Cuatrecasas Arbitration Highlights

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Coordinators: Alberto Fortún and Santiago Rojas

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Our jurisdictions

Our lawyers in Chile, Colombia, Spain and Peru explain the most relevant judicial decisions for our clients in international arbitration matters

Chile – Juan Manuel Rey and Valentina Alamo

In its judgment of June 12, 2023, the Court of Appeals of Santiago rejected a request for annulment against an international arbitration award on the grounds of infringement of Chilean public policy, for alleged violation of Chilean rules on extinctive prescription (statute of limitations) and determination of gross negligence.

The plaintiff claimed that the arbitral award had been rendered in violation of Chilean public policy, which constitutes a ground for annulment under article 34.2(b)(ii) of International Commercial Arbitration Act 19,971. Allegedly there were two defects in the award: (i) rejecting a statute of limitations exception based on article 2000(3) of the Civil Code; and (ii) condemning the defendant for grossly negligent breach of contract, ignoring the negligence differentiation system under Chilean law and failing to apply the limitation of liability clauses in the underlying contract.

In its decisión,[1] the Court of Appeals distinguished between national and international public policy, noting that only the latter applied to international commercial arbitration. The court also recalled that international public policy does not encompass all mandatory domestic rules, but only those related to the most fundamental or relevant legal principles of the legal system in which the award is rendered or enforced.

The court rejected that the alleged defects constituted a ground for annulment, since neither the statute of limitations under article 2003(3) of the Civil Code nor the rules on negligence compromise public policy. Indeed, they can be waived, repealed or relaxed by agreement of the parties. Rather than identifying manifest defects in the award, what the plaintiff really questioned was the arbitral tribunal's weighing of the evidence and its interpretation of the relevant law. However, this falls outside the scope of the grounds for annulment.

Along the same line, the Supreme Court has confirmed its position regarding the recognition and enforcement of international arbitral awards, applying a restrictive interpretation of the grounds for refusal. In particular, the Supreme Court stated that, even if the arbitration request was not notified by an officer of the same kind as provided for in Chilean law, this did not imply a violation of Chilean public order.[2]

[1] Judgment of the Court of Appeals of Santiago, dated June 12, 2023, (Rol No. 9.422-2022).

[2] Judgment of the Court of Appeals of Santiago, dated June 12, 2023, (Rol No. 9.422-2022).

