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# ITA IN REVIEW

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**TABLE OF CONTENTS**

**ARTICLES**

2018-2019 YOUNG ITA WRITING COMPETITION: “NEW VOICES IN INTERNATIONAL ARBITRATION” WINNER: A DATA ANALYSIS OF THE IRAN-U.S. CLAIMS TRIBUNAL’S JURISPRUDENCE—LESSONS FOR INTERNATIONAL DISPUTE- SETTLEMENT TODAY	<i>Damien Charlotin</i> 1
2019 YOUNG ITA WRITING COMPETITION: “NEW VOICES IN INTERNATIONAL ARBITRATION” FINALIST: KEEPING UP WITH LEGAL TECHNOLOGY: THE IMPACT OF THE USE OF PREDICTIVE JUSTICE TOOLS ON AN ARBITRATOR’S IMPARTIALITY AND INDEPENDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION	<i>Shervie Maramot</i> 37
BACK TO THE FUTURE? INVESTMENT PROTECTION AT A TIME OF UNCERTAINTY?	<i>Brian King &amp; Jue “Allie” Bian</i> 56
CORRUPTION AS A JURISDICTIONAL BAR IN INVESTMENT TREATY ARBITRATION: A STRATEGIC REFORM	<i>Georgios Martsekis</i> 74
THE BLURRING OF THE LINE BETWEEN CONTRACT-BASED AND TREATY-BASED INVESTMENT ARBITRATION	<i>Laurence Boisson de Chazournes</i> 94

**ITA CONFERENCE PRESENTATIONS**

KEYNOTE REMARKS: STATE PARTIES IN CONTRACT-BASED ARBITRATION: ORIGINS, PROBLEMS AND PROSPECTS OF PRIVATE-PUBLIC ARBITRATION	<i>Charles N. Brower</i> 103
KEYNOTE REMARKS: 6TH ANNUAL ITA-IEL-ICC JOINT CONFERENCE ON INTERNATIONAL ENERGY ARBITRATION	<i>Eileen Akerson</i> 128
PANEL DISCUSSION: RESOURCE NATIONALISM IN EMERGING MARKETS	<i>Panelists</i> 137
PANEL DISCUSSION: THE FUTURE OF INVESTOR-STATE DISPUTE SETTLEMENT AND THE IMPLICATIONS FOR THE ENERGY INDUSTRY	<i>Panelists</i> 157

CONFERENCE REPORT:  
CONFERENCIA ICC-ITA-ALARB, MEDELLÍN, COLOMBIA *Julieta Ovalle Piedra* 186

**YOUNG ITA**

#YOUNGITATALKS  
THE AMPARO: KEY FACTOR IN THE ARBITRATION SCENE  
OF CENTRAL AMERICA & MEXICO *David Hoyos de la Garza & Ana Catalina Mancilla* 190

YOUNG ITA CHAIR'S REPORT *Robert Landicho* 197

# ITA IN REVIEW

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---

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## **#YOUNGITATALKS**

### **THE AMPARO:**

## **KEY FACTOR IN THE ARBITRATION SCENE OF CENTRAL AMERICA & MEXICO**

by David Hoyos de la Garza & Ana Catalina Mancilla Uribe

### **I. INTRODUCTION**

In July, San Jose, Costa Rica and Monterrey, Mexico hosted the latest #YoungITATalks forum, which was also carried via videoconference. Panelists from all over Central America and Mexico gathered to discuss and share current trends in their respective countries regarding the recognition, enforcement, and annulment of arbitral awards.

The in-person panels were held at the headquarters of the Costa Rican–American Chamber of Commerce’s International Center for Conciliation and Arbitration (CICA-AmCham) in San Jose and the Hogan Lovells office in Monterrey; speakers from El Salvador, Guatemala, Nicaragua, and Honduras also participated in the event through the webinar.

A common topic during both sessions was the relevance of the *amparo* action available in certain jurisdictions that may interfere with procedures related to the recognition, enforcement or annulment of arbitral awards. The speakers discussed how, according to their own experience, this constitutional remedy has become a relevant point to reflect upon when applying for the recognition and enforcement of an award, but most importantly when litigating an annulment request.

