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The applicability of the exequatur process for the enforcement of foreign arbitral awards in Bolivia

La aplicabilidad del proceso de exequátur para la ejecución de laudos arbitrales extranjeros en Bolivia

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Abstract

International commercial arbitration is an efficient and feasible way of solving international disputes in private law, in Bolivia this field is little exploited so by this article is to analyze the effectiveness of applying the recognition and enforcement of foreign commercial arbitral awards as international conventions signed and ratified by the state, by internal policy and procedural study, to promote the effectiveness of dispute resolution with foreign elements through commercial arbitration also getting the incentive to the practice of this alternative method of resolution litigation and may be approved by courts for your requirement.

Arbitration award, Exequatur, Commercial law, Judicial process

Resumen

El arbitraje comercial internacional es una forma eficaz y factible de resolver controversias internacionales de derecho privado, en Bolivia este campo es poco explotado por lo que mediante el presente artículo se pretende analizar la eficacia de aplicar el reconocimiento y ejecución de laudos arbitrales comerciales extranjeros como convenios internacionales suscritos y ratificados por el estado, mediante el estudio normativo y procesal interno, para promover la eficacia de la resolución de controversias con elementos extranjeros a través del arbitraje comercial obteniendo además el incentivo a la práctica de este método alternativo de resolución de litigios y que pueda ser homologado por los tribunales para su requerimiento.

Laudo arbitral, Exequátur, Derecho mercantil, Proceso judicial

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Introduction

The purpose of this article is to carry out a normative analysis of Bolivia's domestic legislation in order to identify the recognition of foreign arbitral awards in commercial matters, since, as we will explain later, arbitration as an alternative method of dispute resolution has become very important at the international level, although in Bolivia it is a little explored subject, which with the abundant procedural burden within the judicial courts would alleviate and solve in a prompt and efficient manner the problems of an international private nature.

It is for this reason that it is essential to delve into the subject not only of arbitration but also of the post-arbitration procedure, which in many cases is where the process lies, leading the situation to become embroiled in judicial instances, which is precisely what was intended to be avoided by resorting to arbitration.

This article does not project an exhaustive study of arbitration, but rather aims to generate basic guidelines for the practice of this method to develop and not to be oblivious to the progress of the rest of the countries.

As for the problem, we have focused on identifying the reasons why the institution of arbitration has not been promoted or is not widely practiced in our country, in addition to identifying the fast procedure by which the recognition and enforcement of the arbitral award framed in the New York Convention of 1958 should be developed.

In this way, we are convinced that progress will be made in the prompt resolution of commercial disputes, since it is necessary that our regulations and practicality are on a par with those of other States, given that commercial relations are becoming essentially international in nature as a result of globalisation.

In this article we will first explain the theoretical progress that the arbitration institution has deserved both at international and national level, and then identify the applicable regulations in the recognition of foreign arbitral awards in Bolivia, and at the same time identify the circumstances under which in Bolivia there are still no known exequatur procedures in commercial matters, with the information gathered we can reach a result of the research in order to draw our conclusions in this regard.

Theoretical framework

Arbitration, in the broad sense of the term, is not new, as its practice dates back centuries, but it is since the end of the 20th century and up to the present day, as a result of the rise of the various alternative means of dispute resolution, that it has been able to position itself, achieving the proliferation of private institutions dedicated to serving as arbitrators (ICC, ICSID, etc.) which intervene to provide the parties in conflict with a prompt, suitable and rapid response in comparison with the time required to process the case in judicial instances until its conclusion. All of this, it is worth remembering, was largely encouraged by the signing (at the end of 1992) of the North American Free Trade Agreement, where one of its articles establishes the commitment of the States Parties to facilitate access to alternative means of dispute resolution [Acedo, 2013].

In international trade matters, arbitration has taken on great importance in recent years, positioning itself as the most representative and effective alternative dispute resolution method at the international level, basically consisting of the voluntary submission of the parties to the arbitration process, which concludes with an award, equivalent to a judgment, resolving the merits of the case, however, However, when this decision is approved in the national jurisdiction, it comes up against the exequatur procedure for recognition of the award, since, according to the position of the publicists, they argue that the arbitration award is of a jurisdictional nature, as the intervention of the judicial courts is necessary for it to be enforceable, as an arbitration court lacks the coerciveness to make the award effective [Barragán García, 2012].