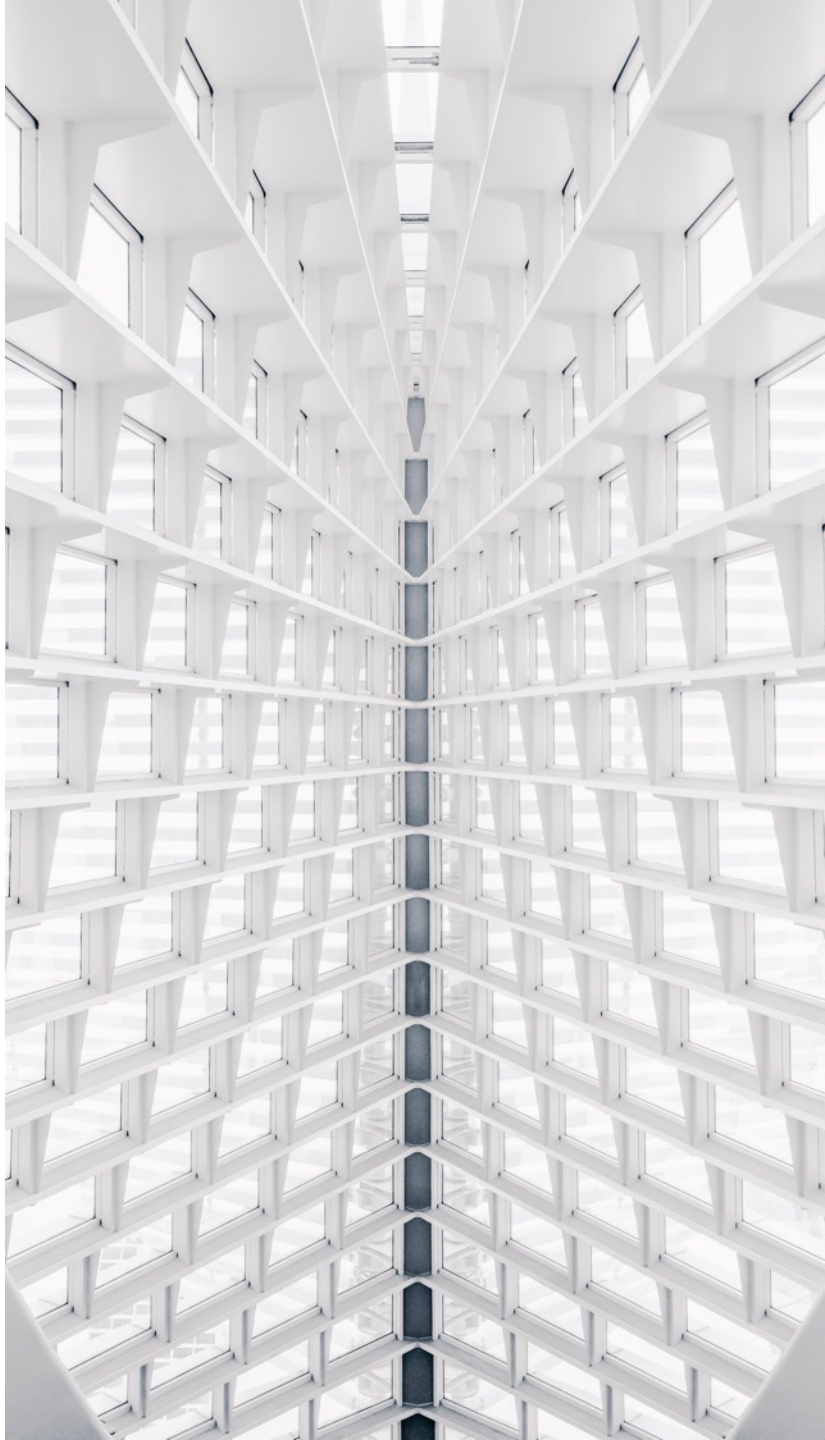
Colombia – Alberto Zuleta, Andrés Nossa and Gabriela Forero

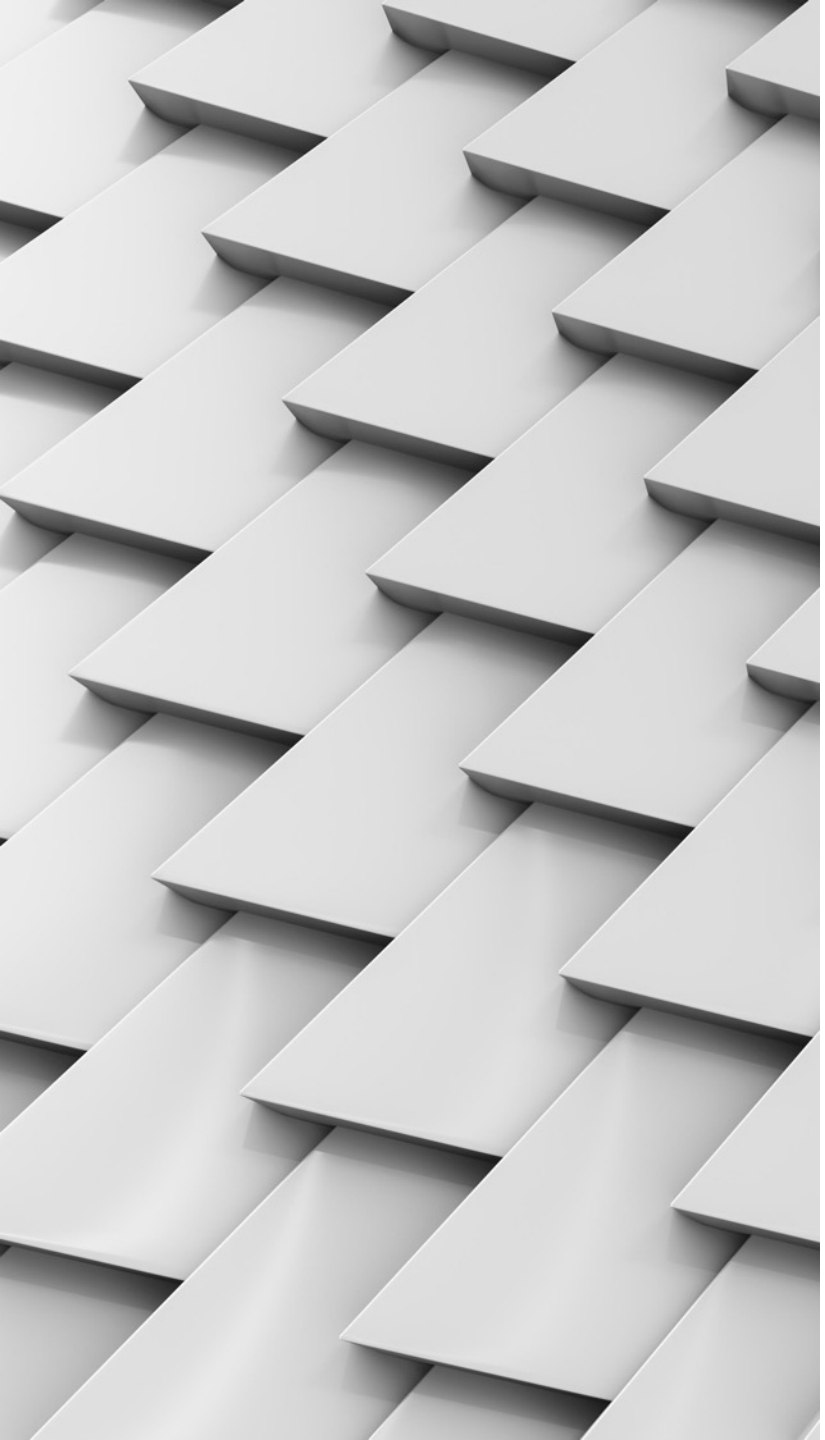
The Supreme Court of Justice dismisses the writ of protection (*tutela*) against international awards.

