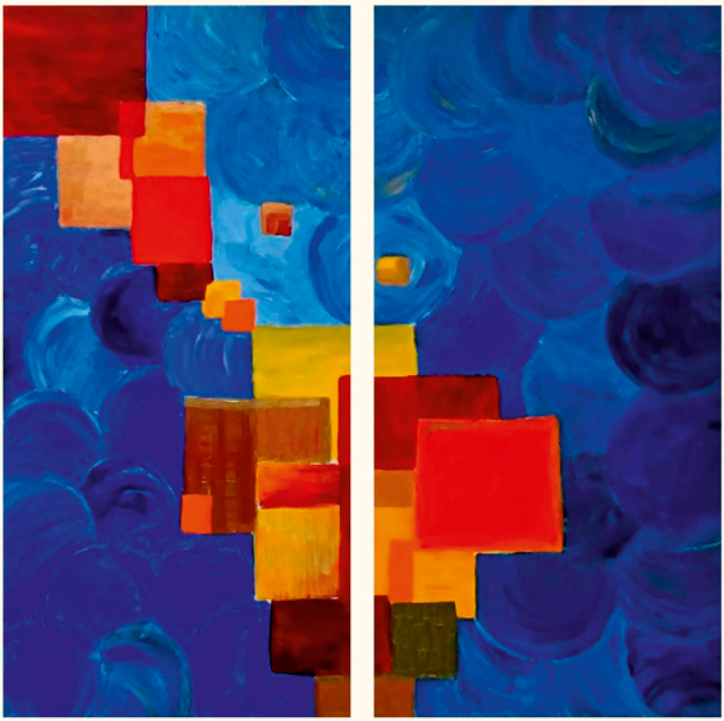
Recognition and Enforcement of International Commercial Arbitral Awards in Latin America

Law, Practice and Leading Cases

EDITED BY OMAR GARCÍA-BOLÍVAR AND HERNANDO OTERO



BRILL | NIJHOFF

Recognition and Enforcement of International Commercial Arbitral Awards in Latin America

Recognition and Enforcement of International Commercial Arbitral Awards in Latin America

Law, Practice and Leading Cases

Edited by

Omar García-Bolívar and Hernando Otero

BRILL
NIJHOFF

LEIDEN | BOSTON

Cover illustration: Continental squares by Gordié.

Library of Congress Cataloging-in-Publication Data

Recognition and enforcement of international commercial arbitral awards in Latin America : law, practice and leading cases / edited by Omar García-Bolívar and Hernando Otero.
pages cm
Includes index.
ISBN 978-90-04-28435-7 (hardback : alk. paper) — ISBN 978-90-04-28436-4 (e-book)
1. Conflict of laws—Arbitration and award—Latin America. 2. International commercial arbitration—Latin America. 3. Judgments, Foreign—Latin America. I. García-Bolívar, Omar E., editor. II. Otero, Hernando, editor.

KG115.R43 2014
347.8'09—dc23

2014032456

ISBN 978-90-04-28435-7 (hardback)
ISBN 978-90-04-28436-4 (e-book)

This book is printed on acid-free paper.

To Omar and Hilda for their 50th anniversary and to Maria, Tina and Juan Diego.

~Omar García-Bolívar

To Lili, Mateo and Sofia

~Hernando Otero

Contents

Leading Cases on Recognition and Enforcement of International Commercial Arbitral Awards in Latin America

Country	Leading Cases
Argentina	Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal, Apr. 2002, *Forever Living Products Argentina S.R.L. v. Beas, Juan y otro*. Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal, Nov. 2002, *Reef Exploration Inc. v. Compañía General de Combustibles S.A*. Cámara Federal de Apelaciones de Mar del Plata, Dec. 2009, *Far Eastern Shipping Company v. Arhenpez S.A*. Cámara Nacional de Apelaciones en lo Civil y Comercial Federal, Mar. 2011, *Smit International Argentina S.A. v. Puerto Mariel S.A.* Corte Suprema de Justicia de la Nación, May 2011, *Armada Holland BV Schiedman Denmark v. Inter Fruit S.A.* Cámara Nacional de Apelaciones en lo Comercial, Apr. 2014, *Pluris Energy Group Inc.* (*Islas Vírgenes Británicas*) *y otro v. San Enrique Petrolera S.A. y otros s/ organismos externos*.
Bolivia	No leading case to date.
Brazil	Superior Tribunal de Justiça, May 2005, *SEC No. 856*. Superior Tribunal de Justiça, Feb. 2006, *SEC No.* 967. Superior Tribunal de Justiça, Dec. 2008, *SEC No. 978.* Superior Tribunal de Justiça, Jun. 2007, *SEC No.* 1,210. Superior Tribunal de Justiça, Jun. 2009, *SEC No. 3,660.* Superior Tribunal de Justiça, May 2009, *SEC No. 3,661.* Superior Tribunal de Justiça, Jun. 2013, *SEC No. 4,213.* Superior Tribunal de Justiça, Jun. 2010, *SEC No. 4,415.* Superior Tribunal de Justiça, Mar. 2012, *SEC No.* 6,335. Superior Tribunal de Justiça, Aug. 2013, *SEC No.* 6,753. Superior Tribunal de Justiça, Apr. 2013, *SEC No.* 6,760.

TABLE (*cont.*)

Country	Leading Cases
Chile	Corte Suprema de Justicia, Jul. 1999, *Quote Foods v. Sacramento*. Corte Suprema de Justicia, Jan. 2007, *Stubrin v. Morice Investment.* Corte Suprema de Justicia, May 2007, *State Street Bank v. Inversiones Errazuriz Limitada* (*"INVERRAZ"*). Corte Suprema de Justicia, Sep. 2009, *Comverse v. American Telecommunications*. Corte Suprema de Justicia, Dec. 2009, *Kreditanstalt fur Wiederaufbau v. Inversiones Inverraz Limitada*. Corte Suprema de Justicia, May 2010, *Western Technology Services International Inc* (*"Westech"*) *v. Cauchos Industriales S.A.* (*"Cainsa"*). Corte Suprema de Justicia, Jun. 2010, *Stemcor UK Limited v. Compañía Comercial Metalúrgica* (*"CCM"*). Corte Suprema de Justicia, Sep. 2010, *Edfi v. Endesa and YPF*.
Colombia	Corte Suprema de Justicia, Jul. 2007, *Petrotesting Colombia SA & Southeast Investment Corp* (*Petrotesting*) *v. Ross Energy SA.* Corte Suprema de Justicia, Dec. 2011, *Drummond Ltd v. Ferrovias en Liquidacion, Ferrocariles Nacionales de Colombia S.A.* (*FENOCO*).
Costa Rica	Corte Suprema de Justicia, Dec. 1989, *Buques Centroamericanos S.A. v. Refinadora Costarricense de Petróleo, S.A.*
Dominican Republic	Suprema Corte de Justicia, Dec. 2005, *I Chu Yin v. Hsu Chu-Ching*.

Country	Leading Cases
Ecuador	Juzgado Octavo de lo Civil de Guayaquil, May 2009, *Daewoo Electronics America Inc. v. Expocarga S.A*.
El Salvador	Corte Suprema de Justicia, Sep. 2011, *Ricardo Humberto Artiga Posada v. Empresa Propietaria de la Red.*
Guatemala	Corte Constitucional (inconstitucionalidad), Mar. 2008, *Corporación de Fianzas, Confianza, Sociedad Anónima and Texaco Guatemala Inc*. Corte Constitucional, (amparo), Sep. 2008, *Apatlán* v. *Halliburton Energy Services Inc. Sociedad Anónima*.
Honduras	No leading case to date.
Mexico	Suprema Corte de Justicia, Jun. 2012, *City Watch v. ADT*
Nicaragua	No leading case to date.
Panama	Corte Suprema de Justicia, Mar. 2001, *Petrocom de Panamá Inc. v. Cable and Wireless de Panamá, S.A.* Corte Suprema de Justicia, Feb. 2005, *Greenhow Limited v. Refinería Panamá, S.A.* Corte Suprema de Justicia, Dec. 2005, *Isthmus Crossing Services, Inc. v Panama Canal Railway Company*.
Paraguay	Tribunal de Apelación en lo Civil y Comercial (Segunda Sala), Feb. 2009, *Ministerio de Agricultura y Ganadería y Procuraduría General de la RPCA c/ Grupanor Cercampo S.A.*
Peru	Corte Superior de Justicia de Lima, Oct. 1998, *Dist Corporation v. Cosmos Internacional S.A*. Corte Superior de Justicia de Lima, Mar. 2005, *Energoprojekt Niskograndja SA v. Pacífico Peruano Suiza.*

TABLE (*cont.*)

Country	Leading Cases
Uruguay	Tribunal de Apelaciones en lo Civil (Segundo Turno), Jun. 2003, *Enersis Internacional, Chilectra S.A., Empresa Nacional de Electricidad S.A. v. Pecom Energía S.A. y PCI Power Edesur Holding Limited*. Suprema Corte de Justicia Feb. 2004, *Vao Techmashexport v. Antigrad Latinoamericana S.A.* Suprema Corte de Justicia, May 2008, *Soufflet Internacional Pte. Ltd. y Prolac v. Brookner S.A*. Tribunal de Apelaciones en lo Civil (Primer Turno), Feb. 2011, *Univen Refineria de Petróleo Ltda. v. Empresa Petrolera Andina S.A*. Suprema Corte de Justicia, Aug. 2011, *A.B.N. Amro Bank N.V.* (*Sucursal Nueva York, Estados Unidos*) *v. Wishaw Trading S.A.*
Venezuela	Tribunal Supremo de Justicia (Sala Político Administrativa), Oct. 1997, *Embotelladora Caracas & others* v. *Pepsi Cola Panamericana.* Tribunal Supremo de Justicia (Sala Constitucional), May 2001, *Grupo Inmensa, C.A.*, Decision No. 827. Tribunal Supremo de Justicia (Sala Político Administrativa), Mar. 25, 2003, Decision No. 476, *Consorcio Barr, SA.* Tribunal Supremo de Justicia (Sala Constitucional), Nov. 2004, Decision No. 2365, *Consorcio Barr, SA* Tribunal Supremo de Justicia (Sala Constitucional), Feb. 2006. Decision No. 174, *Corporación Todosabor, C.A.* Tribunal Supremo de Justicia (Sala Político Administrativa), Dec. 2006, Decision No. 0293, *Tanning Research Laboratories, Inc*. Tribunal Supremo de Justicia (Sala Constitucional), Oct. 2008, Decision No. 1541, *Hildegard Rondón de Sansó et al.*

Country	Leading Cases
	Tribunal Supremo de Justicia (Sala Constitucional), Nov. 2010, Decision Nº. 1067, *Astivenca Astilleros de Venezuela, C.A.* Tribunal Supremo de Justicia (Sala Constitucional), Nov. 2011, Decision Nº. 1773, *Van Raalte de Venezuela, C.A.*

Contributors

Omar García-Bolívar (*Editor*)
Omar García-Bolívar is an international attorney, public policy consultant, business consultant and arbitrator. He is the President of BG Consulting, an international rule of law and development consultancy firm in Washington, D.C. Dr. García-Bolívar has been counsel, expert witness and an international arbitrator in international proceedings. He has published widely in English, Spanish and French for leading arbitration publications, including Transnational Dispute Management, ICSID Review, and others. He is an arbitrator before the World Intellectual Property Organization (WIPO), a member of the American Arbitration Association (AAA) International Panel, and is listed on the International Chamber of Commerce (ICC) Arbitrator Database. He holds law degrees from *Universidad Católica Andrés Bello* (Venezuela), and Southern Methodist University (Dallas, Texas) and M. Phil and Ph.D. studies in International Law from the University of Edinburg (United Kingdom) where he was a Chevening scholar. He is licensed to practice law in Venezuela, New York, the District of Columbia, and the U.S. Court of International Trade.

Hernando Otero (*Editor*)
Hernando Otero is an international arbitration and mediation attorney with experience as counsel of record and as an international arbitrator. He is an Adjunct Associate Professor of Arbitration and Mediation at the Washington College of Law in Washington D.C. (otero@american.edu). He has served as an arbitrator before the World Bank's International Centre for Settlement of Investment Disputes (ICSID) and has been appointed as an international arbitrator by the International Chamber of Commerce's (ICC) Court of Arbitration. He is on the London Court International Arbitration (LCIA) and the Financial Industry Regulatory Authority's (FINRA) lists of neutrals, and on the Hong Kong International Arbitration Centre's (HKIAC) Panel of Arbitrators. He is also on the Bogota Chamber of Commerce Arbitration and Conciliation Center's (CACCCB) roster of international arbitrators for proceedings seated in Colombia and on its high-value closed list for local arbitration proceedings. He is licensed to practice law in the state of New York, the District of Columbia, and in Colombia.

