

# The constitutional review of international commercial arbitral awards in Latin America and the challenges for legal certainty. Insights from Colombian jurisdiction<sup>1</sup>

*Las revisiones constitucionales de los laudos de arbitraje comercial internacional en Latinoamérica y sus retos para la seguridad jurídica. Perspectivas desde la legislación colombiana*

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**Abstract:** The constitutional review of international commercial arbitral awards is a menace to legal certainty, since this review entails different decisions and long delays for arbitral awards to be enforced. This situation is well known in Latin American jurisdictions and in particular Colombia, where domestic High Courts protect fundamental rights in arbitral proceedings. Changing the strong positivist conception of legal certainty and introducing legal pluralism within international arbitration seem to be a good path. It is stark reality the proliferation of non-state actors in the law-making of international business. However, such proposal will depend on positivist theory and public policy, since domestic courts are still in exclusive charge of enforcing the awards.

**Keywords:** Legal certainty, constitutional review, international commercial arbitration, legal pluralism, public policy.

**Resumen:** *Las revisiones constitucionales a través de acciones de tutela contra laudos arbitrales comerciales internacionales son una amenaza para la seguridad jurídica. Esto conlleva a decisiones distintas y plazos extensos para que el laudo arbitral sea ejecutado. Situación que es bien conocida en las jurisdicciones latinoamericanas, en particular Colombia, donde las altas*

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*cortes locales protegen los derechos constitucionales fundamentales en las actuaciones arbitrales. Cambiar una concepción rigidamente positivista de la seguridad jurídica e introducir el pluralismo jurídico en el arbitraje internacional parece ser un buen camino, debido a que es evidente la proliferación de actores no-estatales en el proceso de la construcción de regulaciones en los negocios internacionales. Sin embargo, esta proposición dependerá de la teoría positivista pero también del orden público, toda vez que las cortes locales están aún encargadas de la ejecución de los laudos.*

**Palabras clave:** *seguridad jurídica, acción de tutela, arbitraje comercial internacional, pluralismo jurídico, orden público.*

## Introduction

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Legal certainty is a principle which seeks the predictability in law-making and law-applying activities and one of the main pillars of the rule of law. Gustav Radbruch said that the central requirements of this principle are: “the ability to identify the subject matter as a legal norm, on the one hand, and the certain enforcement of what is identified as law, on the other”<sup>2</sup>. In other words, Radbruch considered for legal certainty “that all of what is called *positive* law stems from the requirement of legal certainty. Thus, legal certainty becomes the ground of positivity”<sup>3</sup>. This is a strong positivist conception of legal certainty which was perhaps suitable for a pre-globalization period.

Legal certainty is also part of a great echo into the world to attain globalization of law<sup>4</sup>. Therefore, eagerness to achieve this principle among international business is burgeoning. International arbitration the most popular alternative dispute resolution in international business law is not free of this eagerness. The world urges for a more efficient, secure and rapid international law system. On the contrary, the nationalism makes also its return and the idea of a truly international arbitration might cause distress in some domestic courts, especially those with a strong positivist thinking and Constitutional public actions.

Latin America has become an important haven for international investors during this recent economic downturn. This is because the region has shown a solid performance and growth during this period of crisis. Nevertheless, Latin America seems still to be under

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<sup>2</sup> ALEXY, Robert. *Legal certainty and correctness* [online]. Conference at the University of Coimbra (Portugal), 2012 <[http://www.fd.unl.pt/docentes\\_docs/ma/jsb\\_MA\\_16919.docx](http://www.fd.unl.pt/docentes_docs/ma/jsb_MA_16919.docx)> (accessed 11<sup>th</sup> august 2014).

<sup>3</sup> *Ibidem*.

<sup>4</sup> MAXEINER, James. «Some realism about legal certainty in the globalization of the rule of law». *Houston Journal of International Law*. vol. 31, n°1, 2008, pp. 27-46.

the shadow of *Calvo* Doctrine. The constitutional review through individual complaints such as *acción de tutela* against international arbitral awards is a proof of such statement. Colombia along with Venezuela and Peru are among of the jurisdictions which favor strongly the setting aside of arbitral awards due to constitutional infringements. This might arise some issues for Colombia a country which has signed more than seven FTAs in the last ten years, including those with the U.S and the European Union.

Constitutional review of international arbitration renders the achievement of legal certainty a hazard. Colombian Law allows the possibility of any person, public or even private entity to claim constitutional protection when a fundamental right might be infringed. This protection is also available for judicial decisions which are akin to arbitral awards according to Colombian jurisprudence. Thus, it is found that legal certainty for arbitral awards in Colombia is part of the domestic public policy and it is therefore far beyond of international standards since Colombian jurisdiction relies on great extent of statutory law and jurisprudence as exclusive sources of law.

The possibility of the constitutional review of an international arbitral award arises many questions of legal certainty. It is known that this possibility allows an arbitral proceeding to be more costly and quite slow due to judicial reviews. Furthermore, the risk is also to have different outcomes for the same dispute in the same jurisdiction or in different jurisdictions, prompting an international judicial chaos. In other words, legal certainty established for protecting fundamental rights such as the right to due process is an obstacle for the legal certainty of international arbitral awards.

At this point is pertinent to propose a twisted legal certainty which could dovetail with globalization phenomenon. Legal certainty might also rely on some non-positivist aspects so as to achieve its purpose of predictability. This is the idea of Volkmar Gessner who is adamant to say that to achieve legal certainty not only legal structures are needed. Social and cultural structures combined with legal frameworks can achieve a better level of legal certainty<sup>5</sup>, especially in European Private Law. Thus, a theory which might assist Gessner's insights is definitely legal pluralism.

Yet this is not an easy pathway since we are dealing with Constitutional review in international arbitration awards. It is therefore necessary to know the background and causes in Latin America region which might have influenced Colombian jurisdiction so as to explore the core of such phenomenon. Second part focuses on the dimensions of legal certainty in international arbitration explained through some international jurisprudence and doctrine.

<sup>5</sup> GESSNER, Volkmar. «Globalization and Legal Certainty». In: GESSNER, Volkmar and BUDAČ, Ali Cem (eds.). *Emerging Legal Certainty: Empirical Studies on the Globalization of Law*. Oñati international series in Law and Society, Ashgate Publishing Company, 1998, pp. 427-449.

Third and fourth section centers on Colombian jurisdiction. The positivist study of Colombian jurisprudence and law will reveal the mainstream of legal certainty in international arbitration and its future in Colombia. However, a proposal of legal pluralism within international arbitration seems to be a solution so as to achieve the global objective of harmonization. This might result in a twisted legal certainty quite far away from our pyramidal positivist conception.

The purpose of this paper is to explore the reasons for the constitutional review in international arbitration and decisions of domestic courts. This might allow to see the consequences for achieving legal certainty in international arbitration. Meanwhile, this research aims to find out whether or not legal certainty in international arbitration might be pluralist rather than extreme positivist.

## 1. The reasons for a Constitutional review of arbitration awards in Latin-American jurisdictions: an overview

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The constitutional review into international arbitration is a phenomenon consequence of the so-called *constitutionalization* of international commercial arbitration, which is quite notorious in Latin America in contrast with other jurisdictions over the world.

The former statement means that arbitration has been incorporated within constitutional acts or has been interpreted as a constitutional option by jurisprudence. Thus, one of the grounds to be considered in this matter is that monist and dualist concepts of international law do not allow that Latin-American jurisdictions could conceive of a different arbitration<sup>6</sup>.

