COMPARING CONSTITUTIONAL CHALLENGES TO THE VALIDITY OF ARBITRATION ACTS

Arbitration, Constitutionality of arbitration acts, Access to court

This article examines the correlation between arbitration and constitutional law by comparing decisions from nine jurisdictions where there has been a challenge to the constitutionality of the arbitration act or an act imposing the use of arbitration. Such challenges are made in different ways. Sometimes they are direct, that is, a direct challenge to the core of the act; and sometimes they are incidental – a challenge to a constitutional guarantee connected to the arbitral process. The aim of the study is to assess if such challenges are a real violation of a constitutional right, or if this is just a tactic made by parties wishing to delay or avoid arbitration that they have previously agreed to. The study compares the rationale behind the challenges and assess the common grounds in which they were raised. Through the comparison, the study concludes that for compulsory arbitration there is a valid argument in the challenges. Nevertheless, for voluntary arbitration, although the challenges are not completely trivial, they do not represent a risk to the practice of arbitration; in effect, they appear to be more like a technique used to procrastinate the enforcement of an arbitral award.

1 INTRODUCTION

In democratic states, where the rule of law is a fundamental guarantee, disputes are resolved through a judicial process. Traditionally, the monopoly of justice belonged to the judiciary, where courts are enshrined with the duty to solve disputes. This duty can be privatised by the use of alternative methods of dispute resolution, such as arbitration. In a sense, arbitration represents a well-received exception to the ordinary court system. Even so, in several jurisdictions challenges to the constitutionality of arbitration acts or to constitutional issues connected to arbitration have been raised. The reasons for the constitutional challenges are somewhat similar; they are based on the fact that the arbitration act or a piece of legislation imposing arbitration restrict or exclude the parties' right to access to court. In doing so, deriving from such limitation, arbitration is curbing the right of natural justice which secures the right to be heard and the impartiality in the decision-making process.[1] The argument comes in two

[1] Frederick F. Shauer, 'English Natural Justice and American Due Process: An Analytical Comparison' (1976) 18 William and Mary Law Review 47, 48.

forms. The first is that the constitutional right to have access to court is being violated because arbitration is taking away a dispute that would originally be submitted to a court belonging to a country's judiciary. The second is the violation of the constitutional principle of natural justice. If a claim is decided by an arbitral tribunal delivering an award that is final and binding, the process is not fair because the parties were not able to make an appeal and, as a consequence, they cannot fully present their case. There is a connection in the two arguments because access to courts is not just having your day in court but also having a fair procedure to solve the dispute, that is, the guarantee of procedural justice. In this sense, the principle of natural justice is a security for procedural justice.[2]

The constitutional guarantees of access to court and natural justice are not strange to arbitration. In effect, they are part of arbitration, after all, arbitration is a procedure used to achieve substantial justice. Therefore, arbitration is a method to access a process to solve disputes akin to court litigation. Additionally, the right to be heard and the right to have an impartial tribunal are protected in arbitration.[3] Nevertheless, arbitration, unlike courts, gives room for more flexible procedures and it provides a final and binding decision that is not normally open to an appeal.[4] This means that when a dispute is submitted to arbitration, the exclusive jurisdiction of courts is removed from the judiciary and a private tribunal will settle the conflict. If a constitution assures the exclusive jurisdiction of courts to solve legal quarrels and, in doing so, the principle of natural justice is secured, when an arbitral tribunal substitutes the work of a court, this raises the argument about the unconstitutionality of arbitration in itself.

Another problem involving the constitutionality of arbitration is the requirement of consent. If courts have exclusive jurisdiction over disputes and arbitration is an exception to such rule, consent is essential to legitimise the practice of arbitration. But if arbitration is imposed on one party, the exception to the exclusive jurisdiction of courts is not freely adhered to; on the contrary, it might be forced onto one party. That being the case, there is room for an unconstitutionality claim because a person cannot be forced to arbitrate a dispute and therefore, legislation providing for compulsory arbitration would violate a person's right to access to courts.

[2] See Nancy A. Welsh, "Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories" (2004) 54 Journal of Legal Education 49, where the work of social psychologists in relation to procedural justice is analysed and in their description of procedural justice, an impartial adjudicator and the right to be heard are fundamental.

[3] Arbitration Acts assure the parties the right to be heard and the need for an independent and impartial tribunal. See for instance: Article 21 §2 of the Brazilian Arbitration Act 1996; Section 33(1)(a) English Arbitration Act 1996; Article 18 of the Russian Arbitration Act 2015 and Act Articles 18 and 25 of the Japanese Arbitration Act 2003. Such protections are also provided for in arbitration rules such as Article 14.4 (i) of the London Chamber of International Arbitration Rules 2015 and Article 22(4) of the International Chamber of Commerce Arbitration Rules 2017 22(4).

[4] There are exceptions such as Section 69 of the 1996 English Arbitration Act which allows appeals in questions of law.

Arbitration is not a force of evil with a sole intention to oust the court's jurisdiction and take away the fundamental guarantee of natural justice; on the contrary, if a party wishes to have a dispute submitted to arbitration, the party is accepting that a dispute will be decided by a private tribunal. This is not necessarily excluding the constitutional rights to access to court and natural justice. Nonetheless, if arbitration is imposed, there are grounds for a violation of a constitutional right. This article examines to what extent arbitration has violated constitutional rights. As it will be assessed, constitutional challenges, from civil and common law jurisdictions, were raised arguing the unconstitutionality of an arbitration act or an act imposing some form of arbitration. The results of these challenges were mostly in favour of arbitration and the courts have been reluctant to accept that in voluntary arbitration, the constitutional rights of access to court and natural justice are not abided. Nevertheless, when it comes to compulsory arbitration, the decisions did not follow the same path and there was a violation of the constitutional right to access to courts.

The study of constitutional law and arbitration is not new,[5] however, a comparative analysis of constitutional challenges to arbitration acts or an act imposing the use of arbitration has not been made. Although the majority of the challenges were unsuccessful, the fact that this challenge has been raised in different scenarios should not be oblivious. The interesting aspect of the challenges is that, initially, they appeared to be something employed by developing economies rather than developed economies. Nevertheless, there was a shift, and courts in Australia, Hong Kong and Portugal had to decide claims based on unconstitutional aspects of arbitration. Consequently, the goal of the current analysis is to look at how the constitutional challenges to the validity of arbitration have been made in different parts of world. In doing so, it will be assessed if the challenges are a tangible violation of a constitutional right, or if this is just a tactic made by parties wishing to delay or avoid arbitration that they have previously agreed to. This evaluation will be done through a comparative study of case law in nine jurisdictions, using the comparative method of functional equivalence, which will be explained in the methodology section below. After describing the methodology employed, the case law from nine identified jurisdictions will be examined in two parts. The first part focuses on the analysis of constitutional challenges to voluntary arbitration and the

[5] See Edward Brunet, "Arbitration and Constitutional Rights" (1992) 71 *North Carolina Law Review* 8; Kimberly J Mann, "Constitutional Challenges to Court-Ordered Arbitration" (1997) 24(4) *Florida State University Law Review* 1055; Jean R Sternlight, "Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns" (1997) 72(1) *Tulane Law Review* 1; Alfrédo de Jesús, "The Impact of Constitutional Law on International Commercial Arbitration in Venezuela" (2007) 24(1) *Journal of International Arbitration* 69; Ola O Olatawura, "Constitutions and Commercial Arbitration: Constitutionalization In General Law And Practice" (2013) 16(2) *International Arbitration Law Review* 56; Peter B Rutledge, *Arbitration and the Constitution* (CUP 2013); Georgios I Zekos, "Constitutionality of Commercial/Maritime Arbitration" (2014) 45(1) *Journal of Maritime Law & Commerce* 35.

second analyses the constitutional challenges in relation to compulsory arbitration. The results of the comparative analysis are then outlined showing that for voluntary arbitration, the challenges have some merit, but for compulsory arbitration, they seem like a tactic to delay the enforcement of an arbitral award.

2 METHODOLOGY

The purpose of the present examination is to compare decisions made in different countries where the object of the claim was the same, that is, a challenge to constitutionality of the arbitration act or an act imposing the use of arbitration. To do so, the case study will be decisions from nine jurisdictions where such challenge was made. The case law selection in this research was made on the basis of their availability and the languages spoken by the author,[6] as well as their access through internet sources. The author has been tracking cases regarding challenges to the constitutionality of arbitration acts for the last seven years. This was done using the Global Arbitration Review newsletter and articles found in Westlaw and HeinOnline. In using this procedure, eleven decisions were identified, and the author accessed the full wording of each decision via a google search or through the respective court website.