Natalie McCrea (*Associate Editor*)

Natalie McCrea is an attorney at a major international law firm in New York City. She received a B.A. in English, cum laude from the City University of New York at Lehman College. She obtained a J.D. from Syracuse University College of Law, and also a M.A. in International Relations from the Maxwell School of Citizenship at Syracuse University. She holds a LL.M., with a specialization in international business law from the American University Washington College of Law. She was the Managing Editor of said institution's LL.M. International Law Journal; a Staff Editor with the law school's Legislation & Policy Brief; and worked as a Dean's Fellow at the Center on International Commercial Arbitration, where she conducted research and writing. She is licensed to practice law in the State of New York.

Julio César Rivera (*h*) (*Argentina*)

Julio César Rivera (h) is a Partner with *Rivera & Asociados* in Buenos Aires, Argentina. His practice focuses on complex commercial litigation and international commercial arbitration. He has extensive teaching experience. He is Global Adjunct Professor of Law at the New York University (NYU) School of Law and he teaches a course on "Dispute Resolution in Latin America" with the NYU's program in Buenos Aires. He also teaches Commercial Arbitration at the *Universidad de San Andrés* (Buenos Aires). He is fluent in Spanish, English and French. He graduated Summa Cum Laude from *Universidad Católica Argentina* and holds an LL.M from Harvard law School and a Ph.D. from *Universidad de Buenos Aires*.

Fernando Aguirre B. (*Bolivia*)

Fernando Aguirre B. is a Bolivian corporate lawyer who includes arbitration as one of his practice areas. He is a Senior Partner of *Bufete Aguirre Soc. Civ.*, a law firm founded in 1940. He graduated from the State University of La Paz, Bolivia and holds a Diploma in Law (Public International Law) from Oxford University under a fellowship granted by the British Institute of International and Comparative Law. He is a registered arbitrator before the Centers of Arbitration of the National Chamber of Commerce and of the National Chamber of Hydrocarbons of Bolivia. Mr. Aguirre has been listed as an arbitrator with ICSID; has taught Public International Law at the Diplomatic Academy of Bolivia; and has been a professor of ADR and International Arbitration at the Masters Diplomatic and International Law Degree program of the Catholic University in La Paz. He advises clients on various issues and controversies under Bilateral Investment Treaties signed by Bolivia.

Nadia de Araujo (*Brazil*)

Nadia de Araujo is a Brazilian lawyer and a renowned private international law expert. She is the founder of *Nadia de Araujo Advogados*, a Rio de Janeiro based law firm that specializes in designing legal strategies for cross-border disputes. She holds a Doctoral degree in International Law from the University of Sao Paulo Law School and a Masters of Comparative Law degree from George Washington University Law School. She is a Professor of Law at the Pontifical Catholic University of Rio de Janeiro, Brazil. She is a proactive member of the international and Brazilian arbitration initiative and a registered arbitrator in several chambers of commerce. She has been a member of the Permanent Court of Arbitration at The Hague since 2004. She has also acted as an alternate arbitrator in Mercosur's Permanent Tribunal of Revision on behalf of Brazil from 2004 to 2008. She is also a member of three editorials boards: the "Journal of Private International Law" with Hart Publishing (London-United Kingdom), the "Jus Gentium" with the University of Baltimore (Baltimore-USA) and the "Revista de Direito Estado e Sociedade (RDE)" with Renovar (Rio de Janeiro-Brazil). She is fluent in English, French and Portuguese.

Ricardo Ramalho Almeida (*Brazil*)

Ricardo Ramalho Almeida is a Partner at *Lobo & Ibeas*, a leading Brazilian law firm. He has extensive experience in complex litigation and arbitration across many business sectors. In recent years, he has focused his practice on structuring commercial real estate transactions, mainly for the shopping center industry. He holds a Master's degree in International Law from the University of São Paulo (USP) and is the author of "*Arbitragem Comercial Internacional e Ordem Pública*" (2005) and numerous other articles in legal journals. He is fluent in Portuguese, English, French and Spanish.

Gonzalo Biggs (*Chile*)

Gonzalo Biggs is a Partner of the law firm of *Figueroa & Valenzuela* (Santiago, Chile), which has an extensive practice in civil, commercial, foreign investment, and international trade matters. He was formerly Legal Counsel of the Inter-American Development Bank in Washington, D.C. Mr. Biggs has a law degree from the University of Chile and a Master's degree in Comparative Law from George Washington University. He is a Fellow of the Weatherhead Center for International Affairs of Harvard University and a member of the Board of Directors of the American Arbitration Association (AAA). He has arbitrated disputes under the International Centre for Settlement of Investment Disputes (ICSID); the

International Centre for Dispute Resolution (ICDR) of the AAA; the Arbitration and Mediation Centre of the Santiago Chamber of Commerce; and has been a panelist in three separate State disputes under the World Trade Organization (WTO). His latest publication was *Arbitration in Chile and Brazil*, a tribute to the Brazilian Jurist, Luiz Olavo Baptista, published by Quartier Latin do Brazil, Sao Paulo, 2013.

Rafael Bernal (*Colombia*)

Rafael Bernal is the Director of the Arbitration and Conciliation Center of the Bogota Chamber of Commerce in Colombia. He is also a Board member of the Inter-American Commercial Arbitration Commission (IACAC) and its former President. Mr. Bernal is a regional expert in arbitration and has advised a number of international development institutions (World Bank, Inter-American Development Bank, UNDP and others) on legal reforms (including the drafting of national arbitration laws) and on institutional and personal capacity building across Latin America. Mr. Bernal has also practiced as an arbitrator in local and international proceedings; lectured extensively on arbitration and alternative dispute resolution in Colombia and Latin America; and published a number of books and articles on these topics. He is licensed to practice law in Colombia.

Roy de Jesús Herrera Muñoz (*Costa Rica*)

Roy de Jesús Herrera Muñoz is Partner with *Arias & Muñoz* in San José, Costa Rica. He currently heads the firm's Litigation Department, focusing on complex litigation. He is also an arbitrator with the International Center for Conciliation and Arbitration of the Costa Rican-American Chamber of Commerce (AMCHAM); a founding member of the Costa Rican Chapter of the Spanish Arbitration Club; Secretary of ICC Costa Rica (ICC National Committee) and member of its Arbitration Commission; and a member of the Latin-American Arbitration Association. Mr. Herrera received both his law and notary degrees from the University of Costa Rica Law School. He also holds a specialist degree in public law from said University.

Lorena Pérez McGill (*Dominican Republic*)

Lorena Perez McGill is a senior attorney at the Department of Legal Services, General Secretariat of the Organization of American States (OAS). The opinions expressed in her contribution to this work are her own and do not reflect those of the OAS or of its General Secretariat. Prior to joining the OAS, she worked at Baker Botts LLP, in the litigation, corporate, and environmental groups. She is on the roster of arbitrators of the *Cámara de Comercio y*

Producción de Santo Domingo. She is an Adjunct Professor with the Georgetown University Law Center. She is admitted to practice law in the Dominican Republic, New York and the District of Columbia.

Álvaro Galindo (*Ecuador*)

Álvaro Galindo is an International Counsel with Dechert LLP in Washington, D.C. Mr. Galindo advises on complex international arbitration matters, particularly those involving Latin American jurisdictions. Mr. Galindo's practice focuses on the representation of sovereign states. In 2012, Mr. Galindo was recognized by Legal 500 Latin America for his international arbitration practice. Prior to joining Dechert, he served as the Director of the International Affairs and Arbitration Unit for the Republic of Ecuador's Attorney General Office. He is also a former legal consultant for the World Bank Group's International Centre for Settlement of Investment Disputes (ICSID) in Washington, D.C. and the Latin American Development Corporation in Ecuador, where he coordinated the legal group in charge of drafting the Arbitration Law of Ecuador. Mr. Galindo has significant teaching experience in the areas of international trade, investment, economic and arbitration law, having previously served as Director of Graduate Programs and Vice Dean of the University of San Francisco de Quito School of Law. Currently, he is a Law Professor with the Georgetown University Law Center, and lectures a course on Advanced Topics in International Arbitration.

Francisco Endara (*Ecuador*)

Francisco Endara is currently a Legal Analyst for the Affiliates of Philip Morris International in Ecuador and Peru (Francisco.Endara@pmi.com). He was an Associate Professor of Administrative law at San Francisco University in Quito and has experience in International Investment and International Human Rights law. He recently published a paper in the Transnational Dispute Management journal that analyzed the interaction between investors' rights and the right to consult of the indigenous communities for the exploitation of natural resources in their territory. He has served as Academic and Mediation Coordinator of the Quito Commerce Arbitration and Mediation Center and has acted as ad-hoc secretary in its arbitral proceedings. He is a member of the ICC Young Arbitrators Forum and the LCIA. He is licensed to practice in Ecuador.

José Roberto Tercero (*El Salvador*)

José Roberto Tercero is an attorney and name Partner with *Tercero Abogacía*. He is an expert in Alternative Dispute Resolution in El Salvador and has published widely on the governing legal regime both in English and Spanish.

He is a licensed attorney and holds a law degree from *Universidad Nueva San Salvador* and a Master of Laws degree from Tulane University Law School.

Álvaro Castellanos Howell (*Guatemala*)

Álvaro Castellanos Howell is a Partner in the firm *Consortium Centro América Abogados* in Guatemala. He studied at Columbia University Law School in New York and holds a Master of Laws (LL.M.) in International and Comparative Law (1990-Fulbright-LASPAU). He is the founding Partner of the law firm *Rodriguez, Archila, Castellanos, Solares & Aguilar S.C.* (1991). He was subsequently the Dean of the Rafael Landívar University School of Law and Social Sciences (2002–2006). In 2009, he served as an *ad hoc* judge with the Inter-American Court of Human Rights in the case, *Tiu Tojin v. Guatemala* (2009). He now serves as: the Chairman of the Board of the Dispute Resolution Committee of the Industrial Chamber of Guatemala (CRECIG, 2011–present); a member of the International Court of Arbitration of the International Chamber of Commerce (2006–present); a member of the roster of arbitrators under the Dominican Republic and Central America Free Trade Agreement with United States of America; and is on the International Centre for Settlement of Investment Disputes (ICSID) List of Arbitrators on behalf of Guatemala. He is licensed to practice law in Guatemala.

Fanny Rodríguez del Cid (*Honduras*)

Fanny Rodriguez del Cid is a Partner with the *Arias & Muñoz* law firm in Honduras since 2008 (she joined in 2002). She coordinates the Litigation and Arbitration group and is in charge of the administrative law group responsible for advising local and international clients. Ms. Rodríguez is licensed to practice law in Honduras and holds a law degree from *Universidad Nacional Autónoma de Honduras*.

Mario Agüero (*Honduras*)

Mario Agüero is an attorney with the *Arias & Muñoz* law firm in Honduras since 2006 and was named a Partner in 2014. He is also an arbitrator with the Arbitration and Conciliation Center of the Tegucigalpa Chamber of Commerce and Industry. Mr. Agüero is licensed to practice law in Honduras and holds a law degree from *Universidad Nacional Autonoma de Honduras* (UNAH) and a Master's degree from the *Institute Empresa* Law School in Madrid.

Claudia Frutos-Peterson (*Mexico*)

Claudia Frutos-Peterson is a Partner with the international arbitration group of Curtis, Mallet-Prevost, Colt & Mosle LLP in Washington, D.C. She focuses her practice on arbitration, international law and international investment

law and works with multiple governments and state entities. She has represented foreign states in investor-state arbitrations under the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL). Prior to joining Curtis, Dr. Frutos-Peterson spent eight years as Counsel at ICSID where she served as Secretary of arbitral tribunals in numerous proceedings brought under the ICSID Convention and the ICSID Additional Facility Mechanism, based on bilateral and multilateral investment treaties and international agreements. Dr. Frutos-Peterson is also an Adjunct Professor with the American University Washington College of Law in Washington D.C., where she lectures on international commercial arbitration and investor-state arbitration. She is the author of several articles on international arbitration and the book *L'émergence de l'arbitrage commercial international en Amérique latine: l'efficacité de son droit*, published by L'Harmattan.

Antonio Riva Palacio (*Mexico*)

Antonio Riva Palacio is an Associate with the international arbitration and trade groups of Curtis, Mallet-Prevost, Colt & Mosle LLP in New York and Beijing. His practice focuses on international arbitration, international trade, international law, and foreign investment. Mr. Riva Palacio has been involved in arbitrations under the rules of arbitration of the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), the North American Free Trade Agreement (NAFTA), the International Chamber of Commerce (ICC), the National Chamber of Commerce of Mexico City (CANACO) and the Arbitration Center of Mexico (CAM). He has been appointed arbitrator by the CANACO and has served as Secretary to the tribunal in a number of arbitrations under the rules of the ICC, CANACO and CAM. Mr. Riva Palacio also advises clients on issues related to joint ventures and other endeavors in Mexico including trade finance transactions, commercial contracts and general corporate matters. He has also lectured on the law of treaties and international organizations and is involved in a number of academic programs focusing on international litigation and advocacy for law school students.