Under monist and dualist visions of law, every legal system is a creation of a sovereign state, in other words, the notion of legal system is strictly associated to domestic law. This situation fosters that judges are prone to consider international arbitration as a part of their own legal system, and any danger of their own legal system might become an issue for national public policy<sup>7</sup>. Moreover, several cases in Latin America confirm this theory, for example a judgment in Peruvian Constitutional Court (hereinafter, the *Cantuarias Salaverry case*) states that :“(...) the faculty of arbitrators to solve interests

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<sup>6</sup> DE JESÚS O., Alfredo. «La autonomía del arbitraje comercial internacional a la hora de la constitucionalización del arbitraje en América Latina». *Arbitraje. Revista de Arbitraje Comercial y de Inversiones*, vol. 2, n° 1, 2009, pp. 31-33.

<sup>7</sup> *Idem*, p. 31.

is not based upon the party autonomy rule but the own Peruvian Constitution”<sup>8</sup>, “the possibility to challenge an arbitration relation through a constitutional procedure is an incontrovertible right”<sup>9</sup>.

Secondly, the legal nature of arbitrators has been misled. Some Latin American legal experts assure that international commercial arbitrators are part of constitutional legal system; they say that their functions are not by the virtue of an arbitral agreement but a constitutional delegation. Nonetheless, De Jesús does not share this opinion; he states that the international commercial arbitrator is a *lex mercatoria* institution, as it has been recognized by a large international community of merchants<sup>10</sup>.

Another argument which supports the misleading conception of commercial arbitrators is the rule of 1958 New York Convention article V paragraph 2 b) which states: “(...) 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (...) b) the recognition or enforcement of the award would be contrary to the public policy of that country”<sup>11</sup>. In other words, the arbitration award cannot be enforced within a domestic jurisdiction whether it is contrary to the public policy in a particular country. Thus, national courts might have the privilege to intervene in all international arbitration proceedings pitfalls, including those related to commercial arbitrators. Article V 2 b) remains therefore as a justification for national courts to consider commercial arbitrators a part of their own domestic public policy. Public policy is a principle protected by constitutional law.

Notwithstanding these positions, a critical issue seems to be the culture and philosophical collision between dualist and monist theories. It appears that the solution might be found within the theory of legal pluralism which was originated to criticize the theory of legal centralism –Law is only derived from the State–<sup>12</sup>. Legal pluralism proposes that the law is not exclusive, neither hierarchical nor systematic, the law supposes the coexistence of different legal systems regardless if they are coming or not from the State<sup>13</sup>. Thus, there is no Latin American jurisdiction which embraces legal pluralism as regards international commercial arbitration awards<sup>14</sup>.

<sup>8</sup> [own translation] Tribunal Constitucional de Perú [online], febrero 28, 2006, Expediente No. 6167-2005-PHC/TC, para. 11, <<http://www.tc.gob.pe/jurisprudencia/2006/06167-2005-HC.html>>.

<sup>9</sup> *Idem*, para. 23.

<sup>10</sup> DE JESÚS, «La autonomía del...», *op. cit.*, p. 74.

<sup>11</sup> Convention on the recognition and enforcement of foreign arbitral awards, Jul. 10, 1958, 330 UNTS 38.

<sup>12</sup> PRIETO MONTT, Manuel José. «Una invitación al pluralismo legal». *Revista de derecho (Valdivia)*, vol. XXV, nº 1, 2012, pp. 25-45.

<sup>13</sup> GRIFFITHS, J. «What is legal pluralism?». *Journal of Legal Pluralism and Unofficial Law*, nº 24, 1986, pp. 1-55.

<sup>14</sup> DE JESÚS, «La autonomía del...», *op. cit.*, p. 77.

It is thereby found that constitutional protection is able to be applied so as to vacate an arbitration award within Latin-American jurisdictions. This is the situation in Panama, a country which is a hub for international trade and arbitration, where is observed that some jurisprudence has granted the possibility to use constitutional protection to remove an award<sup>15</sup>.

One of the reasons to justify those actions, it is that once constitutional protection is available for ordinary judgments, it is likewise for arbitration awards<sup>16</sup>. This is because arbitral awards have the same legal effects than ordinary judgments. Another reason is that the constitutional protections are aimed to avoid violations of fundamental rights and liberties which among of them, the right of the due process of law, which is the most claimed right within constitutional protections against arbitral awards<sup>17</sup>.

Prior to analyze Latin-American jurisprudence regarding this subject, it is also relevant to mention that Latin-American countries are more likely to embrace monist system of arbitration. This system enshrines that rules apply equally for international and domestic arbitration. However, there are some jurisdictions which take dualist approach such as Ecuador, Chile, Cuba, Uruguay and particularly for this article, Colombia<sup>18</sup>.

Under this perspective, several judgments have proved that the influence of Constitution over the effect of arbitral awards is quite strong in Latin America. In Venezuela, two cases in particular demonstrate that the Supreme Court of Venezuela acknowledges broadly constitutional protection to international commercial arbitral awards. First, in *Compañía Anónima Venezolana de Televisión v. Eleetronica Industriale S.P.A.*<sup>19</sup>, the High Court was clear to state that the decisions of awards and interim actions by International Chamber of Commerce are subject to constitutional protection, under article 4 of Constitutional protection and guarantees Act. The main argument of the Court to review this award was the fact that company *Venezolana de Televisión* was Venezuelan and the award would be applied in Venezuela, which means it is part of Venezuelan legal system. Likewise, *Corporación Todosabor C.A v. Haagen-Daz International Shoppe Company, INC*<sup>20</sup>, Venezuelan Supreme Court vacated an international commercial

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<sup>15</sup> ARAÚZ, J. «Acción de inconstitucionalidad contra un laudo por no haber suscrito la parte condenada el contrato que dio origen al litigio». *Revista de Arbitraje Comercial y de Inversiones*, vol. VI, n° 2, 2012, pp. 559-568.

<sup>16</sup> *Idem*, p. 561.

<sup>17</sup> *Loc. Cit.*

<sup>18</sup> REY VALLEJO, Pablo. «El arbitraje y los ordenamientos jurídicos en Latinoamérica: un estudio sobre formalización y judicialización». *Vniversitas*, n° 126, 2013 pp. 199-237.

<sup>19</sup> Tribunal Supremo de Justicia de Venezuela, octubre 16, 2001, M.P. Pedro Rafael Rondón Haaz, Expediente 00-2759 <<http://www.tsj.gov.ve/decisiones/scon/Octubre/1981-161001-00-2759.htm>>.

<sup>20</sup> Tribunal Supremo de Justicia de Venezuela, febrero 14, 2006, M.P. Jesús Eduardo Cabrera Romero, Expediente 04-3033 <<http://www.tsj.gov.ve/decisiones/scon/febrero/174-140206-04-3033.HTM>>.

arbitral award so as to consider that the right to due process and other fundamental rights were violated by arbitrators.

Peru is another jurisdiction where constitutional protection for international arbitral awards is overwhelming. As it was commented above, Constitutional High Court considered the nature of arbitration derived from Constitution. They applied the theory of the transition of the rule of law into the constitutional rule of law. The former opinion was held in Constitutional High Court *Cantuarias Salaverry case*<sup>21</sup> that the agreement under an arbitration contract is not exhausted by either clauses in the contract or Arbitration Act. Arbitration hereby becomes an objective of constitutional jurisdiction, with full rights of autonomy and complied with the respect of fundamental rights. In the opinion of De Jesus, this is an absolute refusal of the real legal nature of arbitration, which is that derives from freedom of contract. Furthermore, this decision did not recognize transnational nature of arbitration<sup>22</sup>.