In this research, the comparison will be between countries following the Anglo-American family (United States of America (USA), Australia and Hong Kong) and the Romano-Germanic family (Brazil, Colombia, Mexico, Guatemala, Madagascar and Portugal). Despite the fact that the decisions come from different legal families, they all have a form of constitutional control in which a challenge can be brought when some piece of legislation offends a constitutional provision. Moreover, they all have statutes regulating arbitration, being either domestic or international arbitration, giving a common denominator to the systems and making the comparison viable. The cases are from developing and developed economies, and from five different continents. Examined together, they epitomise a spectrum of how challenges to the constitutionality of arbitration acts have been addressed across a diverse number of jurisdictions.

For the collection of cases, the author identified two patterns related to the challenges to the constitutionality of arbitration. The first pattern claims that a part of the arbitral legislation is unconstitutional. This can be done through an attack to one or more provisions of the

[6] The author speaks English, Portuguese, Spanish and French.

arbitration act. The ratio behind the challenges tend to concentrate on the exclusive jurisdiction of courts to decide disputes, and the principle of natural justice. The second pattern claims that compulsory arbitration is unconstitutional because parties are not freely adhering to arbitration. The nine jurisdictions presented case law that, when compared, show an expressive pattern in how challenges to the constitutionality of arbitration, being it in a common law or a civil law jurisdiction, have been settled. Moreover, the chronological development of the challenges is also relevant. The first was done in 1924 and after a long silence, they returned in the first decade of this century to grow steadily until 2016.[7]

Of course, the case law assessed here does not reflect the only existing samples in the world. When doing a comparative research, language is always a barrier in any comparison, added to the availability of information. Thus, there are limits to examination of all cases regarding challenges to constitutionality of arbitration. Case law from jurisdictions besides the ones assessed in this article were found,[8] however, the author does not speak the language where the case was decided, and it is not good to rely on digital translations. This is because languages have different roots, and as a result, legal terms that, at first sight, might be the same, in reality, their meaning can be completely different.[9] The cases mentioned in this article were decided in countries where the official language is English, Spanish, French and Portuguese. Therefore, when translating the terms to English from Spanish, French and Portuguese, the conversion was made by trying to find an equivalent terminology in English.

In relation to the research design, borrowing from social sciences, this shall be made by the most different system design which 'seeks to compare political systems that share a host of common features in an effort to neutralize some differences while highlighting others.'[10] This opposes a strict comparison which is not sought in this article because of data restrictions. It is not feasible, or at least desirable, to try to find every single decision in all countries with the same legal family. If arbitration is a tool used to substitute courts and to overcome the territorial limits of a nation, looking at just one legal family would make the international character of arbitration, and the comparison, less appealing. International arbitration provides for an opportunity to mix experiences from different legal systems in one arena. Moreover, not

[7] The first case was decided in 1924 whilst the others were decided in: 2001, 2003, 2010, 2010, 2013, 2015 and 2016.
[8] *See* Jotham Scerri-Diacono & Stephanie Saliba, 'Malta and the anti-constitutionality of mandatory arbitration: the saga continues' (2012) 78(3) Arbitration 226 and Giovanni Bonato, 'Jurisprudence Étrangère: Cour Constitutionnelle Italienne, 19 Juillet 2013' (2014) (4) Revue de L'arbitrage 977.
[9] Sometimes, even when the legal systems employ the same language, the legal term has a different meaning. See for instance the definition of *stare decisis* in England and USA in Peter de Cruz, *Comparative Law in a Changing World*, 3rd Edition (England, Routlege-Cavendish, 2007), page 221.
[10] Todd Landman, *Issues and Methods in Comparative Politics*, 3rd edition (England, Routlege, 2008) page 70.

all decisions are easily attainable and available to the public. Thus, the different system design allows a comparison between 'countries that do not share any common features apart from the political outcome to be explained and one or two of the explanatory factors seen to be important for that outcome.'[11] With this design, what will be compared is the rationale behind the decisions where there was challenge to the constitutionality of arbitration and the decisions challenging the constitutionality of compulsory arbitration.

The method for comparison will be the functional equivalence, meaning that despite the differences in legal systems, there are institutions in each system serving a similar function.[12] Arbitration, in different jurisdictions, has a similar function: that is to provide an alternative form of dispute resolution, thus ousting the exclusive jurisdiction of local courts. Moreover, the constitutional challenges to the validity of arbitration were attacking the right to access to court or a right to natural justice. Therefore, to look at the functionality of the issues being compared – that is, the challenges to the validity of arbitration acts or acts imposing arbitration – the article will assess their purpose and utility and see if there are any concrete reasons to raise a constitutional challenge to arbitration.

3 CONSTITUTIONAL CHALLENGES TO VOLUNTARY ARBITRATION

The challenges made to voluntary arbitration started early in the last century, the first one being in the USA. In this century, the challenges expanded to Latin America, Asia, Africa and Australia. The scope of the challenges was the violation of the rights to access to courts and natural justice. They occurred in different ways as each country has specific procedures for constitutional challenges. The claims varied in topics, ranging from the removal of court's exclusive jurisdiction to rule disputes, the right to appeal and the right to present your case or defend yourself. The argument seems to follow a pattern that arbitration takes away a fundamental right to access to court. As this constitutional right is guaranteed in several constitutions, it should not come as a surprise that arguing the violation of this right could be raised in legal systems originating from different legal families. Be that as it may, although each court, in its respective jurisdiction, rejected the constitutional challenge, it is interesting

[11] *Ibid*.
[12] See Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law*, 3rd edn (Oxford University Press 1998) and Ralph Michaels, "The Functional Method of Comparative Law", in Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).

that they were not raised in the same manner. Therefore, in this section, the cases related to challenges to the constitutionality of voluntary arbitration will be analysed. The description of the cases will focus on the decision's rationale and, where possible, the procedure will be explained.

3.1 The USA Supreme Court and the New York State Arbitration Act

Starting with the earliest case, in 1924, the USA Supreme Court decided whether the New York State Arbitration Act was constitutional. In *Red Cross Line v Atlantic Fruit Co*[13] a dispute arose out of a charter in which the ship's master did not perform the voyage with the utmost dispatch and, as a result, parts of the payment should have been returned. The New York State Arbitration Act 1920 allowed parties to have disputes submitted to arbitration; however, the New York Court of Appeals found that the dispute should be submitted to courts instead of arbitration as it was a question of admiralty. According to the Article III, section 2 of the USA Constitution and § 256, cl. 3, of the Judicial Code, such disputes were of the exclusive jurisdiction of the admiralty courts.[14] The Supreme Court understood that the New York law was valid and the state could compel parties to "specifically perform an agreement for arbitration which is valid by the general maritime law, as well as by the law of the state, which is contained in a contract made in New York and which, by its terms, is to be performed there". The Supreme Court went further and declared that the New York State Act did not change "substantive maritime law or to deal with the remedy in courts of admiralty". This attempt pre-dates the enactment of the Federal Arbitration Act which was not subjected to constitutional challenges.

3.2 Brazil and the ex officio constitutional challenge

Moving to South America, in Brazil, the case of *M.B.V. Commercial & Export Management Establishment v Resil Indústria e Comércio LTDA*[15] required the Supreme Federal Court to assess if the first Brazilian Arbitration Act (BAA) violated the Brazilian Constitution. The case involved a recognition of an arbitral award issued in Spain. Once the award was presented in

[13] 264 U.S. 109 (1924).

[14] Article III, 2 of the Constitution says: "Section 2. 1: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; —between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.." Section 256 of the Judicial Code provides: "The jurisdiction vested in the courts of the United States […] shall be exclusive of the courts of the several states."

[15] Recognition of Foreign Arbitral Award (Agravo em Sentença Estrangeira), SE-AgR 5206/EP–ESPANHA, Full Court of the Supreme Federal Court, Reporting Justice Sepulveda Pertence, decided on 12 December 2001, published in the Brazilian official report on 30 April 2004.

court, the parties did not challenge its recognition, however, the Supreme Federal Court raised a constitutional challenge on an incidental basis.[16] The view was that Articles 6 sole paragraph, 7, 41 and 42 of the BAA[17] were not in line with Article 5, XXXV of the Brazilian Constitution, which provides for the principle of natural justice.[18] The argument was raised by Justice Pertence, the reporting justice. His rationale was that arbitration represents the right to renounce court jurisdiction and, therefore, it could not be done before the dispute starts, only after it. Consequently, arbitration per se was constitutional, but the specific performance of the arbitration agreement was not. Three other justices followed Justice Pertence's view. However, the majority of the Supreme Federal Court understood that the BAA did not deprive parties from their right to access to courts. The prevailing view was raised by Justice Jobin and followed by the remaining justices. The conclusion was that the BAA has several provisions regulating how courts can interact with the arbitral procedure and, therefore, the sovereignty of the domestic court's jurisdiction, to have the final say, is preserved. Justice Jobin asserted that Article 5, XXXV is not addressed to private parties, but to the legislator, meaning that the legislator cannot create laws that will "exclude any injury or threat to a right from the consideration of the Judicial Power". The Brazilian case is peculiar in itself as the challenge was made ex officio, in a case where parties were in favour of the recognition of a foreign arbitral award. This is not a situation whereby one party is trying to avoid the result of

[16] In Brazil, the constitutionality of a law can be challenged in two ways. The first is directly, having an *erga omnes* effect, through a claim arguing that a statute is unconstitutional (Article 102, I, a of the Brazilian Constitution declares: "The supreme federal court is responsible, essentially, for safeguarding the Constitution, and it is within its competence: I – to institute legal proceeding and trial, in the first instance, of: a) direct actions of unconstitutionality of a federal or state law or normative act). The second is incidentally through cases submitted to the Supreme Federal Court having an effect between the parties only (Article 102, III of the Brazilian Constitution declares: III – to judge, on extraordinary appeal, cases decided in a sole or last instance, when the decision appealed: a) is contrary to a provision of this Constitution; b) declares a treaty or a federal law unconstitutional; c) considers valid a law or act of a local government contested in the light of this Constitution; d) considers valid a local law challenged in the light of a federal law).