### **II. THE AMPARO IN LATIN AMERICA**

As a brief background, in Latin America, the commonly called *amparo*<sup>1</sup> is a means of protection against any violation of a person’s (natural or legal) constitutional rights, regardless of whether the entity causing such violation is a public authority or a

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<sup>1</sup> Gloria Orrego Hoyos, UPDATE: *The Amparo Context in Latin American Jurisdiction: An Approach to an Empowering Action*, GLOBALEX (2017), <https://www.nyulawglobal.org/globalex/Amparo1.html>.



private party. In essence, the *amparo*'s purpose is the direct protection of human rights.

This constitutional remedy was first established in Mexico at the end of the nineteenth century and, since then, it has been adopted by several Latin American countries, including those located in Central America.<sup>2</sup> The reason behind the adoption and similarity of the *amparo* in these countries is based on their constitutions; all of them having a federal instrument that provide an extensive and detailed declaration of human rights. The *amparo* is there to guarantee the protection of those rights.

In the majority of the participants' countries, to challenge an unfavorable arbitral award or to request the enforcement and recognition of a favorable award, the interested party has to apply for such action from the competent judicial authorities. After such processes, many Central American countries'—and Mexico's—legislations provide the *amparo* as a means to challenge the judicial determinations rendered therein. By the *amparo* the parties may allege a violation of their constitutional rights. Some of those allegations may be based on a lack of legal grounds for the ruling court's decision or any other violation to their due process, as these rights are protected by these countries' constitutions.

This constitutional remedy creates obstacles to the purposes of the arbitration proceeding. It forces the litigants to go through two additional judicial instances, delaying the process. That is, for the award to be reviewed or enforced, it must go through the enforcement or vacatur judicial processes and, later, be reviewed in a constitutional proceeding (through an *amparo* action brought against the judicial resolution). These two instances have a direct impact on the proceeding's timeframe and create a risk of an undesirable modification to the substance of the award by judicial authorities.

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<sup>2</sup> Cecilia Flores, *Does the New Amparo Law Threatens Arbitration in Mexico?*, KLUWER ARB. BLOG (2015), <http://arbitrationblog.kluwerarbitration.com/2015/10/24/does-the-new-amparo-law-threatens-arbitration-in-mexico/>.



Notwithstanding these considerations, all speakers agreed that the arbitration scene is substantially improving in Central America and Mexico, noting that the scope of the *amparo* action is being limited or even declared inadmissible in many jurisdictions.

For example, the Guatemalan Constitutional Courts' recent holdings tend to narrow the *amparo*'s scope. According to Sosa, these tendencies need to continue in order for Guatemala to become a competitive regional arbitral seat.<sup>3</sup>

Mexico's and Honduras' recent reforms are also an example of countries making their constitutional remedies less threatening for arbitration. For Mexico, the viable remedy against the annulment's resolution is now an *amparo directo*. As for Honduras, the annulment process may be solved before another Arbitral Tribunal, therefore, its resolution is not subject to this remedy.

Although the *amparo* may never be completely eliminated from these countries, recent efforts made by the courts and legislators regarding its proceeding, aim for a faster and more efficient mean of protection.

At the #YoungITATalks, among other matters, the speakers from Mexico, Honduras, Costa Rica, and El Salvador had interesting insights regarding the *amparo* procedures in their countries.

### III. CHANGES IN MEXICO'S CONSTITUTIONAL REMEDIES

Mexican legislation regulates two different *amparo* proceedings. On one hand, the *amparo directo*—a single instance procedure initiated either before the Supreme Court or the Collegiate Circuit Courts—which is only admissible against the final resolution in a judicial process; one that ends a trial. On the other hand, the *amparo indirecto* is a slower proceeding—subject to two levels of review, brought before a District Court Judge to challenge an unconstitutional or unlawful act generally committed by a non-judicial government official.