A particular situation is found in regard to Ecuadorian law. Section 95 of 1998 Constitution Act clearly prohibits constitutional protection for judgments including arbitral awards<sup>23</sup>. However, Constitution Act of 2008 made an outright change on their approach; Section 94 allows constitutional actions as an extraordinary recourse against judgments or any other legal procedures where it is being found that a fundamental right recognized by Constitution was violated<sup>24</sup>. Thus, it exists now a possibility to use constitutional protection against arbitral awards.

Taking into account a study undertaken by a peruvian law firm in 2007, it is possible to describe an overview of the situation in main Latin-American jurisdictions. The majority of Latin-American jurisdictions such as Mexico, Uruguay, Chile, Argentina and Brazil do not allow constitutional protection for arbitration awards, except for Colombia and Peru which consent clearly constitutional protection for arbitration awards. However, this report also comments that the situation is burgeoning and jurisdictions such as Chile and Argentina are now more willing to accept constitutional review for arbitration awards<sup>25</sup>. In Chile, a judgment from Constitutional Tribunal ruled that use of nullification of an arbitral award does not exclude the possibility for Supreme Court to exert constitutional

<sup>21</sup> Tribunal Constitucional de Perú, *op. cit.*

<sup>22</sup> DE JESÚS, «La autonomía del...», *op. cit.*, p. 43.

<sup>23</sup> Constitución Política del Ecuador 1998, art. 95.

<sup>24</sup> Constitución Política del Ecuador 2008, art. 94.

<sup>25</sup> VILLA-GARCÍA, Manuel/CATACORA, Cecilia/DOMECCQ, Gisella. «El control jurisdiccional constitucional en Iberoamérica: ¿Es la etapa que sigue al recurso de anulación de un laudo en un proceso arbitral?» [online]. In: ESTUDIO MARIO CASTILLO FREYR. *Ponencias del Congreso Internacional de Arbitraje llevado a cabo en septiembre del 2007. II parte*, 2008, pp. 317-360, <[http://www.castillofreyre.com/biblio\\_arbitraje/vol6/DIA%205-3.pdf](http://www.castillofreyre.com/biblio_arbitraje/vol6/DIA%205-3.pdf)> (accessed October 22, 2013).

protection whether a fundamental right might be infringed<sup>26</sup>. Moreover, recent Argentinian decisions started to admit constitutional review for arbitration awards<sup>27</sup>.

Despite the position of some Latin American jurisdictions, it seems that legal experts generally do not support the intervention of constitutional law in arbitration. For example, Villa-García et. al. considers that the arbitration was made with the purpose to provide an alternative, rapid and **certain** legal solution to the parties. However, this 'institutionalization' is contrary to arbitration objectives. The authors also recommend that national legislation should be amended so as to forbid constitutional protection for arbitration awards<sup>28</sup>.

The description of all these legal opinions and theories might lead to an important discussion: the possibility that constitutional review in arbitration awards is a hazard for legal certainty, an important international law principle.

## 2. The principle of Legal Certainty and its scope in International Arbitration

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Legal certainty is part of the underpinning principles of international law. Its complex structure implies mainly two aspects: a shared normative expectations and the trust in compliance<sup>29</sup>.

Therefore, the concept of legal certainty entails: "(1) Laws and decisions must be made public; (2) laws and decisions must be definite and clear; (3) decisions of courts must be binding; (4) limitations on retroactivity of laws and decisions must be imposed; and (5) legitimate expectations must be protected"<sup>30</sup>.

The critical point would be how to achieve those expectations. Albeit Theodor Geiger had the point of view that the sanctioning power was the achievement of legal certainty, this concept has evolved to the orientation of human beings explained by Nikas Luhman. This orientation relies on the creation of institutions which provides stable legal structures. However, these institutions were found not well adapted for international legal matters and the system of state conventions was encountered in

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<sup>26</sup> Tribunal Constitucional de Chile, 25 agosto de 2004, Rol de la causa 420-2004.

<sup>27</sup> VILLA-GARCÍA/CATACORA/DOMEQ, "El control jurisdiccional...", *op. cit.*

<sup>28</sup> *Ibidem.*

<sup>29</sup> GESSNER, «Globalization and...», *op. cit.*, pp. 427-449.

<sup>30</sup> SELLERS, Mortimer and TOMASZEWSKI, Tadeusz. *The rule of law in comparative perspective* (eds.). Springer, 2010, p. 45.



low level of compliance as judges do treat all cases as a part of their domestic law system<sup>31</sup>.

Sellers and Tomaszewski shared this opinion. They agreed that legislation was not the sole element so as to achieve legal certainty. Expectations have to be effective and convenient for the society and thereby legislatures must consider specific characteristics of the sectors in which the statute is grappling with<sup>32</sup>.

In general, international institutions and actors have failed to achieve legal certainty. This might seem because of the ignorance of cultural differences into the international law structures. This is demonstrated with the role of Third Cultures which has been stronger than legal structures insofar as the achievement of legal certainty<sup>33</sup>.

These Third Cultures are for example Banking, Reinsurance and Diamond Sectors. Those sectors have created an ethics code whose rules have been quite respected and followed by the entire community. There is no need of legal structures for business actors so as to comply with the rules or those rules are sometimes the result of negotiations between the government and Third Cultures. The non-compliance with the rules affects reputation of business actors, which is essential to continue in the market<sup>34</sup>.

It is also found that business actors within these Third Cultures prefer arbitration instead of national courts to solve their disputes. Members of the banking and insurance businesses choose arbitration because of its certainty<sup>35</sup>. In fact, it might be said that when parties intend to enter into arbitration, they expect to have a binding, definite and clear decision<sup>36</sup>.

The foregoing statements enshrine the principle of finality. Finality becomes therefore a tenet within legal certainty in international arbitration. This principle states that once the final decision (award) into international arbitration process is released, there is no appeal or judicial review available for that case unless very limited exceptions. Finality has been deemed as the key purpose of international arbitration<sup>37</sup>. This is the case of *Hall Street Associates L.L.C. v. Mattel Inc.*<sup>38</sup>, where the American Arbitration Association alleged adamantly that without finality the “unique characteristics of arbitration will be substantially undermined”.

<sup>31</sup> GESSNER, «Globalization and...», *op. cit.*, pp. 427-449.

<sup>32</sup> SELLERS/TOMASZEWSKI, «The rule of...», *op. cit.*, p. 61.

<sup>33</sup> GESSNER, «Globalization and...», *op. cit.*, pp. 427-449.

<sup>34</sup> *Ibidem.*

<sup>35</sup> *Ibidem.*

<sup>36</sup> WASCO, Mark. «When less is more: The International Split over Expanded Judicial Review in Arbitration». *Rutgers Law Review*, n° 62, 2010, pp. 599-626. This is the approach of Drahozal and Naimark.

<sup>37</sup> *Ibidem.*

<sup>38</sup> 552 U.S. 576 (2008) (No. 06-089).