Fernando Medina Montiel (*Nicaragua*)

Fernando Medina Montiel is a Nicaraguan lawyer specializing in commercial law. He holds a doctoral degree from the *Universidad Centroamericana*. Dr. Medina has years of experience litigating complex cases involving multinational investors across several jurisdictions. He was also involved in

an investment arbitration case concerning the State of Nicaragua. He is fluent in Spanish and English.

José René Cruz Orué (*Nicaragua*)
José René Cruz Orué is a lawyer and public notary in Managua, Nicaragua. He has served as an arbitrator before the arbitration center of the Chamber of Commerce and Services of Nicaragua, the Inter-American Commercial Arbitration Commission and pursuant to the Central American Integration System (SICA) Settlement of Commercial Disputes Mechanism. He has been a Professor at the *Universidad Centroamericana* since 1994 and has published several books on commercial law, arbitration and mediation.

Katherine González Arrocha (*Panama*)
Katherine González Arrocha is a Panamanian lawyer. She specializes in international dispute resolution. She joined the Secretariat of the ICC International Court of Arbitration in Paris in 1996, where she was entrusted with the responsibility to manage arbitration cases in the Ibero-American team, first as Assistant Counsel and in 1998 as Counsel. In 2004, she was appointed Secretary to the ICC Commission on Arbitration and was a Senior Counsel for the ICC Dispute Resolution Services. She is presently acting as the Director for Latin America of the ICC International Court of Arbitration, based in Panama City. She also works as an independent practitioner. In this capacity, she currently sits as President of Arbitral tribunals and as co-arbitrator in domestic and international cases. She is the author of several articles and has frequently lectured at universities, workshops and conferences on international dispute resolution throughout the world. She holds a law degree from the University of Santa María La Antigua in Panama and a postgraduate degree specializing in arbitration and alternative dispute resolution from the University of Paris II (Panthéon-Assas). She speaks Spanish, English and French.

Adrián Martínez Benoit (*Panama*)
Adrián Martínez Benoit holds an LL.B. from the University of Panama and an LL.M. in International Dispute Settlement (MIDS) from the University of Geneva and the Graduate Institute of International and Development Studies. Based in Panama City, he was formerly the Deputy Director for Latin America of the ICC International Court of Arbitration. Before joining the ICC, he served as in-house counsel for a major energy sector corporation and as a corporate lawyer for a boutique law firm in Panama City. He has also performed academic research in investment arbitration.

Diego Zavala (*Paraguay*)

Diego Zavala is an attorney with *Mersán Abogados* in Asunción, Paraguay. Mr. Zavala was the Director of the Paraguay Arbitration and Mediation Center (CAMP; 1999–2001) and since 2001 has been on its Panel of Arbitrators. In 2010, he was designated by Paraguay to the International Centre for Settlement of Investment Disputes (ICSID) Panel of Arbitrators. He has also served as Paraguay's Vice Minister of Commerce (2012) and Minister of Industry and Commerce (2013). Mr. Zavala graduated as an attorney from the *Nuestra Señora de Asunción* Catholic University and is licensed to practice law in Paraguay. He also holds an LL.M. degree from Yale Law School with a concentration on public international law, international trade and commercial arbitration. He is also a Member of the Institute for Transnational Arbitration (ITA) and is on its Advisory Board and Board of Reporters.

Carlos Paitán (*Peru*)

Carlos Paitán is a leading international arbitration expert in Peru. He heads the legal services boutique, *Estudio Paitán & Abogados Law Firm* focusing on foreign investment arbitration in Peru. He has appeared as lead counsel in multiple ICSID arbitrations and in numerous other international and local commercial arbitration proceedings in Peru. Mr. Paitán is a licensed attorney in Peru and graduated from the Pontifical Catholic University of Peru.

Danny Quiroga (*Peru*)

Danny Quiroga is an international arbitration expert in Peru. He is a senior Partner at *Estudio Paitán & Abogados Law Firm* and his practice is focused on international investment arbitration under the ICSID Convention and on proceedings before other international and local arbitration fora. Mr. Quiroga is a licensed attorney in Peru and graduated from *Universidad de San Martín de Porres*. He holds an LL.M. in international law from the Johannes Gutenberg University in Mainz—Germany.

Leonardo Melos (*Uruguay*)

Leonardo Melos is a Partner with *Bergstein Abogados* in Montevideo, Uruguay. He heads the firm's litigation practice and is an expert in complex litigation. Mr. Melos has experience both as a judge and as a government attorney. He is a licensed attorney in Uruguay and holds a law degree from the *Universidad de Montevideo*.

Diana C. Droulers (*Venezuela*)

Diana C. Droulers is the Executive Director of the Arbitration Center of the Caracas Chamber of Commerce in Venezuela and the Secretary General of ICC Venezuela, the National Committee of the International Chamber of Commerce (ICC). Mrs. Droulers presides over the International Federation of Commercial Arbitration Institutions (IFCAI), which groups together 59 commercial arbitration institutions around the world and represents Venezuela before the Inter-American Commercial Arbitration Commission (IACAC). She is also a member of the ICC Court of Arbitration (as of July 2014), and a member of the ICC's Arbitration and Latin American Committees. She was formerly Chief of Staff at the Finance Ministry; Legal Counsel with a government entity (*Fondo para la Descentralización*-FIDES); and a Partner at the law firm of *Mejía & Araujo*. Mrs. Droulers graduated from the *Universidad Católica Andrés Bello* Law School and is licensed to practice in Venezuela.

Emilio García-Bolívar (*Venezuela*)

Emilio García-Bolívar is a Partner with *Escritorio Jurídico García Valentiner* in Caracas, Venezuela. He is the head of the Corporate Department and has vast experience in complex local and transnational litigations. He holds degrees from *Universidad Santa María*, *Universidad Central de Venezuela*, *Universidad Metropolitana*, University of Calgary and *Universidad de Salamanca* at graduate and post-graduate levels in law, business and finance. He is listed as an arbitrator with the World Intellectual Property Organization (WIPO).

Adriana Vaamonde M. (*Venezuela*)

Adriana Vaamonde M. is the Deputy Executive Director of the Arbitration Center of the Caracas Chamber of Commerce in Venezuela. She is also a member of the ICC Venezuela Arbitration Commission; coordinates both the National Arbitration Competition and the Under 40 Group of the Spanish Arbitration Club; and has been a delegate before the Inter-American Commercial Arbitration Commission (IACAC). Ms. Vaamonde is a Professor of Alternative Dispute Resolution at *Universidad Metropolitana* and a Professor at the *Instituto de Gerencia y Estrategia del Estado Zulia*. She holds a law degree from *Universidad Monteávila* in Caracas and a Master's degree in international trade from the *Universidad Carlos III* in Madrid.

Introduction

Omar García-Bolívar and Hernando Otero

Collecting on monetary damages or other remedies awarded by a court in an international dispute can be notoriously difficult. International efforts to negotiate an international convention of the recognition and enforcement of foreign judgments have had scant success, and regional and bilateral agreements have limited reach. This state of affairs and the success of the New York Convention explain the success of international commercial arbitration in which the awards of arbitral tribunals may be enforced by local courts. Yet, the enforcement of arbitral awards in local courts is not always a straightforward matter.

In Latin America, the recognition and enforcement of international commercial arbitral awards has a long and sometimes tumultuous history. There are lessons to be learned from past experience, one being that while grouping countries in Latin America might be useful in comparing them to other regions, the differences that might be crucial for practitioners and their clients in a particular jurisdiction are often overlooked. For this reason, we asked experts in 18 countries in Latin America to highlight the more practical aspects of enforcing an international commercial award in their jurisdiction.

I International Conventions on the Enforcement of International Arbitral Awards

Some preliminary comments regarding the main international conventions in force in the region are in order. These include the 1958 New York Convention, the 1975 Panama Convention and the 1979 Montevideo Convention.

New York Convention

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (or New York Convention) is not surprisingly the main international agreement in the region. All 18 countries covered in this book are parties to it.[1] These countries are also parties to the Panama Convention, a convention of historical significance addressed in more detail below.[2] Eleven other countries

1 Cuba, the other Latin American country in the region is also a party.

2 The United States is also a party to the Panama Convention (for a total of 19 countries).

 | DOI 10.1163/9789004284364_002

in the Americas (including the United States, Canada and Cuba), most of them in the Caribbean are also parties to the New York Convention.[3]

With the exception of some "early adopters" of the New York Convention including Ecuador (1962), Mexico (1971), Chile (1975) and Colombia (1979),[4] the remaining 14 countries reviewed in this book became parties to the Convention starting in the 1980s (6), and progressively through the 1990s (4) and early 2000s (4). Notably, only a minority (just 4 countries), did so with the reciprocity declaration allowed by Article I(3).

1970s	1980s	1990s	2000s
Ecuador	Uruguay	Bolivia, Venezuela	Honduras
Mexico	Guatemala, Panama	Paraguay	Brazil, Dominican Republic
Chile	Costa Rica	Salvador	Nicaragua
Colombia	Peru		
	Argentina		

Yet while the New York Convention provides that recognition and enforcement of awards shall not be subject to more onerous conditions than domestic awards, or refused except on limited grounds, the degree of compliance throughout the region has not been uniform.[5] While, the final verdict for each jurisdiction covered in this book (including on the actual practice through relevant case law) is left to the individual experts, some jurisdictions have been singled out as having national legislation appropriately based on the UNCITRAL Model Law on International Commercial Arbitration including:[6] Mexico (1993), Guatemala (1995), Perú (1996; amended 2006), Bolivia (1997), Ecuador (1997), (Panama 1999; 2013) Honduras (2000), Paraguay (2002), Chile

3 Belize, Grenada, Guyana, St. Kitts and Nevis, St. Lucia and Suriname are not parties.

4 The New York Convention entered into force on June 7, 1959. *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last visited on July 8, 2014).

5 New York Convention, Arts. III, and V.

6 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. *See* www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited on July 9, 2014).

(2004), Nicaragua (2005), Dominican Republic (2008), Venezuela (2008), Costa Rica (2011), and Colombia (2012).

Commentators have highlighted the region's gradual adoption of the New York Convention can be attributed to the liberalization of national markets. The negotiation of free trade agreements has certainly furthered the interest in dispute resolution mechanisms for cross border disputes and heightened the relevance of the recognition of international arbitral awards. One of the earliest examples was the Group of Three Trade Agreement between Colombia, Mexico and Venezuela (G-3).[7] This agreement mandated the parties to provide appropriate procedures to ensure the enforcement of arbitration agreements and the recognition and enforcement of arbitral awards in disputes between private parties.[8] More recently, multilateral agreements have followed this example but have elevated the threshold by stating that a party is deemed in compliance of providing appropriate procedures "if it is a party and is in compliance" with the New York or Panama Conventions.[9]

The importance of these provisions should not be overlooked. The inclusion of specific inter-state obligations regarding the recognition of arbitral awards in trade agreements encapsulates them with a number of important trade concessions and investment provisions that ideally promotes compliance. At a more practical level, free trade agreements and bilateral investment agreements provide dispute resolution mechanisms to resolve disputes often related to the application of their provisions.[10]

---

7 Venezuela ceased to be a party to the treaty in November, 2006.

8 G-3, Art. 19-19. Art. 19-19 also provides procedures that allow the parties to take into consideration the provisions of the New York Convention or the Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention).

9 *See* for example the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), Art. 20.22.

10 In an extraordinary example, in 2009, an arbitral tribunal constituted pursuant to the Italy-Bangladesh Bilateral Investment Treaty found Bangladesh responsible for unlawfully expropriating the claimant's investment as a result of the failure of its courts act in accordance with the country's New York Convention obligations. *See Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, ¶ 130 (2009): "Hence, the perspective that the ICC Award could possibly be enforced under the New York Convention outside Bangladesh despite having been declared 'a nullity' by the Bangladeshi courts has no realistic basis. Because, by the Respondent's own admission, the ICC Award could not be enforced outside Bangladesh, the intervention of the Bangladeshi courts culminating in the declaration of the Supreme Court that the ICC Award was 'non-existent' substantially deprived Saipem of its rights and thus qualifies as a taking."

Panama Convention

The 1975 Inter-American Convention on International Commercial Arbitration or "Panama Convention" merits additional discussion. The Panama Convention, negotiated under the aegis of the Organization of American States, is similar to the New York Convention, particularly regarding the grounds upon which a party may refuse enforcement of an arbitral award. Though the convention was enthusiastically embraced in the region, its practical relevance seems to have comparatively faded over the years.[11] Indeed even in the United States, where the Federal Arbitration Act expressly provides for the precedence of the Panama Convention, courts are inclined to apply the New York Convention.[12]

Yet it would be unfair to understate the historical importance of Panama Convention. Though the New York Convention entered into force much earlier in June of 1959, only five countries in the region were parties to it at the time of the Panama Convention's entry into force more than a decade later (June 6, 1976).[13] A number of commentators have identified the Calvo Doctrine as an impediment to the adoption of the New York Convention in its early years. That said, it is important to note the reciprocal recognition of foreign arbitral awards had a long and rich history in the region dating back to the 19th century.[14] For that reason, while the Panama Convention fell short of adopting a universal scope as the New York Convention,[15] the sudden

11 Inter-American Convention on International Commercial Arbitration, 9 U.S.C. §§ 301–07 (1990).

12 Danielle Dean, and Chelsea Masters, *In the Canal Zone: the Panama Convention and its Relevance in the United States Today*, The Arbitration Brief 2, no. 1, 90–102 (2012).