In its judgment of September 27, 2023, the Civil Appeal Chamber of the Supreme Court ruled on a writ of protection (*tutela*) against an international award. The appellants sought to set aside the award for an alleged violation of their fundamental rights to due process and access to justice.

The Supreme Court reiterated that the subsidiarity requirement for *tutela* actions against international awards is even stricter than for domestic awards. In this specific case, the court held that the alleged violations were related to international public policy. Therefore, they should have been alleged in the annulment proceedings and not by means of the *tutela*. Consequently, the Supreme Court dismissed the *tutela* because the subsidiarity requirement had not been met. Cuatrecasas successfully advised on the arbitration for one of the parties benefiting from the award that the appellants sought to set aside.

Two other favorable international awards were rendered last year (one administered by the International Chamber of Commerce and the other by the Arbitration and Conciliation Center of the Bogotá Chamber of Commerce). The proceedings concerned (i) a contract for the construction of fuel storage tanks, and (ii) the installation of electronic security equipment and infrastructure.





Spain – Elia Raboso

Below we summarize, in chronological order, some of the decisions rendered by Spanish courts in international arbitration matters.

Foreign award rendered in Zagreb, recognized by the High Court of Justice of Catalonia: in its order no. 92/2023 of June 15, the court recognized an arbitral award rendered in Zagreb. The court recognized that the exequatur procedure has a mere "homologating" purpose, thus giving effect to foreign decisions. Therefore, it was not entitled to review the merits of the case, but only to check compliance with public policy. This is in line with recent constitutional case law, according to which the scope of these proceedings is limited to "errors *in procedendo*" or the failure to state reasons.

The High Court of Justice of the Basque Country recognizes the limited grounds for opposition to the recognition of a foreign award: in its order no. 7/2023 of June 21, the court reaffirmed the requirements for the recognition of foreign awards. It recalled the presumption of regularity, validity and effectiveness of the arbitration agreement, and of the regularity and effectiveness of the arbitral award itself. The opposing party thus bears the burden to prove any of the grounds for refusal under the New York Convention. In this regard, the court concluded that the abuse of rights was not a valid ground for opposing recognition, especially when the intention was to reassess the merits of the case.