The acknowledgement of judicial reviews in international arbitration fosters the detriment of the finality principle and thereby a sheer level of uncertainty. The possibility to vacate an award or to allow a judicial review in different jurisdictions leads to ineffectiveness and inefficiency of international arbitration. This would commence the shunning of international arbitration by business actors due to the curtailment of their expectations<sup>39</sup>, in which among of them is the trust of compliance.

It was therefore found that business actors would prefer institutional arbitration rather than *ad hoc* arbitration in India. This is because there is a possibility to recourse to National Courts in *ad hoc* arbitration, which is the ultimate purpose of the parties, who enter into an arbitration agreement<sup>40</sup>. It is lucid that National Courts will apply their domestic law and procedures and they will also be influenced by their economic, cultural and political system to the extent that they will neglect an arbitration agreement<sup>41</sup>.

Cases of judicial intervention in international arbitration are widespread. National Courts have frowned upon final arbitral decisions, for example in the case of *Chromalloy Aeroservices Inc. v. Ministry of Defence of Republic of Egypt*<sup>42</sup>, where a United States Court enforced an award vacated by an Egyptian Court. Rather, in Latin America some jurisdictions like Peru or Venezuela have vacated arbitral awards on constitutional grounds, as we discussed in section 1.

It is clear that options to set aside an award in international arbitration are highly likely. These reasons are chiefly that an award has legal effects prior to its recognition, the vacation of the award eliminates uncertainty and the grounds for setting aside an award are broader than the grounds for refusal of recognition<sup>43</sup>.

It draws attention that one of the reasons to vacate an arbitral award is to remove uncertainty. Nevertheless, the effect of setting aside an award leaves the possibility that this decision will be enforced in another jurisdiction. Therefore, the same arbitration case will have distinct legal effects<sup>44</sup>. As we discussed above, certainty and finality are linked and thereby a definite and clear decision is needed. How can we eliminate uncertainty with different decisions in several jurisdictions from the same case?

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<sup>39</sup> WASCO, «When less is...», *op. cit.*, p. 624.

<sup>40</sup> SHAH, Namrata and GANDHI, Niyati. «Arbitration: One size does not fit all: Necessity of Developing Institutional Arbitration in Developing Countries». *Journal of International Commercial Law and Technology*, vol. 6, n° 4, 2011, pp. 232-242.

<sup>41</sup> LEW, Jullien D. M. «Does National Court Involvement Undermine the International Arbitration Processes?». *American University International Law Review*, vol. 24, n° 3, 2009, pp. 489-537.

<sup>42</sup> 939 F. Supp. 907 (D.D.C. 1996).

<sup>43</sup> MARCISZ, Pawel. *International Recognition of Judgments: Lessons from the Past and Predictions for the future* [online] <[http://www.laszczuk.pl/en\\_publicacjeexp.php?id=8](http://www.laszczuk.pl/en_publicacjeexp.php?id=8)> (accessed Dec. 25, 2013).

<sup>44</sup> *Idem*. See also WASCO, «When less ...», *op. cit.*

The answer would not be that straightforward. The reason might seem to be that National Courts insisted on the ground of public policy so as to prevent the enforcement of international arbitration awards<sup>45</sup>. This might lead us again to a possible discussion of the culture structure in the building of real legal certainty.

Public policy is a concept difficult to define. This notion varies widely from country to country and it is not also from written character. In fact, judges in some jurisdictions like Brazil stated that the concept of public policy is created by the Courts and hence judges have the task to set up the boundaries of public policy<sup>46</sup>.

Accordingly, Indonesian jurisdiction is a good example to demonstrate how the ground of public policy hinders the achievement of legal certainty. The Asian country has approached a broad scope of public policy which has rendered some international arbitral awards unenforced. There are two important cases which depicts that scope: first, the case of *E.D. & F. Man (Sugar) v. Yani Haryanto* where Indonesian courts set aside an award from London Court of International Arbitration (LCIA), because the buyer did not fulfill an import regulation which was part of Indonesian Public Policy. Secondly, in *Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Company LLC. and PT Perusahaan Listrik Negara Persero (PLN)* an Indonesian Court vacated an arbitral decision from Switzerland since the enforcement of such award violated Indonesian mandatory rules which was part of its public policy<sup>47</sup>. In other words, arbitral awards were vacated by National Court (Indonesia) and thereby expectations of enforcement which are persuasive in international law were ignored. This standard does not fit with the entire international trade community and it will beget that business actors were reluctant to choose international arbitration in Indonesia.

The reasons encountered by Junita which explain attitude of Indonesian Courts regarding international arbitration might be as follows: (1) The Indonesian legislation does not make a strong difference between the regulation for international and domestic arbitration; (2) The public policy applied by Indonesian courts is the domestic public policy not the international, which is entrenched by the NY Convention and UNCITRAL Model Law; (3) The scope of public policy Indonesia is too broad; (4) Indonesian courts are prone to “equate the term ‘public policy’ with the term ‘law’” and

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<sup>45</sup> *Ibidem*.

<sup>46</sup> DE OLIVEIRA, Leonardo V. P. and MIRANDA, Isabel. «International Public Policy and Recognition and Enforcement of Foreign Arbitral Awards in Brazil». *Journal of International Arbitration*, vol. 30, n° 1, 2013, pp. 49-70.

<sup>47</sup> JUNITA, Fifi. «Judicial Review of International Arbitral Awards on the Public Policy Exception in Indonesia». *Journal of International Arbitration*, vol. 29, n° 4, 2012, pp. 405-427.

(5) the concept of society and law system are considered together in Indonesia, unlike other western jurisdictions<sup>48</sup>.

The previous picture allows to find that not only flaws into the legal structure fostered the uncertainty. If we observed into the majority of the former reasons, those were more from culture nature rather than legal. Also, it was found that there are some similarities with the phenomenon of *constitutionalization* in Latin American jurisdictions. For example, reasons 1 and 4 are a case of the overwhelming monist and dualist conception of international arbitration. Finally, situation in Indonesia evidences that International Conventions even ratified, they are not always enforced as they do not fit with cultural patterns of a particular society<sup>49</sup>.

In spite of the broad public policy evidenced in Indonesia, there were not clear examples of constitutional review for international arbitral awards. Nevertheless, this situation was found in the public policy of some central Europe countries. Central Europe countries like Czech Republic, Slovakia and Croatia have followed the German Model of Constitutional Court, which allow the possibility to undertake individual constitutional complaints before the Court. It was found that specially in Slovakia and Croatia international arbitral awards were vacated by their Constitutional Courts. In Slovakia in 2011 the Constitutional Court (case PL. ÚS 14/2010) ruled that fundamental rights must be protected beyond the limited grounds for setting aside an award. Accordingly, Croatian Constitutional Court had the same view. They found (case U-III-669/2003) that an arbitral award is an individual legal act which is subject of constitutional protection<sup>50</sup>.

Notwithstanding the constitutional weight of these former decisions, they were found a threat for legal certainty: “allowing constitutional scrutiny of arbitral awards could undermine the delicate balance between finality and fairness (...)”<sup>51</sup>. Likewise, Kirby was even further and she claimed that the finality of an award depend on the jurisdiction where parties seek recognition and enforcement. She explained that even though finality is quite protected by all international arbitral bodies, national mandatory rules cannot be circumvented and thereby judicial or constitutional review are highly likely to be accepted<sup>52</sup>.

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<sup>48</sup> *Ibidem*.

<sup>49</sup> GESSNER, «Globalization and...», *op. cit.*, pp. 427-449.