13 Ecuador, Chile, Cuba, and México. Ecuador was a notable example, acceding to the New York Convention as early as 1962, almost 8 years before the United States (1970). Ecuador was also responsible for initially proposing the provisions in the Panama Convention regarding grounds for refusal of recognition and adjournment of enforcement (Arts. 5 and 6) closely track those in the New York Convention. *See* Organization of American States, *Convención Interamericana sobre Arbitraje Comercial Internacional: Actas y Sesiones Preparatorias*, (2013) (discussing documents and preparatory meetings of the Panama Convention). Available at: www.oas.org/es/sla/ddi/docs/arbitraje_comercial_publicaciones_Actas_Sesiones_Preparatorias_2013.pdf (last visited on July 8, 2014).

14 Albert Jan van den Berg, *The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?* 5 ARB. INT'L 214, 214–15 (1989).

15 As a general rule, New York Convention Art. 1(1) applies broadly to "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." Art. 1(3) however does allow a "Contracting State" reciprocity "declaration." In contrast while a reciprocity requirement (or lack thereof) is far from

regional impetus leading to its adoption was not a sudden break with historical precedent. Indeed while the absence of express references to the New York Convention in the Panama Convention negotiation history is surprising given their similarities, references to a number of preceding regional agreements are plentiful.[16] As a result, while it is hard to gauge the exact influence of the Panama Convention, it is clear that for a number of its early adopters,[17] it was a first move to their later accession to the New York Convention. That impact should not be minimized. Indeed, of the subset of 9 countries that first adopted the Panama Convention and later acceded to the New York Convention, only 3 did so with a reciprocity declaration.[18]

Montevideo Convention

Finally, the 1979 Montevideo Convention deserves some brief comments.[19] The Montevideo Convention has suffered a more unfortunate fate than the Panama Convention. The Montevideo Convention also negotiated under the aegis of the Organization of American States and intended to supplement the Panama Convention "in all matters not covered" therein,[20] was ratified by a little more than half of the parties to the latter. Perhaps because its scope was far broader than that of the Panama Convention encompassing foreign judgments and arbitral awards rendered in civil, commercial or labor proceedings in one of the States Parties," it was burdened with conditions that hindered the recognition

express in the Panama Convention commentators agree it is safe to assume that was the intention of the parties. *See* Albert Jan van den Berg, *The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?*, 5 ARB. INT'L 214, 214–15 (1989).

16 These agreements include the Montevideo Treaties and the Bustamante Code.

17 Brazil, Costa Rica, El Salvador, Honduras, Nicaragua, Panama, Paraguay, Uruguay, and Venezuela.

18 The list of countries that first acceded to the Panama Convention and then to the New York Convention are: Brazil, Costa Rica, El Salvador, Honduras, Nicaragua, Panama, Paraguay, Uruguay, and Venezuela. Of this group, only Honduras and Venezuela acceded to the New York Convention with a reciprocity declaration.

19 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo, May 8, 1979) 1439 U.N.T.S. 90, entered into force June 14, 1980 ("Montevideo Convention"). The English version of the Montevideo Convention is available at the Organization of American States Department of International Law website, available at http://www.oas.org/juridico/english/treaties/b-41.html (last visited on July 8, 2014).

20 Montevideo Convention, Art. 1.

of arbitral awards.[21] Notable among them, requiring the recognition in the courts of the seat of the arbitration (or double exequatur), and generally shifting the burden of proof from the defendant to the applicant.[22]

II Obtaining an Enforceable Award

The success of international commercial arbitration rests in part on the ability of the prevailing party to the dispute to enforce a favorable award in 149 contracting States to the New York Convention.[23] That importance is evidenced in the arbitration rules of the preeminent global institutions. For example, the International Chamber of Commerce (ICC) 2012 Arbitration Rules provide as a general rule that: "In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law."[24] The London Court of International Arbitration's (LCIA) 1998 Arbitration Rules provide an almost identical articulation prescribing "every reasonable effort."[25]

---

21 Caicedo Castilla, José Joaquín, *Análisis general del proyecto de temario de la Segunda Conferencia Especializada Interamericana sobre el Derecho Internacional Privado* in OEA, Cursos de derecho internacional, Serie temática vol. I, parte I, 387–414 (2002).

22 See Arts. 2, 3. For an opposing interpretation of the Montevideo Convention, see Paul Arrighi, *El Arbitraje Comercial International en las Américas a Treinta y Cinco Años de la Convención de Panamá* in OEA, Arbitraje Comercial Internacional: el Reconocimiento y la Ejecucion de Sentencias y Laudos Arbitrales Extranjeros: Reunion de alto Nivel [realizada en] Miami, Florida (ee. uu.)—21 y 22 de Enero de 2013, 43 (2013).

23 For example, the Introduction to the ICDR Arbitration Rules provides the following: "The international business community uses arbitration to resolve commercial disputes arising in the global marketplace. Supportive laws are in place. The New York Convention of 1958 has been widely adopted, providing a favorable legislative climate that enables the enforcement of arbitration clauses. International commercial arbitration awards are recognized by national courts in most parts of the world, even more than foreign court judgments."

24 ICC, 2012 Arbitration Rules, Art. 41.

25 LCIA, 1998 Rules, Art. 32.2: "In all matters not expressly provided for in these Rules, the LCIA Court, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every reasonable effort to ensure that an award is legally enforceable." A forthcoming amendment to the rules expected in 2014 provides an amended articulation regarding enforceability at the arbitral seat: "For all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties shall act at all times in good faith, respecting the spirit of the

These formulations suggest the burden of ensuring the making of an enforceable award may lie with:

- The arbitral institution;
- The tribunal; and/or
- The parties.

The Arbitral Institutions

Leading international arbitration institutions diverge however in their approach to administering the arbitral process from the perspective of securing an enforceable award. There is of course a common approach in the respective arbitration rules, including giving the parties proper notice of the appointment of arbitrators and of the arbitration proceeding, safeguarding the appropriate composition of the tribunal and requiring that the award state the reasons upon which it is based.[26] The ICC Court of Arbitration however assumes a greater burden than other institutions.

Notably, the ICC Court of Arbitration is unique in providing "scrutiny of the Award" by "laying down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, [and drawing] its attention to points of substance."[27] On its face, the provision on scrutiny of awards in the ICC arbitration rules indicates that there is a belief that there is an important role for the ICC Court of arbitration regarding the form of award, without interfering with the decision-making of the arbitrators. Though the ICC Court of Arbitration recognizes the freedom of the tribunal to adopt an appropriate form, under its scrutiny function it requires a basic minimum.[28] This basic minimum encompasses issues not provided expressly in the relevant arbitration rules but that are relevant to its enforceability.[29] In particular, the scrutiny of the award considers, "to the extent practicable" the requirements of mandatory law at the place of arbitration including but not limited to arbitrability and international public policy considerations.[30] It also includes a number

---

Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognized and enforceable at the arbitral seat."

26 ICC, 2012 Arbitration Rules, Art. 31(2). LCIA, 1998 Rules, Art. 26.1.

27 ICC, 2012 Arbitration Rules, Art. 33.

28 Lloyd, Humphrey, *et al., Drafting Awards in ICC Arbitrations, ICC International Court of Arbitration Bulleting*, 19, 23 (Vol. 16/No. 2—Fall 2005).

29 Id. at 22: "One of the main advantages of the ICC system is to reduce substantially the risk that the recognition and enforcement of the award might be refused under the provisions of the New York Convention."

30 ICC, 2012 Arbitration Rules, Appendix II, Art. 6. According to the New York Convention, Article V(2): Recognition and enforcement of an arbitral award may also be refused if the

of issues helpfully highlighted in a checklist distributed by the ICC Court to arbitration tribunals with "key information that must normally be included in an ICC award."[31]

It is notable that competing arbitral institutions do not assume a similar duty to scrutinize awards before they are rendered. This dissimilar approach suggests that the burden is shifted to the arbitral tribunal and the parties. Indeed these institutions seem to prefer an approach in which the choice of qualified arbitrators will bring about the same result as an institutional scrutiny of the award. The LCIA for example states the following: "*There is no formal scrutiny of draft Awards by the LCIA Court. However, if the Secretariat is requested by a Tribunal to review a draft for typographical and similar errors, it will do so. Selection of Tribunals by the LCIA is, in contrast to some institutions, a centralised process, over which the LCIA Court itself has direct control. Accordingly, the LCIA feels able to rely upon the Tribunals it appoints to draft well written, well-reasoned and enforceable Awards without its intervention*."[32] For its part, the International Centre for Dispute Resolution (ICDR) has a past practice in which it will simply correct "clerical, typographical or computational errors" on a voluntary and non-binding basis.[33]

Both approaches seem to carry weight with smaller arbitral institutions. An interesting example is that of competing regional institutions in East Asia. On the one hand, the Singapore International Arbitration Center (SIAC) Arbitration Rules (2013) provides for the scrutiny of awards.[34] The SIAC Secretariat has

---

competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

31 ICC Court of Arbitration, "New aid for drafting awards in ICC cases," Press release of February 2010.

32 *See* LCIA website, "Frequently Asked Questions." For its part, the Introduction to the ICDR Arbitration Rules states "*The ICDR's international system is premised on its ability to move the matter forward, facilitate communications, ensure that qualified arbitrators and mediators are appointed, control costs, understand cultural sensitivities, resolve procedural impasses and properly interpret and apply its International Mediation and Arbitration Rules*."

33 Martin F. Gusy, James M. Hosking, and Franz T. Schwarz. *A Guide to the ICDR International Arbitration Rules*, 236 (Oxford University Press, 2011).

34 SIAC, Arbitration Rules (2013), Art. 28.2: "Before making any award, the Tribunal shall submit it in draft form to the Registrar. Unless the Registrar extends time or the parties agree otherwise, the Tribunal shall submit the draft award to the Registrar within 45 days

made clear this scrutiny is meant to ensure New York Convention "consistency and enforceability" in line with Article 37.2 of its rules."[35] Article 37.2 of the SIAC Arbitration Rules provides a general duty to "make every reasonable effort to ensure . . . the enforceability of any award."[36] For its part, the Hong Kong International Arbitration Centre Arbitration Rules (HKIAC, 2013) favors an approach in which neither the arbitrators nor the institution are burdened with a duty to render an enforceable award. Rather, the HKIAC Arbitration Rules merely provides "the arbitral tribunal shall make every reasonable effort to ensure that an award is *valid*."[37] In this approach, the burden of obtaining an enforceable award lies with the parties.

The Arbitral Tribunals

Commentators have weighed in on the nature of the duty to render an enforceable award for an arbitral tribunal. They have mostly coincided in their view that it is limited in scope: "arbitrators are not obliged to take [it] into account in reaching their decision on the merits of the parties' dispute.[38] Furthermore an "arbitrator cannot be expected to be aware of all formal requirements to ensure the enforceability of an award in any given country, or even to know

---

from the date on which the Tribunal declares the proceedings closed. The Registrar may, as soon as practicable, suggest modifications as to the form of the award and, without affecting the Tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be made by the Tribunal until it has been approved by the Registrar as to its form."

35 Lim Seok Hui, "Report on Trends and Recent Developments at SIAC," presentation in Current Trends in International Arbitration panel of the State Bar of California International Law Section, September 6, 2013.

36 SIAC Arbitration Rules, Art. 37.2.: "In all matters not expressly provided for in these Rules, the President, the Court, the Registrar and the Tribunal shall act in the spirit of these Rules and shall make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of any award."

37 HKIAC Arbitration Rules (2013), Art. 13.8: "The arbitral tribunal shall make every reasonable effort to ensure that an award is valid."

38 *See* for example, Mistelis, Loukas A., *Concise International Arbitration*, 390 (Kluwer Law International, 2010). *See also* Yves Derains and Eric Schwatz. *A Guide to the ICC Rules of Arbitration*, 384 (Kluwer Law International, 2005): "The substantive decisions of ICC Arbitral Tribunals are, thus, required to be made on the basis of the requirements of the Rules, the parties' relevant agreements, the rule of law applicable thereto and the mandatory requirements of the place of arbitration. . . . . Article [23] . . . does not impose, any additional obligations on the Arbitral Tribunal in this regard."

where the award may be enforced."[39] Indeed, absent an express requirement in the arbitration agreement from which the tribunal draws its authority or in the applicable substantive law chosen by the tribunal, there is a greater downside for a tribunal applying a different substantive law to take into account a mandatory rule of law in the likely jurisdiction of enforcement. As Gary Born has succinctly explained, an award that is not enforceable in the State whose mandatory rules are not applied is preferable than an award based on the application of the wrong legal rules.[40] Yet a mandatory rule of law at the likely place of enforcement brought to the attention of the tribunal will likely not simply be ignored.[41] A conservative tribunal deciding the dispute under a different law will at the very least address the matter in examining the arguments of the parties and explain its approach.