It is at this point that there is a meeting between private and public law, on the one hand there is the principle of the autonomy of the will of the parties to decide to voluntarily submit to arbitration to settle their disputes through an arbitration clause, and on the other the domestic legal system that may or may not recognise the decision of the arbitral tribunal, The institution of arbitration as an alternative and effective method of dispute resolution, which aims above all to prevent the courts from hearing the dispute and to accelerate the settlement of disputes in a viable way, would in this sense be destroyed.

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There is another position that identifies the arbitration institution not as "an alternative form of conflict resolution" but as another judicial way of dealing with conflicts, justifying that due to the serious crisis of the judicial system worldwide in contemporary society, arbitration has been seen as "weaving a series of myths about its reality, and granting it a quality that it neither has nor corresponds to it" [Quiroga, 2013], and that in the long run, rather than benefiting it, it will reduce its strength as an adequate antecedent mechanism for resolving conflicts between private parties.

He also affirms that arbitration cannot be considered as an alternative to the judicial process, because it is not, neither historically nor in reality; nor is the waiver of rights or the judicial transaction. They are antecedent mechanisms of conflict resolution that procedural law contains of its multiple variables, where the jurisdictional judicial process is the final, terminal way of achieving the solution composed by the State in the absence of the will of the litigants.

In this respect, we can point out that this doctrinal position is not the most widely accepted worldwide, since the aim of arbitration is precisely to avoid the judicial courts, which have a heavy procedural burden to deal promptly with arbitration claims, and once the dispute has been resolved, to proceed with the homologation of the award in the state where it is to be enforced. In this sense, the United Nations, with the aim of harmonising rules on international arbitration, advocated the creation of adjective laws with a view to also agreeing substantive laws, which the majority of States are adopting without reservations, so that arbitration could be perfectly unified, at least on a regional level, which would greatly facilitate the solution of problems, thus contributing to the progress of international trade relations.

We also understand that thanks to this integration process there is a great consensus that States are obliged to recognise the validity of the arbitration agreement and to proceed with the recognition and enforcement of arbitral awards, which in commercial matters unified the rules through the UNIDROIT16 principles of international contracting, the UNCITRAL17 model law of UNCITRAL, among others, to make international investments more effective and thus have legal certainty and between States and their private relations.

Although arbitration awards in international commercial matters are recognised as definitive, it is necessary for each State, in accordance with its domestic legislation, to grant them recognition, checking that they do not infringe on domestic law, so that they can be enforced in accordance with national law, without incurring in any illegality in terms of their procedure [Briseño, 2012], all this in respect of the principle of State sovereignty and also in respect of the principle of party autonomy.

Now, in order to make it possible for the decisions taken by the arbitrators on a specific case to become effective and be executed in a territorial area different from where the award was rendered, it is regulated through the New York Convention, we can also say that it is this convention that in an attempt to simplify the recognition process and strengthen arbitration as a method of dispute resolution, which in 1958 eliminated the double exequatur procedure, which delayed the execution and increased the costs for the winning party.

This instrument, ratified by 147 countries, entered into force for Bolivia on 28 April 1995, is made up of sixteen precepts, of which the one we are interested in highlighting at this moment is the IV according to which in order to obtain the recognition and enforcement of the award -that is, the exequatur- for which the party requesting it must submit, together with the claim, the duly authenticated original of the award or a certified copy, as well as the original of the arbitration agreement (the agreement) or a certified copy, which in this sense are much more accessible requirements than those established in the Panama Convention.

It also establishes that the exequatur can only be denied for seven specific reasons that are included in the following Article V and that succinctly refer to the lack of defence of any of the parties, nullity of the agreement or the award or exequatur contrary to public order [Hernández and García 2012].

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In Latin America, the culture of arbitration still has a long way to go, so it is useful and practical to review its development process in other systems such as the French system, which is quite advanced, stimulating international arbitration with the minimalist conception of public order, without leaving the interests of the country completely unprotected, but also without hindering the development of arbitration [Albornoz, 2014]. According to this position, it is understood that "even in the presence of the laws and principles of public order, the control of the award by the judge of nullity or enforcement judge must be minimal and cannot annul or enforce it except in exceptional cases.

On the contrary, despite Bolivia being a signatory of these principles and conventions, it has not yet been fortunate enough to know and "recognise" a foreign arbitral award in commercial matters, mainly for two reasons, 1) that the exequatur procedure is alien to the knowledge of the competent judges, and/or 2) that arbitration as an alternative method of dispute resolution is not promoted and practiced to reach an agile agreement between parties, so that we will analyse the application of these two hypotheses to identify the root of the situation regarding arbitration.