[17] The wording of the articles is: "Article 6. If the parties shall not previously agree on the form for instituting arbitral proceedings, the interested party shall notify the other party by mail or through any other means of communications (with return receipt requested) of its intent to commence arbitral proceedings, setting a date, time and venue for signing the arbitration agreement. Sole Paragraph: In the event the notified party shall fail to appear or if it shall refuse to sign the arbitration commitment, the other party shall have the right to file a lawsuit, as provided for in Article 7 of this Law, at the Judiciary Branch which originally would have had jurisdiction over the case." "Article 7. If there shall be an arbitration clause but there shall be controversy as to the commencement of such arbitral proceedings, the interested party may request the other party be summoned to appear in Court to officially file arbitration proceedings, whereas the Judge shall order a special hearing to that end. § 1. The plaintiff shall specify in detail the subject matter of the arbitration, attaching to its motion the document containing the arbitration clause. § 2. If the parties shall attend the hearing, the Judge shall first attempt to reconcile the parties in dispute. In not succeeding, the Judge shall attempt to persuade the parties to sign, by mutual consent, the filing of the arbitration commitment proceeding. § 3. If the parties shall disagree on the terms of the proceeding commitment filed, the Judge, subsequent to hearing the defendant, shall decide on the contents thereof, either at the same hearing or within ten (10) days in accordance with the provisions of the arbitration clause, while taking into account the provisions of Articles 10 and 21, § 2 of this Law. § 4. If the arbitration clause shall not have any provisions for the appointment of arbitrators, the Judge, subsequent to hearing the parties, shall rule thereon and shall have the right to appoint a sole arbitrator to settle the dispute. § 5. Should the plaintiff, without good cause, fail to attend the hearing called for drafting the arbitration commitment then, the case shall be terminated without judgment on merits. § 6. Should the defendant fail to attend a hearing, the Judge, subsequent to hearing the plaintiff, shall have the right to establish the wording of the arbitration commitment to be installed and appoint a sole arbitrator. § 7. The ruling granting the motion shall have the effectiveness of a proceeding filed as an arbitration commitment." "Article 41. Articles 267, item VII; 301, item IX and Article 584, item III of the Code of Civil Procedures, shall henceforth have the following wording: Art. 267 VII – by the arbitration convention; Art. 301 IX – arbitration convention; Art. 584. III – an arbitral award and a homologation arbitral award of settlement or conciliation"; "Article 42. Article 520 of the Code of Civil Procedures shall have a new item with the following wording: Art. 520. VI – consider the request for arbitral proceedings has grounds."

[18] Article 5, XXXV of the Brazilian Constitution states that "the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power".

arbitration; on the contrary, it was a case that showed some reluctance from the Brazilian Judiciary to accept arbitration.

3.3 Arbitral procedure and the Mexican Constitution

A few years after the Brazilian decision, another Latin American country experienced a constitutional challenge to its arbitration act. In Mexico, this was materialised in relation to Article 1435 of the Mexican Commercial Code.[19] This article is part of Title IV of the Commercial Code which regulates commercial arbitration in Mexico. The article provides that parties are free to agree on the procedure employed by the arbitral tribunal and in the absence of an agreement, the tribunal can direct the arbitration in a manner that it considers appropriate. Moreover, it determines that such power includes the capacity to determine the value, the admissibility and the pertinence of evidence.[20] The argument was that Article 1435 violated Article 14 of the Mexican Constitution, which provides for the following rights: non-retroactivity of law, liberty, property, legality in criminal law and the right to have reasoned judgments and decisions. [21] The claimants argued that the right to not be deprived of their liberty, properties or rights without a trial by courts where the essential formalities and proceedings established by law are followed were being violated. The claim was that once an arbitral tribunal is able to establish a procedure that it deems appropriate, it is disrespecting the Constitution because parties have the right to proper procedures established by law, instead of procedures agreed by the parties.

The Mexican Supreme Court rejected the claim. It stated that although Article 1435 did not address the essential formalities of proceedings established by law, the articles following Article 1435, which are part of Title IV of the Commercial Code, secured the essential formalities as they determine that the procedure must treat parties equally, that each party must be given an opportunity to present its case, that parties can agree on the place and language of the proceedings, that parties can agree the deadlines to present evidence and to present written arguments, that parties can agree upon the dates for the hearings and that parties can nominate

[19] Amparo en Revisión 759/2003, decided on 30 June 2004.

[20] The wording of article 1435 is: "Subject to the provisions of this title, the Parties shall be free to agree the procedure that is to be used by the arbitral tribunal in its proceedings. In the absence of agreement, the arbitral tribunal may, subject to the provisions of this title, direct the arbitration in the manner considered appropriate. This faculty conferred on the arbitral tribunal includes determining the admissibility, relevance and value of evidence."

[21] The wording of Article 14 is: "No law will have retroactive effect in detriment of any person. No one can be deprived of his freedom, properties or rights without a trial before previously established courts, complying with the essential formalities of the proceedings and according to those laws issued beforehand. With regard to criminal trials, it is forbidden to impose any penalty which has not been expressly decreed by a law applicable to the crime in question, arguing mere analogy or majority of reason. In civil trials, final sentence must agree with the law writing or the legal interpretation thereof. In the case of lack of the appropriate law, sentence must be based on the general principles of law."

experts.[22] Such rules reflect the right of due process and, in the language of the Mexican Constitution, "the essential formalities of the proceedings". Here the challenge was somewhat weak. In a way, it would be anomalous to envisage that the Mexican legislator would create a dispute resolution procedure which is not protected by due process rules. Moreover, as the Mexican Supreme Court explained, such rules are guaranteed in the Mexican arbitral legislation.

3.4 Consent with multiple parties in Colombia

Eleven years after the Mexican decision, in *ISAGEN S.A.E.S.P. v Sección Tercera del Consejo de Estado y Tribunal de Arbitramento de la Cámara de Comercio Internacional*,[23] the Colombian Supreme Court ruled on a constitutional challenge coming out of a consortium of companies that, in 1995, concluded a contract to build a hydroelectric power plant in Río la Miel. The contract was initially concluded between Hidroeléctrica La Miel SA (which was a mixed joint stock company, but this company was eventually succeeded by Fiduciaria Anglo SA in 1997, Lloyds Trust S.A. in 2000 and, in 2004, by ISAGEN SA) and a consortium which was initially composed of five companies (Construtora Norberto Odebrecht SA, Grupo Mexicano de Desarrollo SA, Asea Brown Boveri Limitada, Abb Sae Sadelmi SPA, and Kvaerner Energy AS). This consortium's structure changed throughout the performance of the contract and by the time the construction was over, it comprised three companies.[24] The original contract had a mediation followed by arbitration clause. But in 2004, the parties to the contract, which were ISAGEM S.A. and the consortium (being it Construtora Norberto Odebrecht SA, Alstom Brasil Ltda, ABB SAE Sadelmi SPA and Kvaerner Energy AS) signed an addendum to remove the possibility of mediation, leaving arbitration as the sole method of dispute resolution. Although the company ABB SAE Sadelmi SPA was featured in the consortium, in 2004, such company no longer existed because it went through corporate changes and in 2000, it became Alstom Power Italia SPA.[25] The consortium started arbitration against ISAGEM S.A. for breach of contract and eventually an award was challenged in the Colombian Courts. ISAGEN S.A. argued that it received no information about the changes in relation to the signatories of the arbitration clause. Because of this lack of information,

[22] See Articles 1434 to 1443 of the Mexican Commercial Code.
[23] Sentencia SU500/15, Expediente T-4.230.220, La Sala Plena de la Corte Constitucional, decided on 06 August 2015.
[24] In 1998, ABB Sae Sadelmi SPA transferred its business to ABB Industria SPA which changed, in the same year, its name to ABB Sadelmi SPA, and in 2000, became Alstom Power Italia SPA. Asea Brown Boveri Limitada, in 2000, changed its name to ABB Alstom Power Brasil Ltda. In, 2002, ABB Alstom Power Brasil Ltda changed its name to Alstom Brasil Ltda. In 2002, Grupo Mexicano de Desarrollo SA assigned it rights in the consortium to Norberto Odebrecht SA. In the end, there were three parties composing the consortium, they were: Construtora Norberto Odebrecht SA, Alstom Brasil Ltda. and Kvaerner Energy AS.
[25] ABB Sae Sadelmi SPA ceased to exist in 2001 when it was incorporated by ABB SACE TMS SPA. This was not timely communicated to ISAGEM.