The Parties

Finally, the parties should also be aware of both the arbitral institution and the tribunal's perceived role in the rendering an enforceable award. While in one form or another the institutional rules indicate that when parties submit their dispute to arbitration they agree that tribunal decisions are binding, in some circumstances it is incumbent upon the interested party to request the tribunal to decide through an award for purposes of enforcement.

Understanding the scope of the New York Convention is a helpful starting point. The Convention simply states it applies to "awards made by arbitrators."[42] The arbitration rules of major administering institutions expressly recognize the power of the arbitral tribunal to decide issues of substance separately or grant conservatory and interim measures in the form of an award.[43] With this in mind, a number of commentators agree that a partial award by an arbitral tribunal should be enforceable under the New York Convention

39 Peter Turner and Reza Mohtashami, *A Guide to the LCIA Arbitration Rules*, Section 9.51 (Oxford University Press, 2009).

40 Born, Gary, *International Commercial Arbitration*, 2192 (Wolters Kluwer Law & Business, 2009).

41 Craig, Laurence, *et al., International Chamber of Commerce Arbitration*, Section 17.04 (Oceana Publications, 2000): "it is now understood that international arbitrators have not only the right but the duty to examine the effect of mandatory legislation foreign to the law chosen by the parties and the law of the place of arbitration."

42 New York Convention, Art. II(1).

43 *See* for example the ICC 2012 Arbitration Rules, Arts. 2, 28.1, 34.6, the LCIA 1998 Arbitration Rules, Arts. 25.1, 26.7 and the ICDR 2014 Rules, Arts. 24, 29.1.

if it constitutes the final adjudication of the arbitral tribunal on an issue of substance.[44] Furthermore nothing in the New York Convention should stand in the way of enforcing an interim or provisional measure before a national court.

Furthermore, given that an arbitral tribunal's jurisdiction ends with the making of the award (including its correction or interpretation), the burden is on the interested party to assist the tribunal in making an enforceable award. The grounds to refuse enforcement in the New York Convention can be viewed as encompassing categories, but can demand great specificity in the making of the award. For example, an award's operative or dispositive section should result from careful prayers for relief from the parties. Indeed an award's dispositive "sets out the results in simple terms so that a court responsible for enforcement ought to be able to give effect to them without difficulty."[45] The instances of possible difficulties are numerous, but even some very simple ones are overlooked, including not verifying that party names are entirely consistent with those in likely places of enforcement or have not changed over time; requesting unenforceable non-monetary relief; requesting damages in currency that is not of legal tender or failing to consider payable interest following the making of the award.

Finally, as Article III of the New York Convention makes clear, parties to it are required to recognize arbitral awards as binding and enforce them "in accordance with the rules of procedure of the territory where the award is relied upon. . . ." For this reason, it is incumbent on the interested parties to be mindful of conditions that may facilitate enforcement procedures before local courts. National laws will determine a number of procedural matters including the competent courts, time limits, format and nature of the petition, procedural steps, appeals (if any), etc. It is in this regard, that we hope this book will contribute to the existing literature by providing an overview of these matters across 18 jurisdictions in Latin America.

In international commercial arbitration, the ability to collect on an award is the ultimate bottom line. This book is a guide to the enforcement of arbitral awards written by leading experts in each jurisdiction. Every chapter begins by providing the governing legal regime encompassed by both the international

44 Herbert Kronke, Patricia Nacimiento, Dirk Otto, Nicola Christine Port, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 156, 157 (Kluwer Law International, 2010).

45 HumphreyLloyd, et al., *Drafting Awards in ICC Arbitrations*, The ICC International Court of Arbitration Bulletin 16.2, 19–40 (2005).

conventions to which each country is a party and the applicable national laws. This is followed by a practical description of the competent courts and procedures. Finally, each chapter identifies the leading cases (or if one has yet to be handed down as is the case in some jurisdictions), and canvasses the relevant issues to be considered by interested parties.

The Editors

CHAPTER 1

Argentina

Julio César Rivera (h)

I Introduction

Argentina offers a favorable legal environment for the recognition and enforcement of foreign awards. Not only is Argentina a party to the most relevant international conventions concerning international arbitration but there is a general practice among Argentine courts to enforce foreign arbitral awards.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

Argentina is party to numerous international treaties regarding the recognition and enforcement of foreign commercial arbitral awards dating back to 1889. These Conventions include a number of regional agreements of the South American Common Market (Mercosur) and bilateral agreements that will not be covered in great detail in this chapter. The two most relevant treaties to which Argentina is a party are the following:

1. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention). Argentina ratified the convention by Law No. 23619 of 1998 with reservations related to reciprocity and commercial disputes.
2. The Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention). Argentina ratified the convention through the enactment of Law No. Law 24322 of 1994.

Argentina is also a party to the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (or Montevideo Convention), though in practice, it has lost relevance. Finally, Argentina is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (ICSID Convention). The enforcement provisions of the ICSID Convention will not be discussed in this chapter.

 | DOI 10.1163/9789004284364_003

III Relevant Provisions in Free Trade or Bilateral Investment Agreements

Argentina is a party to over 54 bilateral investment treaties that provide for dispute resolution between foreign investors and the Argentine State. Argentina is also a party to the South American Common Market (Mercosur). The Mercosur agreement provides a number of stipulations regarding the enforcement of arbitral awards. Notably in 1998, the Mercosur member states—Argentina, Brazil, Paraguay and Uruguay, executed amongst themselves, and with Mercosur associated states—Bolivia and Chile, two similar agreements on International Commercial Arbitration (Mercosur Agreements No. 03/98 and 04/98, respectively). These agreements provide that the enforcement of foreign arbitral awards shall be carried out either under the 1975 Panama Convention, the 1979 Montevideo Convention, or a prior Mercosur 1992 Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters (Las Leñas Protocol) as appropriate. Articles 20 and 22 of the Las Leñas Protocol sets forth more stringent requirements for the enforcement of foreign awards than the New York Convention, which may affect the free circulation of awards prescribed by the Mercosur agreement. However, it can be argued that the New York Convention should prevail as *lex specialis* in case of conflict between those international instruments.

IV National Law

Argentina, in contrast to other Latin American jurisdictions, does not have a single arbitration statute. Rather, arbitration is technically governed by the relevant procedural rules in each of the country's provinces and in the city of Buenos Aires. However in practice, the National Code of Civil and Commercial Procedure (CCPC), applied by the federal courts as well as by the civil and commercial courts of the city of Buenos Aires, set out the general framework for the enforcement of foreign arbitral awards.

V Application for Recognition and Enforcement before Local Courts

The enforcement of foreign arbitral awards is governed by the international treaties on the matter to which Argentina is a party. Pursuant to Section Article 75 (22) of the Argentine Constitution, international treaties have a higher hierarchy than any statute or law approved by Congress. In practice,

it is useful to be mindful of the default rules provided by the relevant procedural regulations in the jurisdiction where enforcement is sought. The Civil and Commercial Procedural Code (CCPC) governs the City of Buenos Aires and the federal courts. For purposes of this chapter, we will review the relevant provisions of the CCPC. These provisions are similar to those found in provincial codes.

A *Applicable Awards*

Article 519 *Bis* of the CCPC provides that awards made by foreign arbitral tribunals may be enforced in Argentina. Foreign arbitral awards are understood to be those made outside the Argentinean territory. The relevant provision refers simply to 'awards' and does not address whether international interim measures or partial awards may be subject to an enforcement procedure. According to the Commercial Court of the City of Buenos Aires however, interim measures cannot be enforced under the international conventions ratified by Argentina.[1] On the other hand, a partial award on liability has been considered to be a final award and thus subject to judicial review by the courts.[2]

B *Competent Courts*

In accordance with Article 518 of the CCPC, the enforcement of a foreign judgment or award may first be petitioned before the First Instance judge of the jurisdiction. It is commonly known as an *exequatur* procedure, and the court's decision may be appealed. If leave for enforcement is granted, the foreign arbitral award has the same status as the judgment of an Argentinean court and is entitled to compulsory enforcement.

C *Conditions*

Pursuant to Article 517 of CCPC, foreign arbitral awards and judgment shall be enforceable in accordance with the treaties to which Argentina is a party. The CCPC nonetheless contains provisions that apply by default, namely Articles 517–519. In accordance with Article 519 *Bis* of the CCPC, in general terms, a foreign arbitral award may be enforced if the following conditions have been met: 1) the award is *res judicata* at the seat of arbitration and made by a competent arbitral tribunal; 2) the respondent has been served through personal notification and has had an opportunity to present its case; 3) the award meets the

1 Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal, Apr. 2002, *Forever Living Products Argentina S.R.L. v. Beas, Juan y otro*.

2 Cámara Nacional de Apelaciones en lo Comercial, Apr. 2014, *Pluris Energy Group Inc.* (*Islas Vírgenes Británicas*) *y otro v. San Enrique Petrolera S.A. y otros s/ organismos externos*.

mandatory rules for being considered as such in the place where it has been issued; 4) the award does not violate Argentine public order; 5) the award is not incompatible with an existing decision by an Argentine court; 6) the award involves arbitrable subject-matter;[3] and (7) an Argentine court does not hold exclusive jurisdiction over the dispute (e.g. family, criminal matters).

D *Formalities*

In accordance with Article 518 of the CCPC, an interested party's written application seeking the recognition of a foreign arbitral award must be filed together with an authenticated and translated copy and, if not evident from the award, evidence of the duly authenticated arbitrators' signatures. An interested party will generally have a 10-year period to file, though specific procedural rules in the relevant provincial codes should be consulted.

E *Procedure*

Pursuant to Article 518 of the CCPC, the enforcement petition is handled as a motion before the court (Articles 175–187 of the CCPC). Once ruled admissible by the competent court, the petition is served upon the respondent providing for a 5-day period to answer and file evidence in support. Once the service period has elapsed, the judge may order a hearing, for example to hear witnesses. If the respondent fails to answer or offers no evidence in support of his opposition, the judge may order the enforcement directly. Judges have discretion in managing the proceedings.

VI Leading Cases

The 2002 *Reef Exploration* case is one of the earlier cases often noted as an example of the favorable disposition in Argentina towards the recognition and enforcement of foreign arbitral awards.[4] In this case, the Commercial Court of Appeal of Buenos Aires granted enforcement by reversing a lower court's ruling that had initially denied it on the basis of an outstanding Argentine court order that had directed the arbitral tribunal to decline jurisdiction. The *Reef Exploration* case however, arguably also sets a concerning precedent. Though the petitioning party had filed for enforcement both under the New York Convention and the CCPC, the appeals court ordered the enforcement merely

3 The scope of this condition is rather limited pursuant to the CCPC itself. *See* CCPC, Art. 737.

4 Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal, Nov. 2002, *Reef Exploration Inc. v. Compañía General de Combustibles S.A.*

upon verifying the conditions provided in the latter. This experience suggests petitioning parties must, just in case, be mindful of the conditions set forth in the CCPC that are arguably no more onerous than those in the New York Convention.

More recent cases have helped to clear the air. In a 2009 case, *Far Eastern Shipping Company v. Arhenpez S.A.*, a federal appeals court expressly recognized the relevance of the New York Convention pursuant to Article 519 of the CCPC and found its provisions to displace the internal legal rules.[5] However, it is worth noting that the court rejected the enforcement of the award based on Article IV (2) of the Convention since the petitioner did not provide a duly certified translation of the award. In a 2010 case, *American Restaurants et al. v. Outbank Steakhouse*, another appeals court stated that international arbitral awards can only be set aside at the seat of arbitration.[6] In a 2011 case, *Armada Holland BV Schiedman Denmark v. Inter Fruit S.A.*, the Argentine Supreme Court clearly stated that the New York Convention does not empower a local court to review the merits of the award.[7] Finally, another 2011 case, *Smit International Argentina S.A. v. Puerto Mariel S.A.*, also relied on the New York Convention to enforce an arbitral agreement.[8]

Some commentators note some past and very unfortunate decisions. In the 2007 fact-specific case of *Milantric Trans S.A. v. Ministerio de la Produccion—Astillero Rio Santiago et al.*, a provincial court of appeals refused to grant the enforcement of an award against a state-owned company on public policy grounds arguing that the company was not authorized by law to submit to arbitration.[9] The court expressly rejected the application of the New York Convention because it considered that according to the Argentine Constitution, procedural matters can only be regulated by provincial law. Another controversial decision was issued by a Commercial Court of Appeal in *Ogden Entertainment Services Inc. v. Eijo, Néstor E. y otro* case

5 Cámara Federal de Apelaciones de Mar del Plata, Dec. 2009, *Far Eastern Shipping Company v. Arhenpez S.A.*

6 Cámara Nacional de Apelaciones en lo Comercial, May 2010, *American Restaurants et al. v. Outbank Steakhouse*.

7 Corte Suprema de Justicia de la Nación, May 2011, *Armada Holland BV Schiedman Denmark v. Inter Fruit S.A.*

8 Cámara Nacional de Apelaciones en lo Civil y Comercial Federal, Mar. 2011, *Smit International Argentina S.A. v. Puerto Mariel S.A.*

9 Cámara de Apelaciones en lo Contencioso Administrativo con asiento en La Plata, Aug. 2007, *Milantric Trans S.A. v. Ministerio de la Produccion—Astillero Rio Santiago et al.*

(2004).[10] The court rejected the enforcement of the award on public policy grounds. The court's conclusion was based on the fact that the cost of arbitration and the fees that claimant had to pay exceeded the principal amount he had been awarded. In the court's view, this constituted a violation of the right of access to justice.