<sup>50</sup> GYARFAS, Juraj. «Constitutional Scrutiny of Arbitral Awards: Odd Precedents in Central Europe». *Journal of International Arbitration*, vol. 29, n° 4, 2012, pp. 391-403.

<sup>51</sup> *Idem*. p. 402.

<sup>52</sup> KIRBY, Jennifer. «Finality and Arbitral Rules: Saying an Award is Final Does Not Necessarily Make it so». *Journal of International Arbitration*, vol. 29, n°1, 2012, pp.119-128.

### 3. Constitutional review of international arbitral awards in Colombia: developments and problems for legal certainty

As of 1991 the Colombian Constitution Act introduced new institutions such as the Constitutional Court and the “*acción de tutela*”<sup>53</sup> which give a possibility for individuals to complain before Courts when an infringement of fundamental rights might arise. Thus, constitutional protections are inadmissible whether the complainant has not previously exhausted all other remedies under Colombian Law<sup>54</sup>.

Constitutional protection is available against infringements of public authorities or private entities which deal with public services. This situation might allow a broad scope for this protection which is also eligible against judicial decisions. Moreover, arbitration has a constitutional character as section 116 of 1991 Constitution Act states that arbitrators are individuals enabled with the administration of justice<sup>55</sup>.

It is precisely the *constitutionalization* which has fostered problems for the development of arbitration in Colombia. Arbitration has a jurisdictional function rather than a contract one under Colombian Constitution. This entails that arbitrators are likened to judges and arbitral awards to regular judgments<sup>56</sup>. Therefore, constitutional rules, which are for regular proceedings, would be applied to arbitration. This was stated by the Constitutional Court<sup>57</sup> since they made clear that “the party autonomy rule is curtailed by those cases which were not envisaged by the legislators”. Also, the Court said: “arbitration is a true judicial process (...); it is a mechanism in which all guarantees of due process must be applied like any other judicial action (...)”<sup>58</sup>.

Under this perspective, there is an institutional arbitration case which might help to analyze the position of Constitutional Court, as regards the setting aside of arbitral awards by constitutional grounds. In this case Bogota Telecommunication Company (ETB)<sup>59</sup> seeks to vacate an arbitral award ruled by Bogota Chamber of Commerce tribunal. The claimant via constitutional protection (*acción de tutela*) alleged that the

<sup>53</sup> The expression “*acción de tutela*” is also used as “*derecho de amparo*” in Spain and other Latin-American countries.

<sup>54</sup> Constitución Política de Colombia art. 86. See also Decreto 2591, noviembre 19, 1991, Diario Oficial [D.O.] 40.165, art. 6 (1) (Colombia).

<sup>55</sup> Constitución Política de Colombia, art. 116.

<sup>56</sup> OSORIO, Mario R. «Arbitraje: Un caso en contra de la constitucionalización de los mecanismos alternativos de solución de conflictos». *Revista de Derecho Privado, de la Universidad de los Andes*, n° 47, 2012, pp. 2-34.

<sup>57</sup> Corte Constitucional de Colombia [Constitutional Court], febrero 5, 1996, Sentencia C-037/96.

<sup>58</sup> Corte Constitucional de Colombia [Constitutional Court], marzo 22, 2000, Sentencia C-330/00.

<sup>59</sup> Corte Constitucional de Colombia [Constitutional Court], febrero 2, 1999, Sentencia T-058/09.

arbitral tribunal infringed its fundamental right of due process. The arbitral award ruled in favor of Telefonica which is a foreign company registered in Colombia. However, the Constitutional Court vacated the award on the grounds that the arbitral tribunal infringed the Constitutional fundamental right of due process which is entrenched in Section 29 of 1991 Constitution Act.

In the present case, it is important to add that this constitutional protection was directly initiated by the claimant without the decision of the annulment recourse. Indeed, the Constitutional Court said that even when the recourse of annulment is pending in another tribunal; the constitutional protection is still available for the parties. This is because annulment is not against fundamental rights and cannot avoid an irremediable harm. In this case ETB must have paid interest rates due to the arbitral award. The recourse of annulment did not stem the increasing of interest rates which would render the obligation costly for a public company. Thus, this is an example of the extent of constitutional protection towards arbitral awards in Colombia.

Yet decision (T-058/09) was not that unanimous. Justice Reales Gutiérrez dissented from her other colleagues since she considered that this decision was made on the merits of the arbitral case rather than on the protection of a fundamental right. The Court even did not take into account the arguments of the arbitral award. Justice Reales Gutiérrez also indicated that “(...) constitutional protection is neither a mechanism for challenging arbitral awards nor a third stage of proceedings wherein natural judge (...) might be replaced”<sup>60</sup>. The judge also pointed out that the purposes of the constitutional protection were able to be challenged by the annulment recourse and thereby constitutional review was not needed.

Albeit the setting aside for an international arbitral award has not been yet applied by the Constitutional Court, there are some examples in other high courts. The most controversial case is *Termorio S.A. vs. Electranta E.S.P*<sup>61</sup>, where the Council of State vacated an arbitral award. One of the grounds of the Council was the incorporation of International Chamber of Commerce rules (ICC) into an arbitral clause. This was deemed to be an infringement of public policy by the Council of State. Furthermore, the judges also said that whether arbitration is institutional, the parties would use arbitral tribunals authorized and recognized by Colombian Ministry of Justice solely<sup>62</sup>.

Yet this is not the only unfortunate case for the future of international arbitration in

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<sup>60</sup> *Idem*.

<sup>61</sup> Consejo de Estado [C.E] [Council of State], Sección Tercera, agosto 1, 2002, sentencia 21041 (Colom.).

<sup>62</sup> BURITICA, Olga X. and VESGA, Inés. «Repercusiones del fallo de anulación del laudo arbitral del caso Termorio para el arbitraje internacional en Colombia», Tesis de grado, Facultad de Derecho de la Pontificia Universidad Javeriana, Bogotá, 2003 (unpublished).

Colombia. The case of *Bancolombia v. Gilinski*<sup>63</sup> has demonstrated the reckless and tortuous path of arbitral award enforcement within Colombian jurisdiction. Although this case is national, it has some repercussions for international arbitration in Colombia and the accomplishment of legal certainty. The case has been discussed other four times by the Courts, after the decision of arbitral tribunal. The award was vacated by Bogota District Court. However, a constitutional protection so as to challenge the annulment has triggered other different decisions. In fact, constitutional protection decisions have two recourses and also an exceptional review for the Constitutional Court. This situation gives to the constitutional protection a sheer scope in Colombia. This is also because the concept of fundamental rights is quite broad which would allow constitutional protection to be invoked against any arbitral award<sup>64</sup>.

*Bancolombia v. Gilinski* was a clear example of the legal uncertainty caused by constitutional review of arbitral awards. On the contrary, it is found that the legal certainty is an argument from Constitutional Courts so as to allow constitutional scrutiny for arbitral awards. This was observed in the *obiter dicta* of a case when the Constitutional Court said: “(...) the exceptional character of constitutional review against arbitral awards stems from: (a) the legal stability of arbitral awards (...)”<sup>65</sup>. In case C-330 de 2000 the Court insisted upon and clearly stated: “The ability of private individuals to solve conflicts by arbitration has material constraints (...) Principles such as the legal certainty makes necessary that some matters have to be solved by ordinary jurisdiction proceedings, as they are related with the guarantee of constitutional fundamental rights”<sup>66</sup>.