The High Court of Justice of Madrid partially upheld an action for annulment of an award for failure to state reasons: In its judgment no. 38/2023 of October 19, the court partially upheld an action for annulment brought by a Spanish company against an award rendered in arbitration proceedings administered by the Madrid International Court of Arbitration (CIAM). Despite the partial annulment of the award, this judgement reaffirmed the principle of minimum intervention of the supporting judge, the restrictive nature of the grounds for annulment of awards for violation of public policy, and the restrictive interpretation of the duty to state reasons in arbitral awards, as established by the Constitutional Court. In this specific case, the court considered that the reasoning relating to one of the disputed issues was only "apparent," which was tantamount to lack of reasoning.

Peru – Domingo Rivarola and Rodrigo Rabines

The Superior Court of Justice of Lima annulled an arbitral award on the grounds of improper integration of the underlying contract by the arbitral tribunal, as it was based on criteria that were not discussed in the arbitration.

In its judgment of June 28, 2023, the Superior Court of Justice of Lima[3] annulled an arbitral award which, in the absence of agreement by the parties, and after several years of negotiation, established the rental price of a group of oil assets. The plaintiff Peruvian state-owned company challenged the arbitrators' capacity to set the contractual terms, since the integration and modification of contracts cannot be subject to arbitration.

The court rejected the plaintiff's argument, stating that the arbitration agreement submitted all disputes "*arising out of or relating to*" the lease to arbitration. The court held that the arbitrators could integrate the contract by establishing the price of the rent. However, such integration had been improper, since they had applied criteria that were not part of the debate during the arbitration proceedings, and in respect of which there had been no prior contradictory hearing. In view of this, the court annulled the award on the grounds of improper reasoning for violating the principle of congruence and the parties' right of defense under article 63(1)(b) and (c) of the Peruvian Arbitration Act.

This decision may be relevant for ongoing arbitrations since it provides guidance to arbitrators in disputes arising from the determination of the contract price or the integration of gas supply or similar contracts. Second Civil Chamber specialized in Commercial Matters of the Superior Court of Justice of Lima (Case No. 00602-2019-0-1817-SP-CO-02).

[3] Second Civil Chamber specialized in Commercial matters of the Superior Court of Justice of Lima (Case No. 00602-2019-0-1817-SP-CO-02).

2 Cases relevant to our practice

Beyond our own jurisdictions, our team of lawyers highlights foreign judicial decisions with the greatest impact on our international arbitration practice

France – Julia Martín and Santiago Rojas

The Court of Appeal (*Cour d'Appel*) dismisses an action for annulment, considering that the substitution of the arbitration claimant was not fraudulent.

On July 4, 2023, the Court of Appeal of Paris dismissed an action for annulment filed by Cameroon against an ICC award regarding a construction contract. Cameroon alleged that the award was the product of fraud in violation of French public policy. According to the plaintiff, the French company that signed the contract and filed the arbitration claim was not the same company that had participated in the underlying tender. In its analysis, the court rejected that the substitution of companies constituted fraud, since it was a matter of public knowledge that the companies had not attempted to conceal in any way. Moreover, it was not credible that Cameroon had only discovered the substitution after the rendering of the award.

The Court of Appeal dismisses an action for annulment based on the failure to disclose certain links between one of the arbitrators and the winning party.

On September 19, 2023, the Court of Appeal of Paris dismissed an action for annulment against an ICC award in *Halyvourgiki v. Public Power Corporation (PPC)*, which had rejected all claims against a Greek state-controlled entity. The court confirmed that the arbitrator appointed by PPC, Panagiotis Papanikolaou, had failed to disclose certain links with that party. However, such links did not give rise to reasonable doubt as to his independence or impartiality.

The court stressed that almost all links invoked by Cameroon referred to events that occurred over three years before the commencement of the arbitration. Therefore, according to *IBA Guidelines on Conflicts of Interest in International Arbitration*, there was no obligation to disclose them.

The court also considered that the fact that Mr.Papanikolaou had been appointed as arbitrator in other cases involving the Greek state did not "*constitute evidence of frequent and regular appointment*" that could compromise his independence and impartiality. Indeed, both parties recognized that the pool of arbitrators specialized in the Greek energy sector (the subject of the dispute) was very limited. Finally, the court attributed little weight to the fact that Mr. Papanikolaou had provided legal advice to PPC on other *ad hoc* matters in the past, and that his wife had worked for PPC more than a decade ago.