VII Conclusions

A number of recent cases point to a favorable environment for the enforcement of foreign arbitral commercial awards in Argentina. Though there a couple of fact-specific instances in the past in which courts refused to enforce awards, they are not representative of the generally consistent and favorable disposition towards the recognition of arbitral awards under the appropriate governing laws in the country. Of course, as with other jurisdictions, the enforcement of arbitral awards against state entities is a riskier proposition that deserves a case-by-case analysis.

Annex

National Code of Civil and Commercial Procedure
Chapter II—Foreign Court Judgments, Foreign Arbitral Tribunal Awards
Conversion into Executory Judgment

517. The judgments of foreign tribunals, shall be enforceable in accordance with the treaties executed with the country of origin.
In the absence of treaties, they shall be enforceable upon the occurrence of the following conditions:

1) The judgment must be final (res judicata) in the State where it was rendered, made by a competent tribunal in accordance with the Argentine laws regarding international jurisdiction and the result of exercising a personal claim or a claim over property that has been moved outside Argentina during or after the foreign proceedings.

10 Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal, Sept. 2004, *Ogden Entertainment Services Inc. v. Eijo, Néstor E. y otro*.

2) The defendant against whom enforcement is sought has been given notice in person and has been given an opportunity to presents his/her case.
3) The judgment meets the necessary conditions to be considered as such at the place in which it was made and it has been authenticated pursuant to the requirements demanded under Argentinean law.
4) The judgment does not violate the public order principles under the laws of Argentina.
5) The judgment is not contrary to a prior or contemporaneous judgment of an Argentine court.

518. The enforcement of a judgment issued by a foreign tribunal shall be petitioned before the appropriate First Instance judge, together with authenticated and translated evidence thereof and of the steps that demonstrate that it is final, and if not evident from the judgment itself, that other conditions have been met.

The rules governing the interim/interlocutory decision shall govern the enforcement (exequatur) procedure.

If leave for enforcement is granted, the procedure provided for Argentine court judgments shall be followed.

519. When in a hearing the authority of a foreign judgment is invoked, it will only be applicable if it meets the conditions in Article 517.

519 BIS. Arbitral awards made by foreign tribunals may be enforced by the procedures set forth in the preceding articles, provided that:

1) The conditions in Article 517 are met, accordingly and, in each case, the extension of jurisdiction is appropriate pursuant to the conditions in Article 1.
2) The subject matter submitted to agreement are not excluded from arbitration in accordance Article 737.

CHAPTER 2

Bolivia

Fernando Aguirre B.

I Introduction

In 1997, Bolivia (formally *Estado Plurinacional de Bolivia*) enacted the Arbitration and Conciliation Law (Arbitration Law).[1] The Arbitration Law appropriately followed the UNCITRAL Model Law (1985 version) and established a favorable framework for arbitration in the country.[2] The Arbitration Law currently governs the recognition and enforcement of foreign arbitral awards. Some recent developments however have introduced some uncertainly.

Starting in August 2014, the country's new Civil Procedure Code (CPC or *Código Procesal Civil*) will enter into force.[3] The CPC indicates its provisions regarding the recognition and enforcement of foreign *judgments*, shall apply to foreign arbitral awards "in all that may be pertinent."[4] In contrast to the Arbitration Law, while the CPC does refer to the applicable international agreements and conventions, it also expressly subjects the recognition of foreign judgments to its provisions.[5] In addition, while the CPC does provide that the recognition of foreign *judgments* does not entail revisiting the merits of the dispute, it does not establish an exhaustive list of grounds upon which to refuse recognition.[6]

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

Bolivia is a party both to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention) and the Inter-American

1 Arbitration and Conciliation Law (*Ley de Arbitraje y Conciliación*), Law 1770, Mar. 10, 1997.

2 The Arbitration Law substituted the chapter on Arbitration in the 1975 Code of Civil Procedure (now derogated) and in the 1977 Commercial Code (Decree Law No. 14379 of Feb. 25, 1977).

3 Code of Civil Procedure (CPC or *Código Procesal Civil*), Nov. 19, 2013.

4 CPC, Art. 509.

5 CPC, Art. 502.

6 CPC, Art. 503.

 | DOI 10.1163/9789004284364_004

Convention on International Commercial Arbitration (Panama Convention (1975).[7] The Arbitration Law provides that its provisions on the recognition and enforcement of foreign arbitral awards apply without prejudice to the provisions in these conventions.

Bolivia was formerly also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Bolivia however denounced the ICSID Convention on May 2, 2007. That denunciation took effect on November 3, 2007.

III Relevant Provisions in Free Trade Agreements or Bilateral Investment Treaties

In contrast to some of its Andean neighbors, Bolivia is not a party to many of the modern free trade agreements in the region that contain specific provisions on the recognition of foreign and international awards. Instead, in recent years Bolivia has changed its approach to international free trade agreement and bilateral investment treaties (BITs). Following the enactment of its 2009 Constitution, Bolivia has opted to revisit a number of treaties that it has interpreted to be at odds with constitutional mandates. Indeed, Bolivia has denounced twenty-two BITs entered into during the 80s and 90s and renegotiated a Free Trade Agreement with Mexico because they provided for an investor-State dispute settlement mechanism that subjected the State to foreign law.[8]

IV National Law

The 1997 Law on Arbitration and Conciliation governs the recognition and enforcement of foreign arbitral awards generally.[9] According to the Arbitration Law, foreign arbitral awards shall be recognized and enforced in Bolivia in accordance with the New York and Panama Conventions.[10] In line with New York Convention Article VII, the Arbitration Law also establishes that should

7 The Arbitration Law, Art. 72, also recognized the applicability of the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, subject to prior ratification, an action which so far the Bolivian State has not taken.

8 A number of the treaties have survival clauses and may still apply to existing investments at the time of denunciation.

9 Arbitration Law, Arts. 79–84.

10 Arbitration Law, Art. 80(1).

more than one international agreement govern, courts should apply the convention that is more favorable to the interested party seeking the recognition and enforcement of the award.[11] As a result, in principle courts should not resort to the substantive provisions of Bolivian law.

The State and state entities however are subject to special regime. According the Constitution, the interpretation and application of international treaties to which Bolivia is a party must conform to its provisions.[12] In September 2013, Bolivia enacted a law that governs the making of international treaties and that interprets this constitutional provision.[13] The law provides that arbitral awards rendered pursuant to a dispute resolution "international mechanism", shall be effective and recognized in accordance with the relevant domestic procedural rules and applicable international treaties in force and in accordance with the State's interest, national security and sovereignty.[14]

Though the exact effect of this provision is uncertain, its future application may introduce further uncertainty. Indeed, existing constitutional provisions have already had a significant effect on the ability of state entities to agree to international arbitration. For example, the Constitution provides that foreign investment is subject to the laws, authorities and jurisdiction of Bolivia.[15] As a result, state entities are understood to be unable to agree to international arbitration agreements or clauses with a foreign investor conducting its business in the country through a local subsidiary or establishment.[16] The clearest example of this prohibition is in the hydrocarbons sector. Indeed, based on this same principle, the Constitution expressly prohibits international arbitration in the hydrocarbons sector.[17]

---

11 Arbitration Law, Art. 80(2).

12 Bolivian Constitution (hereinafter "Constitution"), Art. 13.

13 Law No. 401 of Sept. 18, 2013 (Law of Treaties).

14 Law of Treaties, Art. 20(IV).

15 Constitution, Art. 320(II).

16 State entities would still however be able to enter international arbitration agreements or clauses for the procurement of goods or services abroad. In this case, a foreign supplier is not required to have a permanent establishment in the country.

17 Constitution, Art. 366. Pursuant to this prohibition, dispute resolution provisions now exclusively provide a "national arbitration" clause. Theoretically, it is still possible to have a domestic arbitration in accordance with the arbitration rules of a foreign arbitral institution. *See* Fernando, Aguirre, in *Arbitration News*, International Bar Association Legal Practice Division, Vol. 16 No. 1, Mar. 2011.

V Application for Recognition and Enforcement Before Local Courts

It is too soon to know the exact impact of the enactment of the CPC on the Arbitration Law. For the time being, it is appropriate to assume that as in the past, the provisions of the New York Convention and Panama Conventions govern in principle, with the specific provisions of the Arbitration Law guiding the procedure of the courts in practice.

A *Applicable Awards*

According to Article 79 of the Arbitration Law, a foreign award subject to recognition is "any arbitral resolution on the merits issued outside Bolivia."[18] This articulation makes it safe to assume that in Bolivia, partial or interim awards that decide an issue with finality are considered awards in Bolivia and may be presented for recognition. Indeed, even under the new CPC, foreign judgments and 'other judicial resolutions' are considered binding and may be enforced in the country.[19]

B *Competent Courts*

The Supreme Tribunal of Justice of Bolivia (*Tribunal Supremo de Justicia*), seated in the city Sucre has jurisdiction over the recognition of foreign arbitral awards.[20] If the Supreme Tribunal of Justice grants the recognition of the award, it will indicate the competent judicial authority to enforce the award.[21] The competent authority is primarily the Civil and Commercial Court with jurisdiction in the domicile of the respondent. Alternatively, it will be the Civil and Commercial Judge with jurisdiction in the place of the respondent's assets.[22]

C *Conditions*

As previously noted, the Arbitration Law provides foreign arbitral awards shall be recognized in Bolivia in accordance with the New York and Panama Conventions.[23] This principle has yet to be tested before the Supreme Tribunal of Justice. In practice the Supreme Court will likely look to the Arbitration Law for guidance. Article 81 of the Arbitration Law in addition to referring to the international conventions in force, provides an iteration of the grounds

18 Arbitration Law, Art. 79.
19 CPC, Art. 502.
20 Arbitration Law, Art. 82(1).
21 Arbitration Law, Art. 83(3).
22 Id.
23 Arbitration Law, Art. 80(1).

provided in the New York and Panama Conventions but only those resulting from the application of the interested party.[24] The Arbitral Law also takes a narrow view of the grounds to oppose the enforcement of a foreign arbitral award before the Supreme Tribunal. The Arbitral Law instructs the Superior Tribunal to only consider arguments from respondents who properly evidence they have already complied with the award.[25]

D *Formalities*

In accordance with the Arbitration Law, the party seeking the recognition and enforcement of the arbitral award must furnish "duly legalized" copies of the arbitral agreement and of the corresponding arbitral award.[26] Bolivia unfortunately is not a party to Convention Abolishing the Requirement of Legalization for Foreign Public Documents (Hague Convention). Therefore the party seeking to present the award for recognition must authenticate the award or certify a copy of it in the country where the award was made as provided in the New York Convention. In addition, the Arbitration Law provides both the agreement and the arbitral award must be translated into Spanish by a court authorized expert.[27] Finally, in accordance with Bolivian private law, the time limit to present an award for recognition is 5 years.[28]

E *Procedure*

Once the application is filed, the Supreme Tribunal of Justice shall serve the other party with the application and the supporting documents. The respondent will have a ten day period to respond and provide appropriate evidence.[29] Following the response, or in its absence, the Tribunal will decree an evidentiary period. Once notified, the respondent's opportunity to present evidence will lapse within an eight-day period.[30] Thereafter the Supreme Tribunal is called to issue its decision within five days.[31] The Tribunal's decision cannot be appealed. If the application is found to have merit, the Supreme Tribunal will

24 Arbitration Law, Art. 81(1). This Article incorporates the grounds to set aside an award in Article 63, but only those listed in paragraph 2. Those in paragraph 1 relating to non-arbitrable subject matter and international public policy are listed under paragraph 1.

25 Arbitration Law, Art. 84(1).

26 Arbitration Law, Art. 82(2).

27 Arbitration Law, Art. 82(3).

28 Civil Code, Art. 1507.

29 Arbitration Law, Art. 83(1).

30 Arbitration Law, Art. 83(2).

31 Id.

order the award to be enforced before the competent judicial authority.[32] The lower courts seized with an enforcement action, will proceed in accordance with the country's civil procedure rules for the enforcement of local judgments. The enforcement court, upon request by the plaintiff can order measures of sequestration, seizures, and judicial mortgages in public registries of real estate property or personal property subject to registration, and retention of funds, banking deposits and similar assets for their disposition by judicial public auction.

VI Leading Cases

The official records of the Supreme Tribunal of Justice indicate that as of the enactment of the Arbitration Law to date, the court has not heard any application for the recognition and enforcement of an arbitral award.