Colombian Constitutional Court has recognized the principle of legal certainty as an important part of its public policy. However, why is the reason to set aside an arbitral award, whether such action begets legal uncertainty? The point might seem to be the same as we discussed in section 2: public policy. Inasmuch as Colombian public policy, legal certainty is protected but with the limitation of fundamental rights. In other words, as it was found in the situation of Indonesian jurisdiction, there are international and domestic public policies. Albeit Colombian courts were not unanimous regarding international public policy, this has already been supported in the enforcement of an international commercial dispute by the Supreme Court of Justice<sup>67</sup>.

<sup>63</sup> Cámara de Comercio de Bogotá [Bogota Chamber of Commerce], Laudo arbitral Bancolombia v. Jaime Gilinski Bacal, marzo 30, 2006.

<sup>64</sup> ALJURE SALAME, ANTONIO. «Comentario a la sentencia de anulación del laudo arbitral Bancolombia v. Gilinski». *Revista Internacional de arbitraje*. n° 9, 2008, pp.170-178.

<sup>65</sup> Corte Constitucional de Colombia [Constitutional Court], Sentencia SU-174 de 2007.

<sup>66</sup> Corte Constitucional de Colombia, Sentencia C-330/00..., *op. cit.*

<sup>67</sup> Corte Suprema de Justicia de Colombia [Supreme Court of Justice], agosto 6, 2005, sentencia n° 2001-0190-01. In this case the Supreme Court applied the international public policy since it considered the Portuguese approach of the interest rates even though, it was contrary to Colombian law.

As of 2012 Colombia enacted a new international arbitration law: the Act 1563 of 2012<sup>68</sup>. Albeit the Act 1563 is inspired by the UNCITRAL Model Law, this statute also brings elements from foreign jurisdictions. Accordingly, this law reinforces the *Kompetenz-Kompetenz* principle in both positive and negative effects (Section 79) ; allows participation of foreign arbitrators (Section 73 (1)) and makes different clarifications in respect to the Model Law`s rules on arbitral proceedings so as to avoid excessive formalism by Colombian procedural law<sup>69</sup>.

This act is a true advance for curbing constitutional review and protecting the finality of awards. A cursory analysis of this new statute is enough to reach such conclusion. Section 109 (6) does not allow any other recourse against the annulment. This can also be stacked up with provision of Section 107 which goes to the same direction.

We found 1563 Act a serious proposal for internationalizing arbitration in Colombia. Section 108 (2) b) takes into account international public policy rather than domestic public policy. The text clearly indicates as a ground of annulment “when award shall be contrary to international public policy”. Such clarification has never been made in Colombian Law regarding arbitration. Section 101 allows arbitrators to decide *ex aequo et bono*, whether parties agreed to do so, which is in harmony with international law principles. Likewise, arbitral tribunal is also able to apply the *lex mercatoria*.

Turning to the subject of public policy, it was found that it is positively entrenched in the package of constitutional rights<sup>70</sup>. Act 1563 demonstrates that since 2012 domestic public policy will no longer be taken into account to vacate awards. In other words, international arbitration procedures might leave domestic standards.

Nonetheless, it will be difficult to place international arbitration far of the scope of domestic public policy. Mantilla Serrano found difficulties to apply transnational procedural rules to arbitral proceedings; however, he established that there were two common points on international arbitration. These two points were the right to equal treatment and the adequate opportunity present one`s case which are related to the right of due process. It seems that the elements of international public policy rely upon the due process issue and therefore international arbitration awards might still be touched by constitutional rights<sup>71</sup>. Thus, the question of fundamental rights will remain within

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<sup>68</sup> L. 1563/2012, julio 12, 2012, Diario Oficial [D.O.] 48.489 (Colombia).

<sup>69</sup> MANTILLA SERRANO, Fernando. «Colombia Enacts a New International Arbitration Law». *Journal of International Arbitration*, vol. 30, n° 4, 2013, pp. 431-441.

<sup>70</sup> SCHUSTER, Michael W. «For the greater Good: The Use of Public Policy Considerations in Confirming Chapter 11 Plans of Reorganization». *Houston Law Review*, n° 46, 2008, pp. 467-497.

<sup>71</sup> Mantilla Serrano, Fernando. «Towards a Transnational Procedural Public Policy». In: GAILLARD, Emmanuel/SCHLAEPFER, Anne V./PINSOLLE, Philippe and DEGOS, Louis (eds.). *Towards a Uniform International*



international arbitration awards, especially the right of the due process. This might leave some questions of legal uncertainty.

Accordingly, we must also bear in mind that Arbitration is still part of the 1991 Constitution Act. This situation imposes to Constitutional Judges a constraint difficult to bring down. The interpretation of Act 1563 by the Courts will be crucial for the future of international arbitration in Colombia.

Hence, does only positivism entrenched in Act 1563 lead us to a sound achievement of legal certainty as regards international commercial arbitrations? It seems that Mantilla Serrano might have given us a hint for a more effective approach to deal with the problem of legal certainty in international arbitration awards. Mantilla Serrano said: "(...) undoubtedly, international arbitration practitioners, Colombian lawyers, as well as arbitral parties, will significantly impact and contribute to the success of Law 1563 (...)"<sup>72</sup>. We can resume all that in one aspect: Colombian cultural legal structure. We will tackle this in the next section.

#### 4. Legal pluralism a way of reconciling legal certainty and international arbitration in Colombia?

A stark solution for this problem would be to remove arbitration from Constitution positively speaking and thereby impairing constitutional review for international arbitration awards. However, it is deemed that not only the legal structure will attain a solution for legal certainty. In the words of Gessner to achieve legal certainty, cultural structures need to be examined along with structural legal elements. It is not the same for example the case of Germany, a society which avoid the risk of uncertainty, whereas in China business actors might take some risks due to the reliance on social relations, which might seem to be a more efficient approach in that society<sup>73</sup>.

Should we say that legal pluralism might assist us to achieve legal certainty? Another question might be is a civil-law jurisdiction like Colombia willing to adopt cultural patterns to achieve legal certainty? Gessner has the opinion that this situation might be more tractable for common law jurisdictions, since civil law systems depend on great extent to statutes to feel secured<sup>74</sup>.

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*Arbitration Law?* Juris Publishing Inc. and International Arbitration Institute, New York, 2005, pp. 163-198.

<sup>72</sup> MANTILLA SERRANO, «Colombia Enacts a...», *op. cit.*, p. 441.

<sup>73</sup> GESSNER, «Globalization and ...», *op. cit.*, pp. 427-449.

<sup>74</sup> *Loc. cit.*

An attempt to deal with the first question might be assisted by Robert Alexy's insights. According to Alexy legal certainty in a great extent might succeed within a legal system due to the social efficacy of norms. He said "there is an asymmetry between the relation of legal and social validity in that legal validity of a legal system as a whole depends more on social validity than on moral validity"<sup>75</sup>. This means that "in order to be an alternative to legal positivism that can be truly comprehensive, non-positivism must of necessity take seriously the social existence as well as the institutional component of legal practices"<sup>76</sup>.

In fact, Gessner assured that for example Max Weber recognized that non-state norms and institutions were "equivalent to legal coercion in providing calculability and legal certainty"<sup>77</sup>. Therefore, Gessner and other legal sociologist scholars relied on empirical data so as to explain the fabric of legal certainty in international contracts. This empirical data has not yet proved the weakness of state legal structures or a strong hyper-liberal state paradigm.