United States – Borja Álvarez

On June 23, 2023, the U.S. Supreme Court rendered a judgment in *Coinbase Inc. v. Bielski*. The ruling clarifies an important procedural aspect of the U.S. version of the *kompetenz-kompetenz* principle in arbitrations governed by the Federal Arbitration Act (9 U.S.C.).

The defendant in a court proceeding invoked the effects of an arbitration agreement. On this basis, the defendant filed a motion to stay the proceedings and to compel arbitration. In the event of denial, 9 U.S.C. § 16(a) of the Federal Arbitration Act allows -since 1988- the respondent to file an interlocutory appeal to the court of appeals of the federal circuit. There was some controversy as to whether the filing of such an appeal *obliged* or merely *allowed* the court *a quo* to stay the original judicial proceedings pending resolution of the appeal. The Supreme Court's decision in *Coinbase* confirms that the lower court *must* stay such proceedings. In application of the *Griggs* principle, the court considers that the question on appeal is, in essence, whether the case belongs in arbitration or instead in the federal jurisdiction. Since the "*entire case*" is "*involved in the appeal*," the lower court must await resolution of this jurisdictional issue by the court of appeals.

Panama – Santiago Rojas

The Supreme Court confirms annulment as the only remedy against arbitral awards and excludes writs of protection (*amparo*).

In its judgment of April 12, 2023, the Supreme Court of Justice of Panama declared the constitutionality of article 66 of the Panamanian Arbitration Act. According to this provision, actions for annulment are : "*the only specific and suitable remedy to protect any constitutional right threatened or violated in the course of the arbitration or in the award*."[4] The plaintiff claimed that this provision was unconstitutional, since the exclusion of *amparos* against arbitral awards was contrary to the constitutional principles of due process and access to justice.

Contrary to the plaintiff's allegations, the Supreme Court concluded that this provision did not violate due process but, rather, protected it. The disputed provision satisfied the State's obligation to provide a suitable mechanism to challenge awards and remedy eventual violations of the fundamental rights of the parties. In fact, admitting *amparo* actions against arbitral awards would undermine one of the main purposes of arbitration–i.e., the "*prompt, expeditious and effective*" resolution of conflicts.

[4] Art. 66 of National and International Arbitration Act 131 of December 2013.