ISAGEN claimed that it was induced to a manifest error that was the conclusion of an arbitration agreement with a party that did not exist. Thus, the arbitration agreement was not valid because the parties could not have given proper consent to arbitrate since one of the parties did not exist. In this sense, ISAGEM argued that the award violated Article 116 of the Colombian Constitution which allows arbitrators to administer justice, as long as the parties have given them power to act in such way.[26] Because the Constitution requires the authorisation of the parties to legitimise the removal of the Colombian Courts' jurisdiction, the argument was that if a party that did not exist signed an arbitration agreement, an award issued in relation to the arbitration deriving from this agreement is a direct violation of Article 116.

The Colombian Supreme Court did not identify an offence to the Constitution. This was because the parties had consented to arbitration from the conclusion of the addendum which met the requirements for its validity, that is, consent, object and cause. ISAGEN expressed its willingness to submit contractual disputes to arbitration without any contractual mistake or a misrepresentation. In effect, the Colombian Supreme Court considered that after the addendum's conclusion, Alstom Power Italia SPA had agreed to its wording, which dismissed any doubt about the legitimacy of the arbitration agreement. Therefore, no offense to the constitution was found, on the contrary, as the consent was not tainted, the arbitral tribunal was formed according to Article 116. This was a feeble challenge. The claimant, after taking part in an unsuccessful arbitration, tried to argue that it never consented for disputes to be submitted to arbitration.

3.5 Judicial power of arbitral tribunals in Australia

Moving away from Latin America, in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*,[27] the High Court of Australia dismissed a constitutional challenge that the UNCITRAL Model Law on International Commercial Arbitration (Model Law), which was incorporated to the Australian legal system by the International Arbitration Act 2010 (IAA), was incompatible with Chapter III of the Australian Constitution. Chapter III of the Australian Constitution, titled 'The Judicature', has 10 Sections covering the following points: Judicial Power and Courts; Judges' Appointment, Tenure, and Remuneration; Appellate Jurisdiction of High Court; Appeal to Queen in Council; Original Jurisdiction of High Court; Additional Original Jurisdiction; Power to Define Jurisdiction; Proceedings Against

[26] Article 116 states: "Individuals may be entrusted temporarily with the function of administering justice as jurors in criminal proceedings, as mediators or as arbitrators authorized by the parties to issue verdicts in law or in equity in the terms defined by an Act."
[27] [2013] HCA 5

Commonwealth or State; Number of Judges and Trial by Jury. The dispute originated from a distribution agreement between TCL and Castel. When an award was brought to the Australian Courts for enforcement, TCL raised the constitutional challenge relying on the fact that Section 16(1) of the IAA,[28] which gave force of Law to the Model Law, provides for the exercise of the judicial power of the Commonwealth in a way that conflicts with Chapter III of the Australian Constitution. There was no argument against a specific provision of the Australian Constitution; the claim was that Articles 35 and 36 of the Model Law were incompatible with Chapter III of the Australian Constitution.[29] The objection was that both articles would stop the Federal Court from refusing enforcement of an award in relation to an error of law, violating its institutional integrity. The constitutional challenge can be summarised in two points: the first is the fact that once awards could be enforced as a judgement in Australia, judicial powers were being given to arbitral tribunals; the second is that the IAA removed powers from the Australian Courts as the courts then had to enforce an award regardless of the fact that the award might contain an error of law. In addition, it was claimed that an award being enforced by the Federal Court, with a legal error, should be corrected in accordance with Article 28 of the Model Law,[30] or there is an implied term in arbitration agreement governed by Australian Law that the arbitral tribunal's authority is limited by the correct application of the law. Thus, such review – an appeal on an error of law – was required to avoid the conflict with Chapter III of the Australian Constitution.

[28] It provides: "Model Law to have force of law (1) Subject to this Part, the Model Law has the force of law in Australia."

[29] The wording of the Model Law provisions is: "Article 35 - Recognition and enforcement 1. An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36. 2. The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language." "Article 36 - Grounds for refusing recognition or enforcement 1. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitrator proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or (b) if the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the recognition or enforcement of the award would be contrary to the public policy of this State. 2. If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security."

[30] "Article 28. Rules applicable to substance of dispute (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. (3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so. (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

All submissions were rejected. The High Court understood that arbitration was consensual and private, therefore, when an arbitral tribunal is ruling, the exercise of power is private and not judicial, there is, accordingly, no violation of the institutional integrity of the Federal Court. Concerning the error of law, Hayne J, Crennan J, Kiefel J and Bell J decided that the capacity to set aside an award in such cases "was an exception to the general rule concerning the finality of awards, and that it operated in haphazard and anomalous ways".[31] As a result, the absence of a provision specifying that an award can be set aside for error on the face of the award "does not distort judicial independence when a court determines the enforceability of an award."[32] Moreover, it was concluded that judicial independence means independence from the legislative and executive branches of government, which "does not compel the federal legislature to balance the 'rival claims of finality and legality in arbitral awards' in any particular way". The High Court concluded that: "determination of the enforceability of an award, upon criteria which do not include a specific power to review an award for error, serves the legitimate legislative policy of encouraging efficiency and impartiality in arbitration and finality in arbitral awards."[33] In relation to Article 28, French CJ and Gageler J ruled that this provision refers to party autonomy to determine the rules of law to be applied but not if they will be correctly employed. As to the implied term in the arbitration agreement, in a similar manner, the High Court stated that "it is neither the effect of Art 28 of the Model Law nor an implied term of an arbitration agreement governed by Australian law that the arbitral tribunal must reach a correct conclusion on a question of law within the scope of the submission to arbitration."[34]

It is understandable that arbitral tribunals lack judicial powers because they cannot enforce their decisions, but ultimately, an arbitral tribunal is providing justice to the parties, which is a feature of judicial power. Moreover, an arbitral tribunal can solve a dispute, not only because of the agreement between the parties but also because a statute permits the parties to do so. Submitting disputes to arbitration does not necessarily usurp the power of courts or diminish those of the judiciary; on the contrary, as long as enforcement of the award is done by the judiciary, this removal of court's jurisdiction is not present.

[31] (n 33) paragraph 104.
[32] *Ibid*.
[33] *Ibid*.
[34] (n 33) paragraph 17.

3.6 The right to appeal in Honk Kong

In Hong Kong, the Court of Appeal was also faced with a challenge to the validity of the Arbitration Ordinance (Cap. 609). The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China is the constitutional document in Hong Kong.[35] It is a result of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong.[36] The Joint Declaration provided that the People's Republic of China declared basic policies in Hong Kong,[37] and that such basic policies would be stipulated in a Basic Law.[38] Annex I of the Joint Declaration established some of the Basic Law principles, being amongst them, that in the hierarchy of laws, the Basic Law was the highest law in Hong Kong.[39] Article 82 of the Basic Law provides that the "[t]he power of final adjudication of the Hong

[35] In *NG KA Ling and Another v. The Director of Immigration* [1999] HKCFA 72, the Court of Final Appeal of the Hong Kong Special Administrative Region recognised the constitutional character of the Basic law. Chief Justice Li, at paragraph 10, stated that "[t]he Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China was enacted pursuant to Article 31. It was adopted by the National People's Congress and was promulgated on 4 April 1990. It became the constitution of the Hong Kong Special Administrative Region upon its establishment on 1 July 1997 when China resumed the exercise of sovereignty over Hong Kong." And at paragraph 73, he said: "We must begin by recognizing and appreciating the character of the document. The Basic Law is an entrenched constitutional instrument to implement the unique principle of "one country, two systems". As is usual for constitutional instruments, it uses ample and general language. It is a living instrument intended to meet changing needs and circumstances." However, the view is not absolute, and it has been contested, see Lo Pui Yin, *The Judicial Construction of Hong Kong's Basic Law* (Hong Kong University Press 2014) Chapter 2.

[36]The full text of the Joint Declaration can be found in 'Official Publication: Sino-British Joint Declaration on the Question of Hong Kong' (1984) 7 Loyola of Los Angeles International and Comparative Law Review 139.