VII Conclusions

Bolivia has limited experience with the recognition and enforcement of arbitral awards. That said, the country has appropriately established a favorable framework by becoming a party to the relevant international conventions and by enacting an Arbitration Law that incorporates pro-arbitration provisions. That framework however is increasingly uncertain given developments since the country adopted a new Constitution in 2009. This is the case particularly in regards to disputes in which the State or state entities are parties.

Annex

Arbitration and Conciliation Law
(No. 1770 of March 10, 1997)

Article 63—Ground to Set Aside

I. The competent judicial authority shall set aside the arbitral awards for the following reasons:

32 Arbitration Law, Art. 83(3).

1. Subject matter is not arbitrable.
2. Arbitral award is contrary to public order.

II. The competent judicial authority may also set aside the award when the requesting party proves any of the following grounds:
    1. The existence of the grounds to annul or void the arbitral agreement in accordance with the provisions of the Civil Code.
    2. Failure to notify the appointment of an arbitrator or of the arbitration proceedings.
    3. Inability to exercise the right of defense.
    4. The award deals with a dispute not contemplated by the arbitral agreement or includes decisions and subject matter beyond said arbitration agreement, provided matters submitted to arbitration can be set apart and are not been subject to annulment.
    5. The composition of the Arbitral Tribunal has been irregular.
    6. Conduct of a flawed procedure that violates what has been agreed, what is established in the adopted rules, or the requirements of this law.
    7. Making of the award beyond the time limit provided for in Article 55 paragraph I of this law.

[. . .]

Article 72—Complementary Rules

I. The provisions of this Title shall apply to International Arbitration, without prejudice to the provisions of the following instruments:
    1. Inter-American Convention on 'International Commercial Arbitration', adopted in Panama on January 30, 1975.
    2. Convention on the 'Recognition and Enforcement of Foreign Arbitral Awards' adopted in New York on June 10 of 1958.

[. . .]

Article 79—Foreign Awards

Foreign award shall mean any arbitral resolution on the merits made outside Bolivia.

Article 80—Applicable Norms

I. Foreign arbitral awards shall be recognized and enforced in Bolivia in accordance with the instruments cited in Article 72 paragraph I of this law.

II. Unless otherwise agreed and in case there is more than one applicable international instrument, the treaty or convention more favorable to the party applying for recognition and enforcement of the arbitral awards will be selected.
III. In the absence of any treaty or convention, arbitral awards shall be recognized and enforced in Bolivia, in accordance with the legal provisions and special norms of this law.

Article 81—Grounds for Refusal

I. The recognition and enforcement of a foreign arbitral award shall be refused and declared unfounded, for the following reasons:
    1. Presence of any of the grounds for annulment established in Article 63 of this law, proven by the party against whom the recognition and enforcement of the award is invoked, in the cases of paragraph II.
    2. The awards is not binding because it is not yet final, has been set aside or suspended by the competent judicial authority of the country where it was made, proven by the party against whom the recognition and enforcement is invoked.
    3. Existence of the grounds to set aside or invalidity established by the existing international agreements or conventions.

Article 82—Jurisdiction and Application

I. The application for recognition and enforcement of the foreign arbitral award in Bolivia shall be filed before the Supreme Tribunal of Justice.
II. The party seeking the recognition and enforcement of the foreign arbitral award shall furnish duly legalized copies of the corresponding agreement and arbitral award.
III. When the agreement and the arbitral award are not in the Spanish language, the applicant shall file a translation of said documents, signed by an authorized expert.

Article 83—Procedure

I. Once the application has been filed, the Supreme Tribunal of Justice will serve the other party with the application and the supporting documents, so that it can answer it within the ten (10) days following its notification and present the evidence it deems necessary.

II. The evidence must be furnished within a maximum eight (8) day period running from when the decree ordering the start of the relevant evidentiary period is last notified to the parties. Within the five (5) days after the evidentiary period has elapsed, the Supreme Tribunal of Justice shall issue a resolution.
III. Once the application is declared to have merit, the enforcement of the award shall take place before the competent judicial authority designated by the Supreme Tribunal of Justice, in the domicile of the party against whom the recognition of the award has been sought, or in its absence, by one with jurisdiction in the place where the goods are to be enforced.

Article 84—Objections to Enforcement

I. The Supreme Tribunal of Justice shall only accept objections to the compulsory enforcement of the award that are based on evidence of compliance of said award or on the existence of a pending motion to set aside.
II. In the former case, once the existence of a pending application to set aside has been shown, the Supreme Tribunal of Justice shall suspend the compulsory enforcement of the award until that such application has been resolved.
III. The Supreme Tribunal of Justice shall summarily dismiss any objections based on arguments other that those indicated in paragraph I of this article, or any motion that seeks to disrupt the requested enforcement.

CHAPTER 3

Brazil

Nadia de Araujo and Ricardo Ramalho Almeida

I Introduction

Arbitration in Brazil gained momentum in the last seventeen years, upon the enactment of Law No. 9,307 on September 23, 1996 (Brazilian Arbitration Statute, hereinafter '1996 Law'). The Judiciary has since developed a clear and favorable attitude towards arbitration and there has been a growing preference for arbitration clauses in business contractual practice. As a result, Brazil has developed a vibrant arbitration community amongst both practitioners and academics, and now plays a leading role in Latin America as regards to international arbitration.

Foreign judgments are traditionally recognized and enforced in Brazil as per the so-called *giudizio di delibazione* system, where reciprocity is not required and the final decision is brought before the Brazilian competent judicial authority and accepted into internal juridical order, provided it fulfills certain formal requirements and is not contrary to public policy (*ordre public*), national sovereignty or social mores. There are no re-judgment of any aspect whatsoever of the underlying dispute, nor are there any inquiries on the law applied, or inquiries on the procedure followed by the adjudicating court, unless basic principles of Brazilian law are violated.

These main aspects of the procedure for recognition of foreign court judgments are also applicable, in general, to the recognition of foreign arbitral awards, with the supplement of the requirements of specific law, which will be addressed herein below.

All foreign court judgments and arbitral awards must be presented to the Superior Court of Justice (STJ) for recognition and enforcement; otherwise they cannot have legal effect or acknowledgement in Brazil. Such procedure is a 'lawsuit' in the procedural law sense and is called '*homologação*' (from Latin '*homologare*' and ancient Greek '*homologein*', which mean '*to confirm or approve*'). The STJ is a judicial body that sits in the nation's capital, Brasília, and is formed by thirty-three judges nominated by the President of the Republic, according to certain requisites set forth in the Constitution. It is the second

 | DOI 10.1163/9789004284364_005

highest Court in Brazil, secondary to the Supreme Federal Court (STF), and is the highest Court as concerning non-constitutional matters.

The homologation process in general is apparently quite simple and should be expeditious. Nonetheless, since 2005, when the STJ became responsible for such procedure, and although it has set a standard in favor of homologation of foreign arbitral awards (in numbers, out of 52 cases, only 8 were denied and 4 were extinguished),[1] the duration of the actions has been very lengthy, varying from 3 to 6 years to reach a final decision.

This article will discuss the Brazilian law applicable to the procedure for homologation and enforcement of foreign arbitral awards; and will also review and comment on the recognizable trends in scholarly writings and Court judgments.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

Brazil has participated in negotiations and signed significant international treaties on the recognition of foreign arbitral awards. It should be noted that Brazilian law adopts a dualist system, as concerning the interrelation between their national and international law. This means that an international treaty, signed or even ratified, does not have immediate effect with regards to the internal juridical order, although it may originate international obligations for Brazil before foreign counterparts, as a matter of public international law.

The procedure for 'internalization' of a treaty, i.e., the process of acquiring legal applicability and enforceability, inevitably takes considerable time for approval and sanction by the competent governmental bodies, creating a gap between the time of ratification and the time of entry into force. Basically, any treaty Brazil enters into must be approved by Congress (by legislative decree) and subsequently promulgated by the President of the Republic (by presidential decree), in order to become legally effective.

The following list includes the treaties relevant to international arbitration which are in force in Brazil:

- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('NY Convention'): Brazil acceded to the NY Convention

1 As per Exhibit I attached hereto.

on June 7, 2002.[2] The Convention was internalized in Brazil through the enactment of Decree 4,311 of July 23, 2002.[3]

- Inter-American Convention on International Commercial Arbitration ('1975 Panama Convention'): Brazil signed the Convention on January 30, 1975; ratified it on August 31, 1995; deposited the instrument of ratification on November 27, 1995;[4] and internalized it through the enactment of Decree 1,902 of May 9, 1996.[5]
- The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards ('1979 Montevideo Convention'): Brazil signed this Convention on May 8, 1979, with reservation to letter d) of Article 2;[6] ratified it on August 31, 1995; deposited the instrument of ratification on November 27, 1995;[7] and internalized it through the enactment of Decree 2,411 of December 2, 1997.[8]
- International Commercial Arbitration Agreement of Mercosur: Brazil signed this treaty on July 23, 1998;[9] internalized it through the enactment

2 United Nations, Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). Available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (last visited on Feb. 24, 2014).

3 Presidency of the Republic Civil Cabinet for Legal Affairs, Decree 4311 of Jul. 23, 2002 (Promulgates the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) (Brazil). Available in Portuguese at http://www.planalto.gov.br/ccivil_03/decreto/2002/D4311.htm (last visited on Feb. 26, 2014).

4 Organization of American States, Inter-American Convention on International Commercial Arbitration (Panama, 1975). Available at http://www.oas.org/juridico/english/sigs/b-35.html (last visited on Feb. 26, 2014).

5 Presidency of the Republic Civil Cabinet Subchefia for Legal Affairs, Decree 1,902 of May 9, 1996 (Promulgates the Inter-American Convention on International Commercial Arbitration of Jan. 30, 1975) (Brazil). Available in Portuguese at http://www.planalto.gov.br/ccivil_03/decreto/1996/D1902.htm (last visited on Feb. 26, 2014).

6 Organization of American States, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Uruguay, 1979). Available at http://www.oas.org/juridico/english/sigs/b-41.html (last visited on Feb. 26, 2014).

7 Id.

8 Presidency of the Republic Civil Cabinet for Legal Affairs, Decree 2,411 of Dec. 2, 1997 (Promulgates the Inter-American Convention on Extraterritorial Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979) (Brazil). Available in Portugese at http://www.planalto.gov.br/ccivil_03/decreto/1997/d2411.htm (last visited on Feb. 26, 2014).

9 Mercosur, State Treaty Ratification and Applicability Mercosur and Protocols and Associated States (Paraguay, 1991). Available in Spanish at http://www.mercosur.int/t_ligaenmarco.jsp?contentid=4823&site=1&channel=secretaria (last visited on Feb. 26, 2014).

of Decree 4,719 of June 4, 2003;[10] and deposited its instrument of ratification on October 9, 2003.

Analysis

Brazil resisted adoption of the New York Convention for more than four decades due to a legal opinion by the General Counsel of the Ministry of Foreign Relations that considered an arbitral award to be a private matter and thus incapable of producing the same effects as those of a judicial decision.[11]

Prior to the enactment of the 1996 Law, the law applicable to arbitration in Brazil (basically the Civil Code and the Code of Civil Procedure) did not accept the enforceability of arbitral clauses inserted in contracts. Consequently, a specific submission to arbitration was required after the dispute had arisen between the parties. Strangely enough, arbitral clauses were considered binding, but not enforceable. Therefore, a party was entitled to simply refuse to submit to arbitration once a dispute had arisen.

Additionally, domestic arbitral awards had to be confirmed by a judicial court in order to be legally enforceable by the courts. Again, it was considered valid and could be spontaneously complied with by the parties, but the aid of the courts for enforcement purposes would be available only after the awards had been confirmed by the Judiciary. In line with this holding, foreign arbitral awards were not enforceable and could not be admitted to the procedure of homologation (then before the STF), unless they had been previously confirmed by a judicial court in the country of origin (system of *double exequatur*).

---

10 Presidency of the Republic Civil Cabinet for Legal Affairs, Decree 4,719 of June 4, 2003 (Promulgates the Agreement on International Commercial Arbitration Mercusor I) (Brazil). Available in Portuguese at http://www.planalto.gov.br/ccivil_03/decreto/2003/D4719.htm (last visited on Feb. 27, 2014).

11 Clóvis Beviláqua, acting as a General Counsel for the Ministry of Foreign Relations, wrote a legal opinion on the proposal of the Geneva Protocol of 1923, stating that the arbitral clause would not prevent the judge from deciding the controversy. Later, in 1927, he wrote a second legal opinion on the 1927 Geneva Convention where he expressed his views that an arbitral award was no more than a private act and, therefore, unenforceable. Bevilácqua's position would be adopted by another General Counsel, Hildebrando Accioly, who expressed his opinion on the private nature of the arbitral award that it should not be treated as a judicial decision when he analysed the New York Convention. For more information on the subject, refer to Nadia de Araujo & Lidia A. Spitz, *A Convenção de Nova Iorque sobre o Reconhecimento e a Execução de Sentenças Arbitrais Estrangeiras: Análise sobre seu Âmbito de Aplicação, in*: Arnoldo Wald & Selma Ferreira Lemes, Arbitragem Comercial Internacional, 67–70 (São Paulo: Saraiva, 2011).

