id.* at Section 3.E (for instance, the challenges of indirect citations in some courts' argumentations on public policy).

144. *See* Liliana Galdámez Zelada, *El uso del derecho y jurisprudencia extranjera en los fallos del Tribunal Constitucional de Chile: 2006-2010*, 39 REVISTA CHILENA DE DERECHO 189, 192 (Jan.-Apr. 2012). This observation is also noticeable in other contexts different from arbitration, *id.* This study reviews Constitutional court judgements from Chile and the use of foreign constitutional judgments in a wide array of legal fields, and observes that the application is "soft, not very well grounded […]; we can also find references to constitutional judgments by a date but without indicating the number of that judgment […]; references to judgments that strengthen the Court's arguments, but without reproducing the paragraphs that confirm the coherence of arguments […]," *id.*

145. *See id*. at Section 3.C; *see also* Godoy, *supra* note 101, at 53.

146. See UWE KISCHEL, COMPARATIVE LAW 89 (2019) (about the difficulties of identifying which law to compare).

United States cases, and others where they focus on French cases, or, more broadly, cases adopted by state courts of various European countries of civil law tradition. While in the end the court's choice may be legally sound as to the applicable domestic arbitration law, the comparative method would call for an explanation on why the court preferred to follow one or the other approach to the respective legal issue.

Third, even with the comparative method, the state courts rarely take the step to explain how the outcome of the comparative jurisprudential approach relates to the domestic legal system. Only in a few instances do the courts try to build a domestic doctrine for a certain legal issue related to international arbitration based on the holdings of the courts in other countries. Instead, the courts just try to solve the dispute at issue. The resulting tensions become apparent in a judgment where the court recognized certain roots of the domestic legislation in Italian law, but then applied French jurisprudence to further develop that idea related to arbitration.[147]

These challenges have a direct impact on the possibility for a coherent and uniform legal order to emerge in the field of international commercial arbitration.[148] The practice so far, at least in regard to Latin America, suggests that there is no such systematic application, but rather a spontaneous, case-by-case response to various legal questions that arise in international arbitration.

147. *See id.* at Section 3.C; *see also* Moreno Rodríguez, *supra* note 103.

148. *See* KISCHEL, *supra* note 147, at 99 (such lack of coherence may prove in favor of postmodern critics of the traditional functionalist approach to comparative legal studies).