[37] Point number 3 of the Joint Declaration provides: "The Government of the People's Republic of China declares that the basic policies of the People's Republic of China regarding Hong Kong are as follows: (1) Upholding national unity and territorial integrity and taking account of the history of Hong Kong and its realities, the People's Republic of China has decided to establish, in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, a Hong Kong Special Administrative Region upon resuming the exercise of sovereignty over Hong Kong. (2) The Hong Kong Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government. (3) The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged. (4) The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants. The chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally. Principal officials will be nominated by the chief executive of the Hong Kong Special Administrative Region for appointment by the Central People's Government. Chinese and foreign nationals previously working in the public and police services in the government departments of Hong Kong may remain in employment. British and other foreign nationals may also be employed to serve as advisers or hold certain public posts in government departments of the Hong Kong Special Administrative Region. (5) The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law. (6) The Hong Kong Special Administrative Region will retain the status of a free port and a separate customs territory. (7) The Hong Kong Special Administrative Region will retain the status of an international financial centre, and its markets for foreign exchange, gold, securities and futures will continue. There will be free flow of capital. The Hong Kong dollar will continue to circulate and remain freely convertible. (8) The Hong Kong Special Administrative Region will have independent finances. The Central People's Government will not levy taxes on the Hong Kong Special Administrative Region. (9) The Hong Kong Special Administrative Region may establish mutually beneficial economic relations with the United Kingdom and other countries, whose economic interests in Hong Kong will be given due regard. (10) Using the name of "Hong Kong, China", the Hong Kong Special Administrative Region may on its own maintain and develop economic and cultural relations and conclude relevant agreements with states, regions and relevant international organisations. The Government of the Hong Kong Special Administrative Region may on its own issue travel documents for entry into and exit from Hong Kong. (11) The maintenance of public order in the Hong Kong Special Administrative Region will be the responsibility of the Government of the Hong Kong Special Administrative Region."

[38] Point number 3 (12) of the Joint Declaration provides: "The above-stated basic policies of the People's Republic of China regarding Hong Kong and the elaboration of them in Annex I to this Joint Declaration will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years."

[39] This can be seen by the wording of the first paragraph of number II of the Annex I: "After the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Hong Kong Special Administrative Region legislature." A counter argument would be that the Constitution of the People's Republic of China would be above the Basic Law in the constitutional principle of one country two systems. See Yin (n 41).

Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal." This provision was challenged twice regarding the right to appeal on the grounds that some limitations to appeal in the Arbitration Ordinance are unconstitutional. The Arbitration Ordinance in Hong Kong regulates the practice of arbitration in Hong Kong. It was enacted in 2011 and according to Section 3, its object "is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense."[40] Another aspect of the Ordinance is the adoption of the Model Law by giving it the force of law in Hong Kong.[41]

The first challenge was made in *China International Fund Limited v Dennis Lau & Ng Chun Man Architects & Engineers (HK) Limited.*[42] *The case involved the enforcement of an award deriving from a dispute out of an architectural consultancy contract. A claim to set aside the award was presented to the Court of First Instance and it was rejected. This would make the decision final, however, a leave to appeal was presented to the Court of Appeal on the grounds that Section 81(4)*[43] *of the* Arbitration Ordinance conflicted with Article 82 of the Basic Law. Section 81 (1) gives force to Article 34 of the Model Law which provides for an "[a]pplication for setting aside as exclusive recourse against arbitral award".[44] Section 81(4) provides that "[t]he leave of the Court is required for any appeal from a decision of the Court under article 34 of the UNCITRAL Model Law, given effect to by subsection (1)." In this case, the leave required was from the *Court of First Instance where such request was not granted. The result is that refusing leave of appeal makes res judicata under Section 81(4) and thus, without room for an appeal, it brings finality to the proceedings.* Since Article 82 of the Basic law provides that in Hong Kong, the final adjudication belongs to the Court of Appeal, the Court of First Instance cannot stop or refuse the leave of appeal. In deciding, the Court of Appeal applied the proportionality test. The test is a requirement that must be satisfied in cases limiting access to the Court of Appeal under Article 82. The basis for the test originates from two cases: *Solicitor and Law Society of Hong Kong v Secretary for Justice*[45] and *Mok Charles*

[40] Section 3 of the Arbitration Ordinance. The full wording of the Section is: "3. Object and principles of this Ordinance (1) The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense. (2) This Ordinance is based on the principles— (a) that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved; and (b) that the court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance."

[41] Section 4 of the Arbitration Ordinance provides: "UNCITRAL Model Law to have force of law in Hong Kong The provisions of the UNCITRAL Model Law that are expressly stated in this Ordinance as having effect have the force of law in Hong Kong subject to the modifications and supplements as expressly provided for in this Ordinance."

[42] [2015] 4 HKLRD 609.

[43] Section 81 states: "Article 34 of UNCITRAL Model Law (Application for setting aside as exclusive recourse against arbitral award) […] (4) The leave of the Court is required for any appeal from a decision of the Court under article 34 of the UNCITRAL Model Law, given effect to by subsection (1)."

[44] The wording of Section 81(1) is: "Article 34 of UNCITRAL Model Law (Application for setting aside as exclusive recourse against arbitral award) (1) Article 34 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(5)—".

[45] (2003) 6 HKCFAR 570

Peter v Tam Wai Ho.[46] The test has three limbs: the restriction must have a legitimate aim; the restriction must be rationally connected with the legitimate aim and the restriction must also be no more than was necessary to accomplish that legitimate aim. In this case, the parties challenged the third limb, meaning, if Section 84(4) is no more than is necessary to accomplish that legitimate aim. In its decision, the Court looked at the nature of arbitration and realised that the limitation to leave to appeal in the Court of First Instance was in line with the nature of arbitration, which is to provide "speed and reduction of costs of dispute resolution by arbitration". Therefore, the limitation was necessary to accomplish the aim of arbitration. Moreover, the Court declared that: "as arbitral disputes had to be resolved without unnecessary delay or expense, it was proportionate that the judge who knew about the case and who decided the dispute should be entrusted with the decision whether there was a reasonable prospect of success."

The second challenge occurred in *Wing Bo Building Construction Company Limited v Discreet Limited.*[47] *The argument was similar, that is, the role of the Court of Appeal as the final adjudicator in Hong Kong. But this time, instead of the enforcement of an arbitral award, it related to the lack of jurisdiction of courts due to the existence of an arbitration agreement. The dispute arose out of a contract to build 13 houses in Tseun. Although the contract had an arbitration clause, the construction company started legal proceedings at the Hong Kong Courts. The defendant challenged the court's jurisdiction and a Master in Chambers accepted the claim. The claimant appealed and contended the unconstitutionality of Section 20(8) of the* Arbitration Ordinance, which declares that once a court refers the dispute to arbitration, such decision cannot be subject to appeal.[48] The argument was that the lack of right to appeal to the Court of Appeal was contrary to the provisions determining that such court is vested with the final power to adjudicate disputes in Hong Kong. Again, the Court of Appeal applied the proportionality test and assessed if the limitation in Section 20(8) is no more than is necessary to accomplish its legitimate aim. The aim was based on Section 3 of the Arbitration Ordinance, which is to "facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense". Hence the court concluded that proportionality had to be analysed with the general purpose of the Arbitration Ordinance, which "ultimately it is a matter of the implementation of a policy to promote the use of arbitration, to facilitate the fair and speedy

[46] (2010) 13 HKCFAR 762
[47] [2016] HKEC 642 (2016)
[48] Section 20(8) states: "A decision of the court to refer the parties to arbitration under— (a) article 8 of the UNCITRAL Model Law, given effect to by subsection (1); or (b) subsection (2), is not subject to appeal."

resolution of disputes by arbitration without unnecessary expense, and to promote Hong Kong as an arbitration friendly jurisdiction." Thus, not only the rejection of appeal, in this case, was in line with the aim of establishing the restriction, but the court also asserted that once the arbitration procedure starts, a party can persuade the arbitral tribunal that it does not have jurisdiction to hear the dispute and bring the claim back to court.