This empirical experience demonstrated that albeit contracts are honored, concluded or enforced by stable expectations such as ownership, legal status of parties and the right to sell and purchase; business actors also rely on non-legal infrastructures such as banks, the chambers of commerce, agencies, etc.<sup>78</sup>. As Gessner indicated: "These support structures work together with contract enforcement like communicating tubes: if contract enforcement has a low support level, property rights protection may rise in order to reach a sufficient level of certainty and trust—and vice versa"<sup>79</sup>. Thus, this example assists our theory: positivism supported by legal pluralism can achieve a better level of certainty in international business.

Notwithstanding the broad approach of legal certainty from Alexy and Weber, legal pluralism still features some problems in practice. Some authors consider this theory a failure to accomplish legal certainty. Albeit the reality of legal pluralism is well known within European private law, self-regulation is not legally binding and widely ignored

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<sup>75</sup> ALEXY, Robert/PAULSON, Stanley and PAULSON, Bonnie. *The argument from Injustice*. Oxford, 1992, pp. 92-93.

<sup>76</sup> BERTEA, Stefano. «How Non-Positivism Can Accommodate Legal Certainty» [online]. In: Pavlakos, G. (ed.). *Law, Rights and Discourse. Themes from the Legal Philosophy of Robert Alexy*, Oxford, Hart, 2007, pp. 69-82. <<http://ssrn.com/abstract=2112960>> or <<http://dx.doi.org/10.2139/ssrn.2112960>>> (accessed July 06, 2014).

<sup>77</sup> GESSNER, Volkmar. «Theories of Change. The Governance of Business Transactions in Globalising Economies». In: GESSNER, Volkmar (ed.). *Contractual certainty in International Trade: Empirical studies and theoretical debates on Institutional support for global economic exchanges*. Hart publishing, Portland, 2009, p. 176.

<sup>78</sup> *Idem*, p. 183.

<sup>79</sup> *Idem*, p. 197.

by European legislators. Thus, it is problematic that mechanisms of state law are needed to enforce rules based on self-regulation. Furthermore, legal pluralism is not considered as a source of law within international or domestic jurisdictions<sup>80</sup>.

The foregoing analysis might allow us to propose that legal certainty might be achieved along with legal pluralism and positivism in regard to the arbitral agreement and internal procedures but not for the arbitral decision. The challenging of the award will therefore remain in hands of national courts so as to be enforced. Legal pluralism might do little help as regards the enforcement of awards. Our pluralist theory for legal certainty in respect of constitutional review for international arbitration awards might be dismissed. Positivism is seminal to produce legal certainty of arbitral awards.

Positivism seems to bear the only power of enforcement an award by its own. A businessman who refuses to comply with an arbitral award and challenge it before a domestic court might be rejected into a business community for its action. Nonetheless, there are no other means to force him to comply with such award. On the contrary, positivism has a coercion element which will foster the award to be accomplished.

This exercise of finding a twisted legal certainty for international arbitration might achieve interesting outcomes and in some way it might avoid the constitutional review of international arbitration awards. This is because pluralist rules might create a standard policy or “pseudo-rule” in which the attempt to vacate an award would be regarded as a wrong business practice. Yet this proposal remains unclear in Colombia a civil-law jurisdiction wedded to the grip of positivist thinking.

Colombian business culture might be akin to Mexican business culture where the reluctance to enforce arbitral awards is wide. Mexican lawyers resort to judicial reviews without grounds since their purpose is to delay the enforcement of the award. In some cases, the defeated party takes advantage of the time to hide its assets from the successful party. This is the “formalist” legal practice in civil-law jurisdictions as regards arbitration procedures<sup>81</sup>. Another unfortunate feature of arbitral legal culture in Latin America is sheer risk taken by arbitrators since they are often being sued by any of the parties<sup>82</sup>.

Prior to examine the Colombian case, some pluralist elements were found in the

<sup>80</sup> MAK, Vanessa. *Draft paper: Private actors as norm-setters. On new legal pluralism in European regulatory private law and how to manage it* [online], 2014. <<http://reggov2014.ibei.org/bcn-14-papers/34-38.pdf>> (accessed June 25 2014).

<sup>81</sup> GÓMEZ PALACIO, Ignacio. «Arbitraje Comercial Internacional: Dos culturas en el Estado de noviazgo y posible matrimonio de conveniencia». *Anuario del Departamento de Derecho de la Universidad Iberoamericana de México*, n° 36, 2006, pp. 71-87.

<sup>82</sup> *Idem*, pp. 82 and 84.

enforcement of arbitral awards. Firstly, the enforcement of arbitral awards in branch arbitration might rely on pluralism in great extent, for example, the cotton industry. This is because the self-regulation within cotton industry might force an arbitral award to be enforced. An award was vacated in domestic jurisdiction but the Bremen Cotton Exchange threatened to put the defendant on a black list and to announce non-fulfillment in the Cotton Report. This is a deleterious reputation within the cotton industry. Consequently, the Bremen Cotton Exchange succeeded to get the award enforced<sup>83</sup>.

Secondly, law firms have a sheer influence in the drafting of arbitral agreements which has diminished the role of the State. Hence, there is a wide acceptance of ICC awards which are recognized by the international lawyer community in almost 100%. This means that the ICC awards foster compliance without further execution proceedings<sup>84</sup>. However, the hurdle of this acceptance relies on the enforcement within a domestic jurisdiction.

Colombian jurisdiction in regard to international commercial arbitration is very reluctant to comply with arbitral decision, especially public entities. This was seen in cases such as *Termorío S.A v. Electranta E.S.P.* and *E.T.B vs. Telefónica* (T-058/09) explained into section 3. Two different approaches therefore exist in Colombia towards international commercial arbitration: arbitration between private parties and arbitration between private and state entities. The latter is more problematic in terms of legal certainty and the Colombian legal culture shows little general acceptance. It is widely known that public entities do not accept to insert arbitration clauses into contracts and they have also been ordered to refuse voluntary compliance of foreign arbitration awards<sup>85</sup>. However, the new law 1563 of 2012 and the FTA with the U.S. and European Union might prompt a change of attitude within Colombian culture structures. Four important cultural or social structures were identified: freelance lawyers and law firms, industries, chambers of commerce and public entities.

Law Firms in Colombia have welcomed the entry into force of law 1563 of 2012 but they also remain concerned about the forthcoming interpretation of judges with some kind of trepidation. The same opinion is shared by Chambers of commerce and some industries

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<sup>83</sup> SOSA, Fabian. «Cross-border dispute resolution from the perspective of Mid-Sized Law Firms: The example of International Commercial Arbitration». In: GESSNER, Volkmar (ed.). *Contractual certainty in International Trade: Empirical studies and theoretical debates on Institutional support for global economic exchanges*. Hart Publishing, Portland, 2009, p. 122.

<sup>84</sup> *Idem*, p. 148.

<sup>85</sup> *An overview of arbitration in Colombia for U.S. companies*. [online], may 2011, <[http://www.export.gov/colombia/static/Report%20-%20Arbitration%20in%20Colombia%20-%20final%206-1-11\\_Latest\\_eg\\_co\\_033097.pdf](http://www.export.gov/colombia/static/Report%20-%20Arbitration%20in%20Colombia%20-%20final%206-1-11_Latest_eg_co_033097.pdf)> (accessed august 3, 2014).

in Colombia. On the other hand, it is found that the policy of public entities is to strictly apply Colombian jurisprudence and directives of Attorney General Office (*Procuraduría General de la Nación*) which defend vigorously the interests of public ownership<sup>86</sup>.