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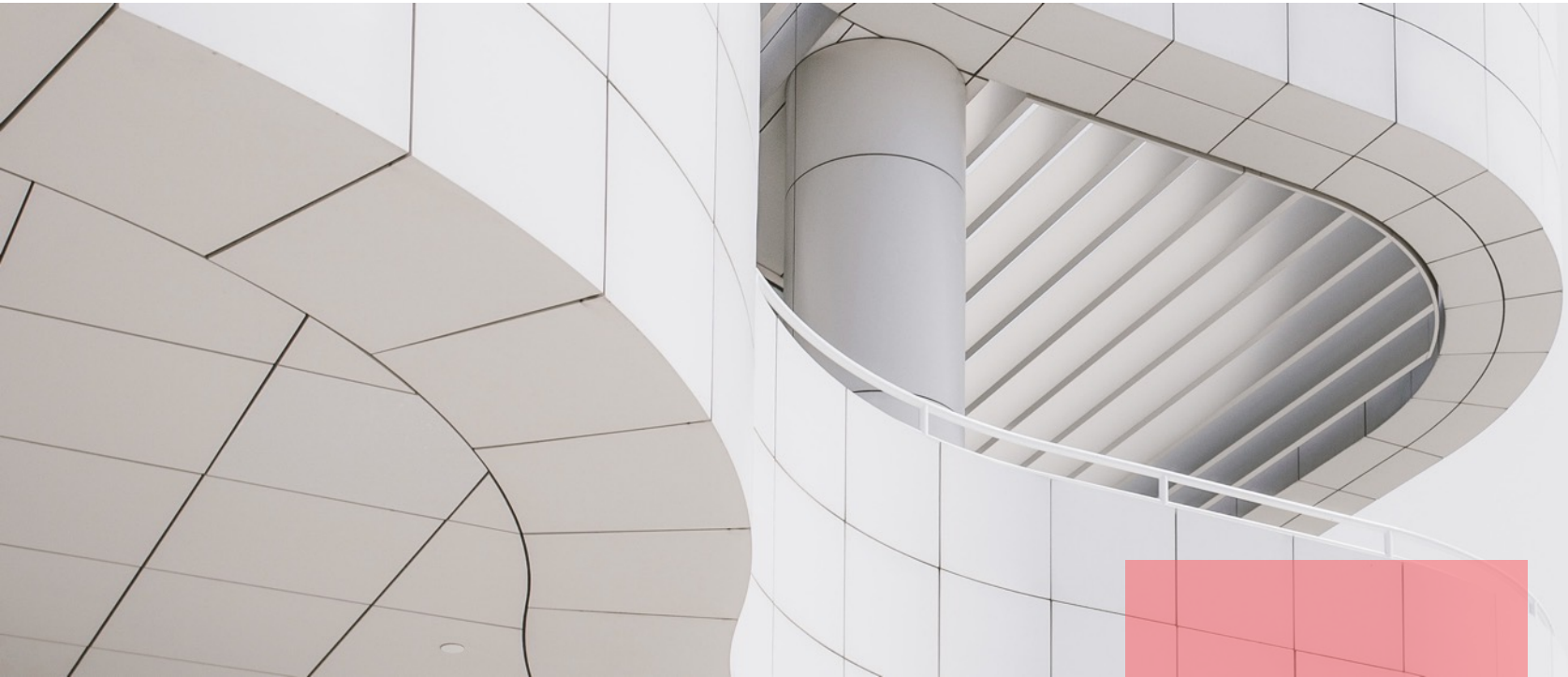
To be followed closely

Our team of lawyers explains recent developments that will continue to impact our international arbitration practice in the future



China modernizes its Foreign State Immunity Act and will allow its courts to hear arbitration-related issues – Mingjin Zhang and José Ángel Sánchez Villegas

On September 1, 2023, the Standing Committee of the National People's Congress passed the new Foreign State Immunity Act ("FSIA"). Its purpose is to "*improve China's foreign state protection system*" and "*clarify the jurisdiction of PRC courts in civil cases involving foreign states and their property*." The FSIA repeals the traditional absolute jurisdictional immunity enjoyed by foreign States in the PRC, in line with prevailing international practice. Thus, as of January 1, 2024, Chinese courts have jurisdiction to hear civil and commercial cases[5] involving foreign sovereign States or entities authorized to act on their behalf.[6]

The FSIA provides that, where a dispute arising from commercial activities between a foreign State and an organization or individual of another State—including the PRC—is submitted to arbitration, the foreign State will not enjoy immunity from the jurisdiction of Chinese courts on the following issues: (i) validity of the arbitration agreement, (ii) confirmation or enforcement of the arbitral award, (iii) annulment of the arbitral award, and (iv) other matters subject to review by Chinese courts under the applicable legislation.

In addition, the FSIA clarifies that foreign State property in the PRC will not enjoy immunity from enforcement measures adopted by Chinese courts. Although the FSIA does not specify it, these measures could be interpreted broadly to include both pre-judgment interim measures, property preservation orders, or post-judgment enforcement measures. Despite this major change in public policy, the FSIA has left room for interpretation of certain practical issues on a case-by-case basis.

[5] The FSIA defines commercial activity as any transaction or investment involving goods or services or other commercial act that does not constitute an exercise of sovereign authority.

[6] The FSIA does not indicate whether it will apply to the Hong Kong and Macau Special Administrative Regions. However, given that the foreign affairs of both regions are administered by the PRC central government, it is safe to assume that their foreign state immunity rules should be aligned with the FSIA.

Key Contacts

Alberto Fortún
Partner
alberto.fortun@cuatrecasas.com

Alfonso Iglesia
Partner
alfonso.iglesia@cuatrecasas.com

Cristián Conejero
Partner
cristian.conejero@cuatrecasas.com

Miguel de Almada
Partner
miguel.almada@cuatrecasas.com

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