3.7 The right to appeal in Madagascar

In Madagascar, the constitutionality claim involved the right to appeal in an employment dispute involving the unions of workers from Air Madagascar.[49] The Madagascan Labour Code asserts that in collective bargaining, the procedure to settle disputes is made up of three stages: negotiation, mediation and arbitration.[50] If the first two stages are not successful, arbitration can be used to solve the collective bargaining.[51] The subject matter of the arbitration is restricted to reasons why an agreement was not reached through mediation.[52] Additionally, in the Labour Code, the second paragraph of Article 225 states that, in collective bargaining, the arbitral award is final and is not subjected to an appeal.[53] The argument for the constitutional challenge was that Article 225, second paragraph, limits the right to appeal and such restriction clashed with the fundamental right in Article 13, sixth paragraph, of the Madagascan Constitution because it took away the parties' right to present their case.[54] Consequently, there was a request for Article 225 to be removed from the Labour Code due to its incompatibility with the Constitution. The Constitutional High Court rejected the challenged and concluded that Article 225 is constitutional. The reason was that in the three stages established to solve collective bargaining, arbitration is the last one, after negotiation and mediation. Therefore, when arbitration is reached, there were plenty of opportunities for the parties to present their case. In this sense, there is no restriction to the right of a party to defend themselves. The Constitutional High Court went further to argue that Article 95 of the Constitution provides

[49]Haute Cour Constitutionnelle, Décision n° 01-HCC/D2 du 21 octobre 2015 Relative à des requêtes aux fins d'exception d'inconstitutionnalité de l'article 225 alinéa 2 du Code du Travail.
[50] Article 210 of the Labour Code: "The collective dispute settlement procedure consists of three stages: negotiation; mediation; arbitration."
[51] Article 220 of the Labour Code: "If mediation fails, the collective dispute is submitted by the Ministry responsible for Labour and Social Laws: either to the contractual arbitration procedure pursuant to a collective agreement binding the parties; either to the arbitration procedure of the jurisdiction of the labour court."
[52] Article 221 of the Labour Code: "The arbitration can only relate to points could not be settled by an agreement during the mediation. Any new request that has not been submitted to mediation is inadmissible."
[53] Article 225 of the Labour Code: "The arbitral award must be reasoned and immediately notified to the parties. This decision is final and cannot be appealed. It puts an end to the litigation. From the transmission of this
decision to the parties, the strike or the lockout must end."
[54] Article 13 sixth paragraph: "The State guarantees the plenitude and the inviolability of the rights to defence before all the jurisdictions and at all the stages of the procedure, including that of the preliminary investigation, and at the level of the judicial police or of prosecution."

that the legislative has the power to establish procedure rules to new types of jurisdictions.[55] Accordingly, when the Labour Code created an arbitral procedure, the legislator was just following the rules in the Constitution and therefore, when legislating the possibility of arbitration in collective bargaining, no restriction was made to the right to present your case.

The decision in Madagascar is somewhat particular because although it could be argued that in a negotiation and in a mediation you can present your case, they are not entirely adversarial procedures, hence, presenting your case in litigation is not the same as presenting your case in conciliatory forms of dispute resolution. Be that as it may, the second part of the reasoning shows that the Constitution allows the legislative to establish different forms of dispute resolution such as arbitration, making it weak the argument that Article 225 of the Labour Code contradicted the Constitution.

4 CHALLENGES TO THE CONSTITUTIONALITY OF COMPULSORY ARBITRATION

Another facet of constitutional challenges to arbitration acts refer to compulsory arbitration, that is, arbitration in which consent is not necessary and the procedure is imposed by law. The interpretation is simple: if arbitration is an alternative form of dispute resolution, imposing it is not constitutional because it excludes the parties' right to have a dispute submitted to courts. This has occurred in Guatemala concerning a free trade agreement and in Portugal regarding sports and intellectual property arbitration.

4.1 Compulsory arbitration in a Guatemalan free trade agreement

In Guatemala, the case involving a compulsory arbitration clause originated from Decree 11-2006, which implemented the DR-CAFTA–US Free Trade Agreement. Article 117 of the Decree 11-2006 added a third paragraph to Article 2 of the Guatemalan Arbitration Act.[56] The third paragraph of Article 2 of the Arbitration Act provides that

> "[t]he controversies arising out of the application, interpretation and execution of international agreements between private parties, is resolved according to the provisions contained in the rules of arbitration of the Court of Arbitration of

[55] Article 95: "In addition to the issues that are directed to it by other Articles of the Constitution: I. The law establishes the rules concerning: … the creation of new orders of jurisdictions and their respective competences as well as their organization and the rules of procedure that are applicable to them;".
[56] The Arbitration Act is the Decreto Numero 67-1995, and Article 2 regulates International Arbitration.

International Chamber of Commerce, unless the parties expressly agree to submit the dispute to others arbitration forums."

As a result, a constitutional challenge was presented to the Guatemalan Constitutional Court arguing that such provision was unconstitutional.[57] The reasoning was that compulsory arbitration did not allow parties to seek another method of dispute resolution besides arbitration. Therefore, parties lost their constitutional right to have disputes submitted to the Guatemalan Judiciary as it is guaranteed in Articles 12 and 29 of the Guatemalan Constitution.[58] The Constitutional Court ruled that arbitration was a legitimate method of dispute resolution and it promotes international commerce, being in line with Articles 43 and 119(l) of Guatemalan Constitution.[59] It also made an analysis of the Guatemalan Arbitration Act to conclude that party autonomy was the essence of arbitration as it ousts the jurisdiction of the courts. However, the court's conclusion was that since arbitration derives from party autonomy, imposing arbitration was a violation of the parties' right to access to courts. Therefore, since Articles 12 and 29 provide for the Constitutional right to access to courts, paragraph 3 of Article 2 is unconstitutional because it imposes arbitration as the sole method of dispute resolution in international agreements between private parties. The Guatemalan Constitutional Court did not render arbitration in itself unconstitutional, but it asserted that the absence of party autonomy can make it unconstitutional.

Consent and party autonomy are essential for arbitration, but compulsory arbitration does not necessarily mean a limitation to access to courts. When compulsory arbitration relates to disputes where inequality of arms is present, yes, that can be problematic; yet, in free trade agreements, there will be a presumption that "the traders" are well informed of the "rules of the game". Additionally, the arbitral procedure might be one of the reasons for the free trade agreement and, once an award is issued under the International Chamber of Commerce rules, resort can be made to local courts.

[57] Expediente 387-2010, Guatemalan Constitutional Court (Corte de Constitucionalidad), decided on 07 July 2011 by Justices Alejandro Maldonado Aguirre, Mauro Roderico Chacón Corado, Héctor Hugo Pérez Aguilera, Roberto Molina Barreto, Gloria Patricia Porras Escobar, Ricardo Alvarado Sandoval and Carmen María Gutiérrez De Colmenares.

[58] They respectively state: "Article 12: The defense of the person and his [or her] rights are inviolable. No one may be sentenced or deprived from his [or her] rights, without being summoned, heard and defeated in a legal process before a competent and pre-established judge and tribunal. No person may be tried by Special or Secret Tribunals, nor through proceedings that are not pre-established legally." "Article 29: Free Access to Tribunals and Dependencies of the State. Every person has free access to the tribunals, dependencies and offices of the State, in order to exercise their actions and enforce their rights in accordance with the law. Only foreigners may avail themselves of diplomatic channels in case of a denial of justice. The sole fact that a resolution [fallo] may be adverse to their interests[,] is not qualified as such a denial[,] and in any case, the legal recourses established by the Guatemalan laws must have been exhausted."

[59] They respectively state: "Article 43: Freedom of Industry, Trade, and Work The freedom of industry, trade, and work is recognized, except for the limitations that due to social motives or the national interest are imposed by the law." "Article 119: [The] Obligations of the State. The following are the fundamental obligations of the State […] l. To promote the ordered and efficient development of the domestic and foreign trade of the country, promoting markets for national products."

4.2 Sports and intellectual property arbitration in Portugal

In Portugal, there were two cases involving compulsory arbitration in different areas of law. The first case related to sports law and originated from Decree 128/XII, of 08 March 2013.[60] This statute created the Sports Arbitral Tribunal (SAT) which embodied the competence to administer disputes regarding sports law or related to sport activities in Portugal. Articles 4(1) and 5 of the Decree's Annex established a system of compulsory arbitration in sports disputes deriving from decisions of sports bodies, and also for cases of doping in sports.[61] Article 8(1) and (3), of the same Decree, determined that the decisions from the last instance in Sports Arbitral Tribunal are final and not subject to any appeal, save appeals to the Portuguese Constitutional Tribunal.[62] After the Decree came to force, the President of Portugal challenged its constitutionality. The Portuguese Constitution provides that the president of Portugal, before enacting a decree into law, has the prerogative to request the Constitutional Court to review any decree sent to them.[63] In this case, the request for review argued that such compulsory arbitration violated the right to access the Portuguese courts, which is protected by Articles 18(2), 20(1) and 268(4) of the Portuguese Constitution.[64] The Portuguese Constitutional Court declared that the provisions in the Decree were unconstitutional. The reasoning reflected upon the nature of arbitration and compared the difference between voluntary and compulsory arbitration, stating that in the latter, the right to waive an appeal is not unconstitutional as parties agree upon it. However, when arbitration is compulsory, parties did not have a chance to waive their fundamental right to appeal. The Constitutional Court also addressed the SAT's composition and its impact in the independence and impartiality of arbitrators. SAT is located at the Portuguese Olympic Committee, which is a non-profitable body formed of sports

[60] Case number 279/2013, Tribunal Constitucional, Acórdão 230/2013, decided on 24 April 2013 by Justices Carlos Fernandes Cadilha, Ana Guerra Martins, Pedro Machete, Maria de Fátima Mata-Mouros, José da Cunha Barbosa, Catarina Sarmento e Castro, Maria José Rangel de Mesquita, João Cura Mariano Fernando Vaz Ventura, Maria Lúcia Amaral, Vítor Gomes, Maria João Antunes and Joaquim de Sousa Ribeiro.