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<sup>3</sup> Iosif Alexander Sosa, *Arbitration in Guatemala: The Admissibility of the Amparo Action Regarding Judicial Assistance on Jurisdictional Matters*, Kluwer Arb. Blog (2019), <http://arbitrationblog.kluwerarbitration.com/2019/04/12/arbitration-in-guatemala-the-admissibility-of-the-amparo-action-regarding-judicial-assistance-on-jurisdictional-matters/>.



As part of the 2013 reform to Mexico's *Amparo* Law, an *amparo indirecto* may be filed against private institutions or individuals when they execute acts equivalent to those from an authority. However, Carlos Leal-Isla shared that there have been several dissenting criteria determining that this constitutional remedy cannot be brought against an arbitral award itself. Nevertheless, an *amparo* can be filed against the resolution rendered by the judge in the enforcement proceeding or in the annulment special procedure. A notable comment concerning this remedy is that the available proceeding against such resolution is now the *amparo directo*.

This is an important change in the arbitration scene in Mexico. The *amparo indirecto* is, by essence, a slower proceeding to that of the *amparo directo* because its decision can be appealed to a higher court. This modification was the result of the 2011 reform to the Code of Commerce. That reform abolished the ancillary procedure of annulment in favor of a new annulment special procedure; making its resolution the end of the trial, thus, making the *amparo directo* the only remedy available.

#### **IV. NO AMPARO AGAINST THE ANNULMENT RESOLUTION IN HONDURAS**

Unlike Mexico's, the *amparo* action in Honduras can only be filed against resolutions issued by public officials or state authorities. Such proceeding can be initiated before the Supreme Court, before the Appellate Circuit Courts, or before the Specialized Courts depending on the alleged violations. The decision rendered in the *amparo* proceeding does not admit any other remedy.<sup>4</sup>

Regarding the arbitration scene in his country, especially the annulment process against arbitral awards, Roberto Williams commented that, to avoid the obstructions of *amparo*, this process may be brought before another Arbitral Tribunal. This second Tribunal is normally administered by the same Center as the one that administered the original proceeding. This second arbitration is available if previously agreed upon by the parties. The benefits of considering this option is that any resolution issued by the aforementioned Arbitral Tribunal—according to the applicable legislation and

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<sup>4</sup> Francisco Daniel Gómez Bueso, EL DERECHO DE AMPARO EN HONDURAS, <https://core.ac.uk/download/pdf/30047167.pdf>.



recent jurisprudence—is immune to the *amparo* action since it is not rendered by public officials or state authorities.

## V. THE PARTICULARITY OF THE AMPARO IN COSTA RICA

The Costa Rican *amparo* is different from other constitutional remedies in the region. In Costa Rica, there is no need to previously exhaust the corresponding judicial remedies. This characteristic grants the user the possibility to proceed directly before the Constitutional Court against any unconstitutional act held by an administrative authority or private party. However, this constitutional remedy is not admissible against judicial decisions.

In the arbitration scene, the Constitutional Court has held that the *amparo* action is inadmissible against the arbitration proceedings and its awards. The reasoning behind such holding is that the special laws on the subject contain the necessary remedies against those proceedings or awards.<sup>5</sup> Christian Díaz also discussed this topic by stating that making the *amparo* unavailable, the Court has made its stand to not intervene in the arbitration procedure.

## VI. THE EFFECTIVENESS OF THE AMPARO IN EL SALVADOR AGAINST ARBITRAL AWARDS

Under Salvadoran legislation, an *amparo* can be filed against acts or omissions of public or private entities that violate or restrict someone's constitutional rights. According to article 81 of El Salvador's Law of Constitutional Proceedings,<sup>6</sup> the resolution rendered in the *amparo* proceeding is final and does not admit any kind of appeal, just like Mexico's *amparo directo*.

There is, however, still a dissenting criterion regarding the faculties of the Judicial Courts to dive in and analyze a constitutional transgression in an arbitral award; especially when it comes to awards issued abroad. Humberto Sáenz commented on the matter describing the situation as a problem—or rather a challenge—that El

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<sup>5</sup> See Pablo Rey Vallejo, *El Arbitraje y los Ordenamientos Jurídicos en Latinoamérica: Un Estudio sobre Formalización y Judicialización*, Universitas (2013), <http://www.corteidh.or.cr/tablas/r32022.pdf>.