Thus, if important business actors in arbitration such as law firms, freelance lawyers, chambers of commerce and industries agree to reject current interpretation of constitutional review by Colombian High courts, legal certainty (which entails finality) of awards will be granted, at least, in a better scope. Colombian business actors might establish some conduct codes of ethics towards arbitral awards such as blacklisting, downgrade of categories, negative reports, etc.,. These sanctions might avoid the constitutional review since burdensome consequences might appear without any intervention of the State.

Legal certainty of international arbitration awards would not belong to a pyramid. Instead legal certainty would be achieved through a kind of 'spider web'. This web will be built by different structures like law firms and independent lawyers which will comply with arbitral awards through ethical conduct codes. Industries will set black-list measures, chambers of commerce will undertake other sanctions like exclusion of meetings or the increasing of service fees. This 'spider web' is an interconnection where all these plural actors and structures are in harmony to achieve the legal certainty in international arbitration as an essential principle for international public policy.

On the contrary, public entities might have no choice to rely on state norms and dispositions. When it is said "might" we really meant it. What about central government establishes a public policy for the automatic recognition of international arbitration awards? Such approach makes sense since it is known that Colombian government has a quite friendly free-trade economy so as to diversify its trade options around the globe. This public policy will affect public entities position regarding international arbitration in sheer extent.

Notwithstanding our pluralist argument, the role of domestic judges stands crucial insofar as legal certainty for international arbitral awards in Colombia. The automatic enforcement of international commercial awards is not a possibility under Colombian Law; hence domestic courts will have the last word as regards legal certainty for international arbitration awards.

It was explained that defeated party would still have the possibility to vacate an international arbitral award by constitutional review; since *acción de tutela* is part of Constitution Act 1991 which holds superior hierarchy against Law 1563. Colombian

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<sup>86</sup> *Idem*, p. 10.

courts would have different positions in this regard as a constitutional review might give judges the temptation to review the arbitral process *in extenso*<sup>87</sup>. Different judges, different opinions leads to different decisions and a costly process. This is not the aim of legal certainty in international arbitration. Again, the grip of positivism seizes our pluralist conception of legal certainty. Legal certainty for international arbitration awards is therefore into a spider web not within a pyramid.

## Conclusions

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The overview of main Latin American jurisdictions reveals the seminal role of Constitution as regards arbitration. This is because the dualist and monist visions of law inspired the legal tradition of arbitration in Latin America. This nationalist and protectionist approaches jeopardize the possibility of legal pluralism in Latin America for international arbitration.

The theoretical analysis of legal certainty in international arbitration has shown an evolution of this principle. Legal certainty has also the purpose to fulfill the legal expectations of a business community. This was the example of Gessner in his “Third cultures”.

However, legal certainty was observed taking into account the positivist legal system and it was found that predictability was difficult to attain. Jurisdictions in Indonesia, Brazil and some countries in Central Europe have shown that blurred boundaries exist between national and international public policy. National public policy is the main justification to fade away the principle of finality which entails legal certainty for international arbitration. Thus, national interests prevail over international law principles such as freedom of contract and of course, legal certainty.

This situation is akin to Colombian jurisdiction where public policy protection appears to be the leitmotif so as to vacate arbitral awards by constitutional review. Colombian jurisprudence demonstrated that albeit legal certainty is part of its public policy, this legal certainty is entrenched with the protection of fundamental rights, brushing the legal expectations of business actors aside. The conception of fundamental rights is too broad and especially for arbitration, since it is seen as a regular proceeding rather than a contractual relation. This brings about the curtailment of pluralist approaches for international arbitration within Colombian jurisdiction.

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<sup>87</sup> GAVIRIA Gil, Juan Antonio. «Comentarios sobre las nuevas normas colombianas de arbitraje en materia internacional». *Revista de derecho privado*, n° 24, 2013, p. 272.

International arbitration in Colombia appears to have some advancement, since the entry into force of Act 1563. However, this current law leaves some questions for legal certainty as arbitration is still part of the 1991 Constitution Act. The opportunity for a defeated party to invoke constitutional protection continues and therefore the setting aside of international arbitration awards might arise.

The attempt of integrating pluralist elements to a positivist legal structure in international arbitration was not a successful task within Colombian jurisdiction. It is stark that legal pluralism is henceforth a reality in international private law activities. This is because the reliance and role of non-states entities in law activities is pervasive in this globalization process. Nonetheless, the Constitutional review of international arbitration awards is a proof of the strong positivist mindset of Colombian and Latin American jurisdictions. Such situation hampers the likelihood of introducing pluralist elements for international arbitration in Colombia. Moreover, legal pluralism might be elusive as the enforcement of arbitral awards remains an exclusive task for domestic courts.

Business Colombian culture seems to be in favor of legal certainty without Constitutional review<sup>88</sup>. Lawyers, industries and chambers of commerce might join a kind of spider web to achieve legal certainty through different elements and thereby we could prove our theory. The constraints therefore belong to domestic courts and their interpretation of legal certainty in international commercial arbitration.

However if we solely rely on positivism, international commercial arbitration awards will never achieve legal certainty. Thus, cultural and social structures e.g. institutions, entities, communities, etc., need to make “sub-regulations” or “pseudo-legislation” so as to attain legal certainty for international commercial arbitral awards in strong positivist jurisdictions like Colombia.

It is certain that an exclusive approach of positivism is not a straightforward solution for legal certainty, at least for the legal certainty of XXI century, which is somewhat of a distorted perception. Legal certainty has to be twisted, if it wants to survive

<sup>88</sup> Consejo Privado de Competitividad (CPC). “Informe Nacional de Competitividad 2012-2013” [online], capítulo 11 “Justicia”, p. 257, <<http://www.compitem.com.co/site/wp-content/uploads/2012/11/Justicia.pdf>> (accessed october 18, 2014). The Private Council of Competiveness (CPC) summarizes the proposal of many business actors (Private, Public entities, Universities) in Colombia. In regard to constitutional review in International Arbitration they made clear that constitutional actions hampers legal certainty for arbitral decisions. We can also follow the insights of Fernando Mantilla Serrano in this regard. MANTILLA SERRANO, Fernando. «Colombia. ¿Sede de arbitraje internacional?» [online]. *Ámbito Jurídico*, 24 july, 2012 <[http://www.ambitojuridico.com/BancoConocimiento/N/noti-120724-06colombia\\_sede\\_de\\_arbitraje\\_internacional/noti-120724-06colombia\\_sede\\_de\\_arbitraje\\_internacional.asp?print=1](http://www.ambitojuridico.com/BancoConocimiento/N/noti-120724-06colombia_sede_de_arbitraje_internacional/noti-120724-06colombia_sede_de_arbitraje_internacional.asp?print=1)> (accessed 18 october, 2014). An International Arbitration settlement was chosen to be held in New York instead of Colombia due to the risk that the arbitral award might be vacated by constitutional reviews.

the globalization of law. Colombian judges cannot be a maverick in the plethora of jurisdictions which are willing to offer the most rapid and effective arbitration services. This will drive towards the wrong direction for competitiveness in the era of free trade markets. Legal certainty for international arbitration in Colombia has the challenge to remove constitutional review for awards, but also to allow pluralism in its own legal mindset.