[61] Articles 4(1) states: "Compulsory Arbitration. It is of SAT's competence to rule emerging disputes related to the acts and omissions of the federations and other sports entities and professional leagues, in the exercise of the corresponding regulatory powers, organization, direction and discipline." Article 5 expresses: "Compulsory Arbitration for anti-doping. It is of SAT's competence to rule on the deliberations taken by disciplinary bodies of sports federations or anti-doping authority of Portugal in the field of violation of anti-doping rules, pursuant to law No. 38/2012, 28 August, which approves the anti-doping law in sport."

[62] Article 8 declares: "Definitive nature of arbitration awards 1 – Without prejudice to the following paragraphs, the decisions handed down in only one or last instance, by SAT are not subject to appeal, since the submission of the dispute to the Tribunal implies, in the case of voluntary arbitration, the waiver of the same […] 3 – It is protected in all cases, the right of appeal to the Constitutional Court and to challenge the decision on the grounds and in accordance with the Voluntary Arbitration Act."

[63] According to Article 278, (1) of the Portuguese Constitution the President "may ask the Constitutional Court to conduct a prior review of the constitutionality of any rule laid down by an international treaty that is submitted to him for ratification, by any decree that is sent to him for enactment as a law or executive law, or by any international agreement, the decree passing which is sent to him for signature."

[64] The provisions declare: "Article 18. Legal Force […] **2.** The law may only restrict rights, freedoms and guarantees in cases expressly provided for in this Constitution, and such restrictions shall be limited to those needed to safeguard other rights and interests protected by this Constitution." "Article 20. Access to Law and Effective Judicial Protection **1.** Everyone shall be guaranteed access to the law and the courts in order to defend those of his rights and interests that are protected by law, and justice shall not be denied to anyone due to lack of financial means." "Article 268. Citizens' Rights and Guarantees […] **4.** Citizens shall be guaranteed effective judicial oversight of those of their rights and interests that are protected by law, particularly including the recognition of the said rights and interests, the impugnation of any administrative act that harms their rights and interests, regardless of its form, the issue of positive rulings requiring the practise of administrative acts that are due by law, and the issue of adequate injunctions."

associations. Thus, the entity promoting and organising the settlement of disputes through arbitration is formed of sports bodies that will be parties in conflicts tried at SAT. In effect, SAT is created and maintained by parties that will use its system of dispute resolution. In addition, the three-member panel of arbitrators at SAT can be selected from a list fixed by SAT's members, or SAT's president can nominate an arbitrator if the parties failed to do it. Once a tribunal is formed, SAT's president will also determine who will be the panel's president. As a result, the Constitutional Court ruled that not only SAT's nature limited the autonomy of the parties, but its procedures for the selection of arbitrators gave serious doubts about their independence and impartiality. After the decision, on 06 September 2013, the Portuguese Legislative approved Law 74, which changed Decree 128/XII, and now, Article 8 of the Law's Annex provides for the possibility to appeal to a local court from Sports Arbitral Tribunal decisions.

In this case, there is a presumption that the athlete and the sports body are not in equal footing. This is because the adherence to the arbitration clause is an "in or out" scenario. If the athlete rejects the arbitration agreement that is imposed as a condition for their participation in a sports competition, the athlete cannot exercise their trade. Furthermore, the clause will be imposed by a sports body that controls the sport activity and its rules. That is why the relationship between the athlete and the sports body is not always representative of an equilibrium.

In the second case, the Portuguese Constitutional Tribunal had a different view regarding compulsory arbitration in relation to disputes involving intellectual property.[65] Law No. 62, of 12 December 2011, established a framework of compulsory arbitration for disputes involving intellectual property of medicines. Article 2 of Law No. 62 stated that for such cases, disputes will be solved by arbitration, being ad hoc or institutional.[66] The argument raised was again the fact that compulsory arbitration violates the parties' right to access to courts specified in Article 20(1) of the Constitution. This time, the question involved an appeal in an injunction aimed at stopping the respondent from producing, stocking, offering, possessing or introducing to the Portuguese market a medicament. The issue revolved in the allegedly lack of access to courts when it comes to injunctions in compulsory arbitrations. Following the precedent of the Sports

[65] Case No. 763/13, Tribunal Constitucional, Acórdão no 123/2015, decided on 12 February 2015 by Justices Maria José Rangel de Mesquita, Lino Rodrigues Ribeiro, Carlos Fernandes Cadilha, Catarina Sarmento e Castro and Maria Lúcia Amaral.

[66] The wording of the Article is: "The disputes arising out of invocation of industrial property rights, including precautionary procedures related to medicines, within the meaning of point (a) (ii)) of paragraph 1 of article 3 of Decree-Law No. 176/2006 of 30 August, and generic drugs, whether they are concerned with patents process, product or use, or supplementary protection certificates, shall be subject to arbitration necessary, institutionalized or not institutionalized."

Arbitration decision, the Constitutional Court realised that in this case there was, in the law, an option to appeal. Article 3(7) of Law No. 62 provides that the decision issued by the arbitral tribunal is subject to an appeal to the local court.[67] As a result, there was no violation of the constitutional principle to have access to courts. Furthermore, the ruling addressed the fact that compulsory arbitration did not have a mechanism for interim measures and therefore an injunction could not be claimed through arbitration. This point would create a restriction to the right to access to court, but again, the argument was rejected as the Constitutional Court asserted that the Portuguese Arbitration Act has provisions for interim measures and by analogy, it can be used for compulsory arbitrations. This instance did not involve inequality of arms but procedure tools to guarantee access to courts. As a result, the question was not exactly about a constitutionality because in the end, the interim measure that was not present in the Law No. 62 could be found in the Portuguese Arbitration Act.

4 COMPARATIVE ASSESSMENT

As explained at the beginning of this article, the method for comparison would be the functional equivalence, meaning that despite the differences in legal systems, there are institutions in each system serving a similar function. Arbitration, in different jurisdictions, has a similar function: that is to provide an alternative form of dispute resolution, thus ousting the exclusive jurisdiction of local courts. Moreover, the constitutional challenges to the validity of arbitration were, more or less, attacking the right to access to court or a right related to it. Therefore, to look at the functionality of the issues being compared – that is, the challenges to the validity of arbitration acts – this part of the article will assess their purpose and utility and see if there are any concrete reasons to raise a challenge to the constitutionality of an Arbitration Act or to constitutional issue connected to arbitration.

When a challenge is made to the act in itself, it is done in a form of constitutional control. Accordingly, the highest court in the county is called to decide if an act passed by the legislative power is in line with the Constitution. Normally, such decision has an *erga omnes* effect,[68] and the law is no longer valid once a decision stating so is made. From the cases analysed in section 2 of this paper, no challenge was successful; however, they appear to fulfil

[67] The wording of the provision is: "From the arbitral decision, an appeal can be made to the competent court of appeal, having a devolutive effect."
[68] This was not the case of the Brazilian decision as explained above in footnote no. 16.

the same function but in a different way. The majority had a similar focus, which was the exclusive jurisdiction of courts over arbitration.

In the USA, the question was if maritime disputes would be arbitrable. If that were the case, courts would have exclusive jurisdiction of such disputes and removing this prerogative would be unconstitutional. In Brazil, the question went further to add that arbitration not only removes the exclusive jurisdiction of courts, but it also violates the principle of natural justice. In Australia, the argument was that the Arbitration Act gave judicial power to arbitrations when such power should be vested in courts, which is basically saying that the courts have exclusive power to rule disputes. It seems that in the three jurisdictions, the function of the challenge was the same, that is to state that arbitration is usurping the role of the judiciary and because of that, the procedure will be unfair, hence the argument about offending the principle of natural justice.