<sup>6</sup> D. Leg. No 2996, Ley de Procedimientos Constitucionales, 186 D. Off. 15, Jan. 22, 1960.



Salvador must face. However, his country is adapting in order to become a more arbitration friendly jurisdiction.<sup>7</sup>

Regarding the effectiveness of the *amparo* against the recognition of an award, Mr. Sáenz noted that, even after being granted the constitutional protection and prevented its recognition in El Salvador, the opposing party may still go to a foreign jurisdiction and request recognition and enforcement under their legislation. Where, as he explained, the judicial authority could ignore the *amparo*'s protection, since the New York Convention<sup>8</sup> does not bind the authorities to recognize a foreign judicial resolution issued in relation to such arbitral award.

## VII. CONCLUSION

The insights shared in this #YoungITATalks suggest that, indeed, when applying in this region for the recognition, enforcement, or annulment of arbitral awards, it is very important to consider the *amparo* action available in each jurisdiction. However, as described, the recent changes in the region's legislation regarding the *amparo* proceeding and the latest precedents issued by the judicial authorities on the matter reveal a pro-arbitration tendency, which is undoubtedly a promising sign for the arbitration scene in Central America and Mexico.



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<sup>7</sup> Manuela de la Helguera, *El Salvador, Towards An Arbitration Friendly Jurisdiction*, Kluwer Arb. Blog (2013), <http://arbitrationblog.kluwerarbitration.com/2013/07/24/el-salvador-towards-an-arbitration-friendly-jurisdiction/>.

<sup>8</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. I.1, I.2, 1155 U.N.T.S. 331, 7 I.L.M. 1046.

#YOUNGITATALKS

THE AMPARO: KEY FACTOR IN THE ARBITRATION SCENE  
OF CENTRAL AMERICA & MEXICO



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## Table of Contents

### ARTICLES

A DATA ANALYSIS OF THE IRAN-U.S. CLAIMS TRIBUNAL'S JURISPRUDENCE—LESSONS FOR INTERNATIONAL DISPUTE-SETTLEMENT TODAY	<i>Damien Charlotin</i>	1
KEEPING UP WITH LEGAL TECHNOLOGY: THE IMPACT OF THE USE OF PREDICTIVE JUSTICE TOOLS ON AN ARBITRATOR'S IMPARTIALITY AND INDEPENDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION	<i>Shervie Maramot</i>	37
BACK TO THE FUTURE? INVESTMENT PROTECTION AT A TIME OF UNCERTAINTY?	<i>Brian King &amp; Jue "Allie" Bian</i>	56
CORRUPTION AS A JURISDICTIONAL BAR IN INVESTMENT TREATY ARBITRATION: A STRATEGIC REFORM	<i>Georgios Martsekis</i>	74
THE BLURRING OF THE LINE BETWEEN CONTRACT-BASED AND TREATY-BASED INVESTMENT ARBITRATION	<i>Laurence Boisson de Chazournes</i>	94

### ITA CONFERENCE PRESENTATIONS

STATE PARTIES IN CONTRACT-BASED ARBITRATION: ORIGINS, PROBLEMS AND PROSPECTS OF PRIVATE-PUBLIC ARBITRATION	<i>Charles N. Brower</i>	103
KEYNOTE REMARKS AT THE ITA ENERGY CONFERENCE	<i>Eileen Akerson</i>	128
RESOURCE NATIONALISM IN EMERGING MARKETS	<i>Panel Discussion</i>	137
THE FUTURE OF INVESTOR-STATE DISPUTE SETTLEMENT AND THE IMPLICATIONS FOR THE ENERGY INDUSTRY	<i>Panel Discussion</i>	157
CONFERENCIA ICC-ITA-ALARB, MEDELLÍN, COLOMBIA	<i>Julieta Ovalle Piedra</i>	186

### Young ITA

#YOUNGITATALKS, SAN JOSE, CR & MONTERREY, MX	<i>David Hoyos de la Garza &amp; Ana Catalina Mancilla</i>	190
YOUNG ITA CHAIR REPORT	<i>Robert Landicho</i>	197

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