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The “Amparization” of the Justice System in Latin America and International Arbitration

Manuel A. Gómez (Florida International University College of Law) · Friday, November 1st, 2013 · Institute for Transnational Arbitration (ITA), Academic Council

One of the most important legal developments in Latin America during the last few decades has been the expansion in the protection of fundamental rights. This has occurred not only with regard to the express recognition of new substantive rights into several national legal systems, but also regarding the creation of procedural remedies geared to ensure the defense of those rights. Some specific procedural vehicles include the writ of amparo -also known as *tutela* or *mandato de segurança*-, the habeas data, and more recently, the different types of popular and group actions. These mechanisms have increasingly become the subject of specific constitutional provisions and further statutory regulation.

In those countries where Constitutional courts exist such as Colombia, a growing body of judicial decisions has routinely interpreted the formal law in a way that broadens the reach of the constitutional protection to situations not covered before. Litigants and ordinary judges have also played an important role in this phenomenon. The former, by advocating for novel and creative arguments that seek to reshape the status quo for the benefit of their own positions; and the latter, by supporting or restraining the actions of the litigants, and also by imprinting their nuanced interpretations on the black letter law.

Another related and important legal phenomenon in the Latin American region, has been the wider acceptance of international and domestic arbitration. This has mainly occurred through the modernization of national laws, the rise of national arbitral institutions, and the adoption of important international treaties such as the New York Convention, which contribute to enhancing the efficacy of the system. According to recent statistics, at least ten Latin American countries have adopted the UNCITRAL Model Law on International Commercial Arbitration, and eighteen of them have ratified or acceded to the New York Convention.

Moreover, some Latin American jurisdictions have also experienced an upsurge in both domestic and international arbitration-related court cases, which has in turn prompted the national courts to redefine their role vis-à-vis the arbitral process. Although most modern legislations have espoused the principle of minimal or non-judicial intervention in arbitration, and have as a result narrowed the involvement of the national courts to a supporting role; some judges in the region are still struggling with this idea thus giving rise to a significant tension. On the one hand, is the policy that favors the autonomy of the arbitral process and its perceived efficiencies, among which the idea non-judicial intervention takes an important place. On the other hand, is the traditionally

formalistic view that still considers the judiciary to hold the monopoly of dispute processing in society.

This tension is exacerbated by the expansive role accorded to the national courts, as mentioned earlier, with regard to their active defense of a rapidly growing list of individual and collective rights deemed to warrant constitutional protection. The number of such cases has grown at an unprecedented rate in several jurisdictions, and the granting of extraordinary remedies for alleged constitutional violations has also multiplied. The courts vested with the power to decide these constitutional cases are routinely given sweeping authority, their proceedings are also treated as urgent matters, and the sanctions imposed for non-compliance with their constitutional orders are usually harsher than the ordinary remedies afforded by civil and commercial courts.

These features have naturally made it extremely attractive to private litigants to try identifying purported constitutional violations in their ordinary claims, as a way to take advantage of the enhanced constitutional proceedings available and prevail in their cases. This phenomenon, which has led to an abusive filing of extraordinary writs of amparo in several countries of the region, has become known as “amparization” of the justice system.

Unsurprisingly, such tactical use of constitutional remedies has also made it to the world of international arbitration, thus leading to a pernicious practice that taints and confuses the role of the courts and the rightful application of well-established arbitral principles. The frequent use of writs of amparo throughout the region to circumvent annulment proceedings and other proper remedies set forth in the national arbitration laws, have become a staple in the practice of international arbitration in some Latin American jurisdictions.

The general perception is that parties are increasingly relying on amparo petitions to delay the course of arbitral proceedings, to interfere with the process, to coerce unfavorable arbitrators, and to evade the recognition and enforcement of arbitral awards. Although some litigants prevail in their tactics, there is also an increased awareness among national judges who have taken a firm position to avoid becoming instruments in the parties’ overall litigation strategy. Hopefully, as national judges become more familiar and knowledgeable with international arbitration and related institutions and principles, they will be in better position to identify these tactics that negatively affect the good development of international arbitration and the much needed constitutional protection of fundamental rights.

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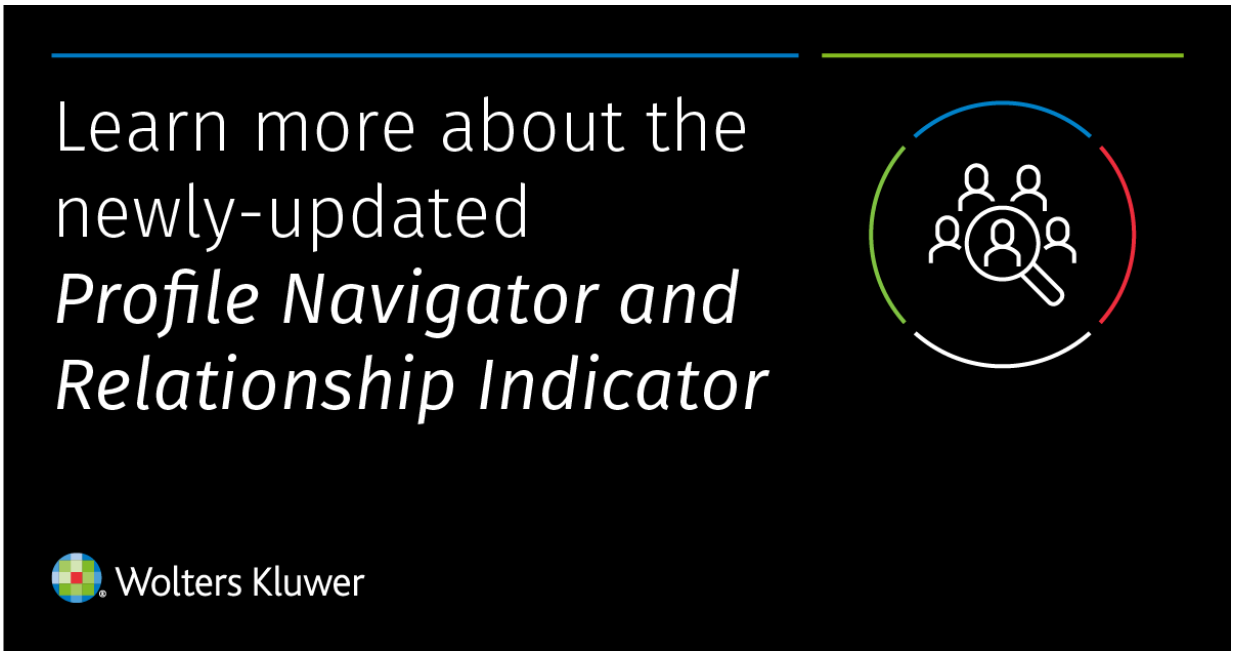

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