The cases in Mexico and Hong Kong also had challenges to the Act in itself but this time, although related to the exclusive jurisdiction of courts, the cause of action was not exactly the monopoly of courts to adjudicate disputes. They were based on features of arbitration. Thus, in Mexico the right to be tried in a court was the reason for the allegedly unconstitutionality, however, the support was that the Arbitration Act violated the constitutional right to be tried in a court where the procedures are established by law. It was just a tangential claim that arbitration does not follow procedures enacted by the Mexican legislative, but its own rules. It seems like a weak argument because what would be the point of having a procedure determined by law in arbitration? The attraction of arbitration is that parties are free to establish the procedure that they would like to adopt. In effect, the Mexican decision stated that although arbitration is private, the law has established minimum standards for it to take place, and such parameters are in line with the Mexican Constitution. In Hong Kong, again, the challenge was to a feature of arbitration, which is the fact that arbitration does not provide for the award to be subjected to appeals.[69] Nonetheless, connecting the right to appeal with the exclusive jurisdiction of the Court of Appeal to rule disputes in Hong Kong is, actually, a challenge to the exclusive jurisdiction of the Hong Kong Courts disguised as an offence to the right to appeal.

In Madagascar, the challenge was not to the Arbitration Act but the right to appeal from arbitral decisions made in collective bargaining. The challenge was made to a provision of the

[69] See (n 4).

Labour Code providing for arbitration as the last resort in a three-stage dispute resolution mechanism. The argument was that arbitration was final and it restricted the parties' right to present their case. This was not a direct challenge to the exclusive jurisdiction of courts, but to a method used to assert the right to be heard. Be that as it may, the right to be heard is a guarantee provided by the right to access to court, which, according to the claimants, could not be properly guaranteed in arbitration.

The Colombian case is the variant in this sequence of decisions. There, the challenge was that enforcement of an award violated the constitutional right of party autonomy. This case was not a direct challenge to the Colombian Arbitration Act but a party wanting to find a tangential reason to annul an award, and for that, it employed a constitutional argument. The question in the case was about being a party to the arbitration agreement, not the arbitration in itself. The Colombian example differs from the previous samples as it really feels like a procedural "Hail Mary" to see if the award's decision could be reversed.

The last two samples of this study are different in nature. Despite the same rationale being adopted, this time the exclusive jurisdiction to courts referred to compulsory arbitration. There was no possibility or option given to the parties: it was either arbitration or no chance of redress. However, this was not done by the Arbitration Act; on the contrary, it was provided for in another piece of legislation. In Guatemala, the law providing for compulsory arbitration derived from a free trade agreement that conflicted with the Guatemalan Constitution. The Guatemalan Constitutional Court understood that arbitration in itself was constitutional, nevertheless, compulsory arbitration was against the principle of natural justice and it hindered access to court. In Portugal, a provision in a statute establishing compulsory arbitration in sports disputes was considered unconstitutional in a similar argument to the question debated in Hong Kong, the right to appeal. When waived, the right to appeal removed the exclusive jurisdiction of Portuguese courts to settle disputes in Portugal. However, as opposed to Hong Kong, the arbitration was compulsory, therefore the Portuguese court stated that waiving the right to appeal in voluntary arbitration is constitutional whereas in compulsory arbitration it is not. In the decision regarding intellectual property, the same question was raised but the law provided for an appeal, therefore, there was no unconstitutionality.

What all cases have in common is that they challenge the fact that arbitration would restrict the right to access to court, or some benefit deriving from such right. There might be some foundation to this plea, as all the jurisdictions analysed have some provision with constitutional character protecting this right. This is not done randomly, the right to access to

court is a recognised right in international instruments.[70] Consequently, the purpose and utility of this protection, which is to make sure that all persons have a right to obtain redress for violation of their rights, can be found in the legislation of the jurisdictions mentioned above. But when it comes to assessing the functionality of the challenges made to the validity of the arbitration acts, despite the basis for it, it appears that those related to voluntary arbitration are all a frantic attempt to avoid the inevitable, that is, the enforcement of an arbitral award. Trying to argue that an arbitration procedure, entered or adhered voluntarily, deprives the right to access to court, feels like an escape plan to avoid payment. If the arbitration agreement or the arbitral procedure is vitiated, it is understandable that it can be challenged; nevertheless, this attack can only be done on constitutional grounds if a constitutional right was not followed by the arbitral tribunal. If the tribunal does not permit a party to present its case, the constitutional right to be heard will be violated. Be that as it may, this is not an offence to an arbitration act. Additionally, arbitration acts tend to guarantee fundamental rights.[71] Therefore, if a constitutional right has been damaged, there is a relief to be sought in the arbitration act as opposed to its invalidation.

The cases concerning compulsory arbitration are a little bit more tenuous. In terms of its functionality, the decisions recognise that being forced out of the exclusive jurisdiction of a court is an attack to your right to access to court. A counter argument is that although compulsory arbitration provides for an "in or out" agreement, the party can still say no and choose not to conclude the agreement. Nonetheless, life is not always that simple. In the case of athletes, not adhering to the agreement means not participating in the competition. It is almost as if the agreement limited the person's capacity to trade. Thus, recognising that this rule is unconstitutional is just a form to protect the right to access to court. This view was not entirely shared by the European Court of Human Rights (ECtHR). For voluntary arbitration, the ECtHR established that when a dispute is submitted to arbitration, there is no violation of the right to court.[72] In relation to compulsory arbitration, in *Bramelid and Malmström v*

[70] See Article 6 of the European Convention of Human Rights, Article 8 of the Universal Declaration of Human Rights, Article 8 of the American Convention of Human Rights and Article 7 of the African Charter on Human and Peoples' Rights.
[71] See Article 1042(1) of the German Code of Civil Procedure, Article 1036(2) of the Dutch Code of Civil Procedure and Article 25 of the Japanese Arbitration Act (Law 138 of 2003).
[72] In *Deweer v Belgium* [1980] ECHR 1, at paragraph 49, the Court declared: "In the Contracting States' domestic legal systems a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts, and in criminal matters in the shape, inter alia, of fines paid by way of composition. The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention."

Sweden,[73] the ECtHR did not say it contradicted the right to access to court but it emphasised that fundamental rights provided in court should be guaranteed in the arbitral procedure.[74]

Arbitration is an exception to the exclusive jurisdiction of state courts. There is no doubt that arbitration removes the legal procedure from the judiciary, however, this does not mean that access to court has been diminish. Not only during the arbitral procedure, but also, after the arbitral procedure, a party can resort to a local court to challenge something unlawful that was done in the arbitral procedure. This is the opposite of no right to access to court. Perhaps, in arbitration, the right to access to court might be applied in a different manner when compared to how it works in court litigation, but that does not signify the end of the right to access to court.

5 CONCLUSION

The examination of the decisions challenging the constitutionality of arbitration acts or constitutional issues connected to arbitration has shown that a similar argument was raised in different countries. The attempt to undermine arbitration as a method of seizing the right to access to court was used in legal systems deriving from either the common law or the civil law family. The rationale for the majority of the challenges was not based on a sophisticated claim. From the case studies addressed in this article, the samples involving voluntary arbitration resemble a "last shot" of some glory in the dispute. This can be seen in the cases from USA, Colombia, Madagascar and Mexico. They all tried to find a loophole to raise a constitutional challenge where the violation of a constitutional right was not clear, and at times, so tangential that it is hard to conclude that this was an offense to the constitution. In other jurisdictions, such as Brazil, the challenge was not made by the parties but by the court *ex officio*. This is a particular case, but the substance of the claim is very similar to the one used by parties when raising this argument, that is, access to courts. In this sense, the Hong Kong and the Australian cases provide a good example of an attempt to avoid arbitration that that the parties freely agreed to, without any vitiation. The first one focused on the right to appeal to the highest court of the land, and the second one focused on the integrity of the judiciary as it could not correct

[73] (1983) 5 E.H.R.R. 249.

[74] *Ibid*, at paragraph 30: "Furthermore, the Commission notes that a distinction must be drawn between voluntary arbitration and compulsory arbitration. Normally, Art. 6 poses no problem where arbitration is entered into voluntarily ... If, on the other hand, arbitration is compulsory in the sense of being required by law, as in this case, the parties have no option but to refer their dispute to an Arbitration Board, and the Board must offer the guarantees set forth in Art. 6(1)."

an award based on error of law. The same cannot be said about the two jurisdictions where compulsory arbitration was considered unconstitutional. In Guatemala and Portugal, the idea that arbitration obliges the parties regardless of their consent does not go hand-in-hand with the right to access to court, on the contrary, it removes party autonomy and limits the right to access to court.

To conclude, on the one hand, through the comparison of the cases in voluntary arbitration, as the result was the same in the seven jurisdictions studied, the discussion appears to be more academic and with no negative impact to arbitration. On the other hand, when it comes to voluntary arbitration, privatising justice without the parties' consent feels like a strike to the constitutional right to have access to court. Even though a party can have access to remedies in court against compulsory arbitration, forcing someone to arbitrate clashes with the idea that arbitration is a consensual method of dispute resolution. The result obtained from the comparison is that the functionality of the challenges was the same; in voluntary arbitration, to delay the enforcement of the award; and, in compulsory arbitration, to recognise that imposing arbitration might not go hand in hand with the right to access to courts.