Regulations concerning the process of exequatur of arbitral awards in Bolivia

Prior to the normative analysis, it is necessary to make an assessment of the constitutional reception that international arbitration has had in Latin America, highlighting that almost all constitutional texts contain provisions that favour arbitration, as for example in Argentina, Peru establishes the principle of unity and exclusivity of the jurisdictional function, which means that it opens as a jurisdiction independent from the arbitral one.

Likewise, Ecuador recognises arbitration, mediation and other alternative dispute resolution procedures; Venezuela promotes these alternative means in accordance with international conventions; a similar case is that of Mexico which, although not constitutionally recognised, is established in one way or another in the Commercial Code and the Federal Code of Civil Procedures, confirming the legality of arbitration in its territory [Briceño, 2011].

Bolivia is not excluded from this recognition, although it is not express and exhaustive in the constitutional text, it opens up a recognition framed within the principle of legal pluralism established in Article 118, recognising the coexistence of different jurisdictions in the territory, in addition to the fact that according to Bolivian legislation, which regulates arbitration and conciliation, any "arbitral decision of substance that has been issued outside Bolivia" is considered a foreign award (Article 79 of Law N° 1770).

As mentioned above, recognition is a matter of private international law. It is a judgement on the admissibility of the effects of a foreign decision, recognising it as having the same effect as a decision of the forum of a comparable nature. It is a formal and declaratory act. Formal, because it does not review the merits of the case.

The facts are not assessed, but a decision is taken on the formal conditions laid down for granting or refusing recognition. And declaratory, because it allows foreign res judicata to produce the same effects as it would produce in its State of origin [Andaluz, 2013, p. 3]. In Bolivia, the rules of the New York Convention on the subject are applicable to the recognition and enforcement of foreign awards. As an exception, the rules of Law No. 1770 apply. For the following reasons: firstly, in arbitration matters, there is an assumption in favour of recognition and enforcement, which obliges to opt for the application of the international instrument most favourable to the requesting party.

Only if there is no applicable instrument that is more favourable, the domestic provisions will be applied21; the same rule refers us to those instruments to which recourse could be had and, as Andaluz explains, the most appropriate because it is more favourable is the New York Convention because its scope of application is broader and not restrictive, by admitting that not only the States party to the convention are obliged to comply but also those that are not signatories to it, as well as those that are not signatories to it.

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Furthermore, it can be analysed that it is applicable to all awards that require recognition, according to Article I, when referring to "arbitral awards", whether they are of a commercial, family or other nature. Therefore, it can be inferred that it is applicable to the commercial and investment spheres dictated in national or international arbitration.

Therefore, of the four conventional instruments to which Law No. 1770 refers, the New York Convention is the international instrument most favourable to recognition and enforcement. Therefore, in compliance with Article 80.II, the Supreme Court of Justice must opt for its application. This does not exempt that since its ratification it should have applied it i) to the recognition of awards prior to it; and ii) to awards whose recognition procedure had been underway under other norms [Andaluz, 2013].

Standard	
Convention on Arbitration Commercial Arbitration Convention on Recognition y Enforcement of Judgments Arbitral Awards Foreign Arbitral Awards	Adopted at Panama on 30 January 1975. 30 January 1975. Adopted at New York on 10 June 1958. June 1958.
Convention on Effectiveness Extraterritorial Efficacy of Foreign Judgments and Awards Foreigners	Adopted at Montevideo on 8 May 1979. 8 May 1979.
Convention on the Settlement of Investment Disputes Investment Disputes between States and Nations of Other States	Adopted in Washington on 18 March 1965.

Table 1 Regulations applied to the recognition of foreign awards in Bolivia
Source: Bolivian Arbitration and Conciliation Law No. 1770

Having already identified as a guideline applicable to exequatur proceedings in Bolivia, it is necessary to analyse the requirements for which recognition would not be appropriate for a foreign award to be homologated according to Article V of the New York Convention, in the first place is that the party against which the award fails must request its non-recognition before the competent authority, in Bolivia that authority would be the Supreme Court of Justice according to the powers conferred by the Political Constitution of the State;

What the Court must do is first of all to observe that there have been no defects of consent such as the incapacity of the parties, errors of notification regarding the composition of the arbitral tribunal and the arbitration procedure, as well as to examine that the arbitration does not exceed the terms of the commitment between the parties.

Another ground for refusing recognition is that the decision of the arbitral tribunal is contrary to the public order of the country, which means that it must not exceed the imperative norms in force in Bolivia.

Within the Bolivian adjective norm we have the Code of Civil Procedure (1976), it establishes the application of international treaties saying that the sentences and other resolutions (arbitral awards) dictated in a foreign country will have the force established by the respective treaties, however the Political Constitution of the State in its article 410 establishes the normative hierarchy and after the CPE, the international treaties have binding force, therefore the procedure established in the New York Convention is more beneficial for the recognition of the foreign award.

Now, having made it clear that the arbitration institution is legally constituted in our domestic legislation and having ratified the New York Convention in its entirety and without restrictions, it is necessary to examine the reasons why in Bolivia, although arbitration processes have been developed, exequatur procedures have not yet been carried out.

First of all, we can establish that throughout Bolivian history there has not been a strong security in internal commercial relations, and even less so internationally, they have always been informal and somewhat unstable, and this situation has worsened during the last two presidential terms, as a "protectionist" economy has been implemented in an attempt to revalue national production, As a consequence of the above, international trade relations are scarce and, consequently, the controversies arising from them, although foreign awards have been recognised, it has been mostly in family arbitration matters (divorce cases), but not in commercial arbitration matters.

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Methodological framework

This article is framed within the basic type of research, as it aims to make a theoretical contribution in order to expand the doctrine on arbitration, taking into account that the process of recognition of exequatur in Bolivia is not very widespread and practised, i.e. practically no recognition of awards in international commercial arbitration has taken place.

It is also descriptive in nature because it aims to analyse the development of the arbitration institution in Bolivia as an effective tool for resolving conflicts between parties with foreign elements without going to court and thus promote its application.

And it is documentary because the information was obtained from books, scientific articles, scientific journals, etc.

Results

Previously we can establish that the strong impact and transcendence of globalisation, regional integration, the liberalisation of international trade and the enhancement of the autonomy of the will of the parties, together with the progress of international commercial arbitration law at a global and Latin American level, have led to a greater degree of independence of arbitration with respect to the jurisdictions of the States, the situation of liberation of arbitration from the legal systems has not been total, however, it can be stated that there has been progress, with greater or lesser intensity in each country.

Subsequently, having studied the situation of the recognition of arbitral awards, both doctrinally and normatively, it is worth making an analysis, in this regard [Serrano, 2013] states that firstly the arbitration process runs parallel to the judicial process, unlike what is expressed by the doctrine that maintains the position that there is no difference between the two processes. However, the intervention of the judicial organ of the State is not alien to arbitration, since, in order for the decision of the arbitrator or arbitral tribunal to obtain the binding force to be complied with by the parties in a coercive manner, in the event that it has not been complied with voluntarily.

It is necessary that the award be brought before a judge, who, once the corresponding incidental process of homologation (recognition) has been concluded, may, and only until then, give it enforceable force and thus be enforceable between the parties and third parties.

Therefore, what is certain is that in the face of a party reluctant to comply with the award, arbitral decisions must be approved by the competent authority, otherwise they would remain mere theoretical exercises, devoid of any legal effect or material achievement [Serrano, 2013]. This means that although there is a strong tendency to attribute independence to the arbitration institution, it is necessary for the award to be approved by the country's courts in order for it to be recognised by the Supreme Court, but the latter should only hear questions of form and not the substance of the dispute itself. In other words, it must

Conclusions

With regard to commercial arbitration, we conclude that it is the most suitable method for the parties in general, for the resolution of their disputes, because its essence is the willingness of the parties to submit to the professionals they consider appropriate, in addition to being faster, it helps to lighten the procedural burden of the courts. In the international sphere, it is the dispute resolution method par excellence because it is framed within the unification of international commercial rules as the law applicable to the resolution of the merits of the case.

It has been observed that in Bolivia, the majority of those interested in resolving their conflicts through arbitration, although they resort to this means, once the award has been rendered, it is not recognised or approved by the Bolivian courts and therefore, according to the theory of the jurisdictionalists, this award would not have coercive force for its forced compliance. In this sense, it is necessary to disseminate the exequatur procedure for the recognition of foreign awards, since our country is a signatory, without restrictions, of the New York Convention.

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