For these reasons, Brazil did not sign the 1927 Geneva Protocol on Enforcement of Arbitral Awards nor accede to the New York Convention before the enactment of the 1996 Law. Notwithstanding, a few months before the promulgation of the 1996 Law, Brazil ratified the 1975 Panama Convention. The New York Convention was ratified a few years after the promulgation of the 1996 Law and was effectuated by Brazil only after the STF affirmed the constitutionality of the 1996 Law, on December 2001, by a majority of seven out of eleven Justices.[12]

Nonetheless no dramatic changes resulted from the ratification of the New York Convention, as compared to the legal regime instituted by the 1996 Law, as the arbitration statute was heavily inspired by the Convention, concerning foreign arbitral awards, and essentially adopted the same legal provisions with a more concise language. It should be noted that the STF (until 2004) and the STJ (from 2005 onwards) very seldom made any reference to the New York Convention and primarily applied their respective Internal Regulations and the 1996 Law, both of which will be addressed below.[13]

III National Law

As mentioned earlier, the main changes promoted by the 1996 Law, were the granting of legal enforceability to the arbitral clause, irrespective of a voluntary submission to arbitration at the moment the dispute arises; and, as regards to international arbitration, establishing clear rules for the recognition and enforcement of foreign arbitral awards, abolishing the 'double exequatur' system that prevailed before.

In addition to that, the 1996 Law provided a modern legal framework for domestic and international arbitration in Brazil, adhering to the prevailing standards in the legislation of leading countries. The UNCITRAL Model Law was also a relevant source of inspiration for the 1996 Law. Many principles and rules established by the Model Law were adopted in Brazil, such as, the equalization of the arbitration clause and the *compromis*; the freedom of the parties to establish the legal rules applicable to both substance and procedure and to determine the number of arbitrators, the place and language of the proceedings, and the determination of alternative means of appointment of arbitrators, failing voluntary appointment by the parties, *inter alia*.

12 SEC 5,206-Espanha, judgment declared final on Dec. 12, 2001.

13 The New York Convention was mentioned by the Superior Court of Justice in 'Recurso Especial' Number 1,231,554 (May 24, 2011) and in SEC n. 3,709 (June 14, 2012).

The 1996 Law also adopted the *Kompetenz-Kompetenz* principle which assigns primary competence to arbitral tribunals for adjudication over their own jurisdiction; also, the 1996 Law provided for the independence between the arbitral clause and the contract and gave authority to the tribunal to evaluate evidence through a system of free and reasoned persuasion.

An arbitral award cannot be appealed before the Judiciary and ordinarily, is only subjected to a limited recourse, before the same arbitral tribunal, for the purpose of correcting clerical errors and omissions, or clarifying obscurities or contradictions. Awards rendered in Brazil may be set aside through an independent suit, which must be brought before the Judiciary within 90 days after the rendering of the award, and is limited to a certain number of grounds that are consistent with the Model Law and international practice. All such grounds concern serious irregularities or illegalities in the conduct of the arbitration.

The 1996 Law defines objective arbitrability as per the disposability of the rights involved in the dispute. Thus any claims of an economic nature over disposable rights may be arbitrated. The 1996 Law adopts the principle of party autonomy in its full extent, allowing parties to choose the rules applicable to the dispute, not limited to national laws, but including the prerogative of choosing international sources of law such as the *lex mercatoria* or principles of commercial law, or resorting to *ex aequo et bono* arbitration. An innovative feature of the 1996 Law is the express disposition that limits the choice of the legal rules applicable to the merits to those that do not violate good mores and public policy.

As concerning the arbitration procedure, the parties enjoy a similar liberty to freely establish the applicable rules, or to adopt those of any institution providing arbitration services or rules. The arbitral tribunal is competent to decide any procedural matter not addressed by the parties, or to supplement the parties' provisions. Although not expressly provided for in the 1996 Law, it is generally accepted that arbitral tribunals may render preliminary injunctions or interim relief, and that the interested party may petition the Judiciary for emergency measures, but only prior to the commencement of the arbitration. The main limit to the liberty of establishing procedural rules is the constitutional clause of *due process of law*, embodied in the 1996 Law by the expressed adoption of the principles that the parties must be given a fair opportunity to be heard; must be treated equally; and that the arbitral tribunal must act impartially.

The nationality of awards is determined by the territory where they are rendered. Therefore, an award issued by an arbitral tribunal sitting in Brazil shall be considered a domestic award and will not be subjected to the homologation procedure, even if the dispute is subjectively or objectively international.

The award shall then be immediately enforceable as if it were a final domestic court decision. Only awards rendered by arbitral tribunals sitting outside of Brazil must be homologated, even if the parties involved are Brazilian and the dispute is not international.

IV Application for Recognition and Enforcement Before Local Courts

The 1996 Law mirrors the New York Convention in its listing of a number of grounds which the party opposing homologation (recognition) shall allege and prove as an obstacle to the internalization of the foreign award. Thus, where there is no applicable treaty or convention, the recognition of the foreign arbitral award will only be denied, under Article 38 of the 1996 Law, if the party proves that (a) a party to the arbitration agreement was not legally capable; (b) the arbitration agreement was not valid according to the law to which the parties submitted it or, in the absence of such choice of law, according to the law of the country where the award was made; (c) the party was not notified of the appointment of the arbitrator or of the arbitration procedure, or if the principles of ample defense and contradictory procedure were violated; (d) the arbitral award exceeded the arbitration agreement and it was not feasible to segregate the exceeding part; (e) the arbitration was initiated or the arbitrator appointed in violation of the arbitral agreement; or (f) the award is not enforceable, or was annulled, or was suspended by a judicial decision in the country where it was made.

As per Article 39 of the 1996 Law, which again mirrors the New York Convention, there are two grounds for denial which may be invoked on the Court's own initiative: (a) the subject matter of the arbitration could not be submitted to arbitration, according to Brazilian law; or (b) the arbitral award violates Brazilian public policy. The latter requirement is interpreted by legal scholars as meaning Brazilian international public policy, as opposed to mere domestic public policy, in the civil law sense.

It should be noted that Article 39 of the 1996 Law expressly authorizes that the notification of parties domiciled in Brazil be made by means other than letters rogatory (which by contrast are the only acceptable means of notification and citations in Brazil for judicial procedures instituted abroad), provided that it is made in accordance with the relevant arbitration agreement (or rules applicable as per the arbitration agreement), or with the law of the country where the arbitration takes place. The only requirement is that such notice provides reasonable time for the notified party to prepare its appearance before the arbitral tribunal.

A *Competent Courts*

As previously mentioned, the homologation of foreign arbitral awards is a legal requisite for its subsequent enforcement and also for any effects it may have in Brazil—not only for enforcement purposes, but also for declaratory and constitutive effects (recognition). Enforcement of the award, after its homologation, shall be conducted by the federal court of the jurisdiction of the domicile of the party subject to enforcement.

The rules for recognition and enforcement of foreign arbitral awards are set forth in Articles 34 to 40 of the 1996 Law. As mentioned above, an arbitral award is considered foreign as long as the seat of the arbitration is outside of Brazil. This geographical connecting factor, albeit criticized, brings legal certainty to the parties.[14] The 1996 Law also considers an arbitral award as equal to a judicial decision of last resort. Thus, a foreign arbitral award is considered to be akin to a foreign judicial decision that is ready to be executed and thus is no longer subject to any appeal. Therefore, in order to be executed in Brazil, the arbitral award has to undergo the same process for recognition and enforcement as any decision held by the Judiciary of another state.

From 1934 to 2004, the Supreme Court (*Supremo Tribunal Federal*) had exclusive jurisdiction to confirm foreign judgments, arbitral awards and all foreign judicial requests to be executed in Brazil. Constitutional Amendment Number 45 transferred such competence to the Superior Court of Justice (*Superior Tribunal de Justiça*).[15] This change was part of a judicial reform

14 This understanding was confirmed in the judgment of Special Recourse ('Recurso Especial') Number 1,231,554 by the Superior Court of Justice, on May 24, 2011, where it was decided that "*in Brazilian law, the geographical criterion* (*jus soli*) *was adopted, for determining the nationality of arbitral awards, based exclusively on the place where the decision was rendered. In the instant case, the fact that the arbitration was initiated by means of a request before the International Court of Arbitration of the International Chamber of Commerce does not have the effect of altering the nationality of the award, which remains Brazilian.*"

15 The Superior Court of Justice issued Resolution Number 9 in May 2005, which contains the legal requirements for the recognition of foreign judgments and arbitration awards in Brazil, as well as the granting of letters rogatory. It is important to explain that until the Constitution of 1988, the Supreme Court had jurisdiction over all matters in the so-called third instance, including the right to review any violations of the Constitution and federal law. Although Brazil is a federal system, all legislation in civil and criminal matters is federal (thus the system is all encompassing). The States' legislative power is very limited, in contrast to other systems, such as Canada and the United States. The 1988 Constitution created a new Court, the Superior Court of Justice, that took over some of the jurisdiction from the Supreme Court for review of matters of federal law. With the 2004 Amendment, additional jurisdiction of the Supreme Court was transferred to the Superior Court of

implemented in Brazil in 2004 due to the overload of cases before the STF and the result of which allowed the Supreme Court to focus its attention on constitutional matters. Therefore, international judicial cooperation in general was transferred to the STJ, which is primarily in charge of unifying the interpretation of federal legislation made by the appellate courts of both the States and the Federal Justice.

The requirement that all foreign decisions and foreign arbitral awards be previously recognized ('homologated'), before enforcement and as a condition for producing legal effects in the country, is established by Article 483 of the Brazilian Code of Civil Procedure.[16] This requirement has been applicable, since Brazil established a legislation of its own after independence from Portugal, in 1822.[17] Neither the first Unified Brazilian Code of Civil Procedure,

---

Justice in order to lighten the Supreme Court's workload. The aim was that the Supreme Court would finally become a true Constitutional Court, dealing only with constitutional issues. All decisions cited in this work are easily accessible by their class and number directly through both the Courts' websites: that of the Supreme Court is www.stf.gov.br and that of the Federal Superior Court is http://www.stj.jus.br/portal_stj/publicacao/engine.wsp. Research through these websites is easy and reliable. The full texts of all decisions are also available.

16 For more detailed references, see in Portuguese Nadia de Araujo, *Direito Internacional Privado: Teoria e Prática Brasileira* (N. 5ª ed. Rio de Janeiro, 2011), Nadia de Araujo & Lidia Spitz, Cooperação Jurídica Internacional no Superior Tribunal de Justiça—Comentários a Resolução n. 9 do STJ, (Rio de Janeiro: Renovar, 2010). In English, see Nadia de Araujo, *Dispute Resolution in MERCOSUL: The Protocol of Las Lenas and the Case Law of the Brazilian Supreme Court*, 32 U. Miami Inter-Am. L. Rev. 25, 44 (2001). For more information on the Brazilian system of recognition of foreign decisions, see in English, Jacob Dolinger, *Brazilian International Procedural Law*, in A Panorama of Brazilian Law 349, 365–66 (Jacob Dolinger & Keith S. Rosenn eds., 1991); Daniela Trejos Vargas, *Proceedings Inaugural Conference on "Legal and Policy Issues in the Americas,"* 13 Fla. J. Int'l L. 125, 127–28 (2000); Maria Angela Jardim de Santa Cruz Oliveira, *Recognition and Enforcement of United States Money Judgments in Brazi*l, 19 N.Y. Int'l L. Rev. 1 (2006). For a recent account of recognition of foreign arbitral awards see Mauricio Gomm-Santos, *Brazil's Conflicting International Arbitration Case Law: The Inepar and Renault Decisions*, 64 J. Disp. Resol. 82. This article used and expanded upon information that was previously published in the article by Nadia de Araujo & Frederico de Valle Magalhaes Marques, *Recognition of Foreign Judgments in Brazil: the Experience of the Supreme Court and the shift to the Superior Court of Justice*, 1 World Arbitration and Mediation Review, 211 (2007). At that time, the Superior Court of Justice had just initiated the process of presiding over cases on international co-operation, while now it has a firm and established case law on the subject.

17 Brazil became the capital of the Portuguese empire from 1808 to 1821, when King João VI transferred his residence from Portugal to its largest and most distant colony, in order

dated 1939, or the current Code, dated 1973, established any specific rules on the procedure for the recognition of foreign decisions, as such matter is delegated to the internal regulations of the competent court.

B *Conditions*

The most important feature of the homologation process is the discussion of public policy issues, as this is the only point that touch upon the merits of the case, albeit indirectly. Defendants frequently attempt to rehash the merits of a foreign decision on the basis of alleged public policy violations. The boundaries of what is a question on the merits, or what is a question on public policy grounds are not clearly established, although the STJ has demonstrated that it is more inclined to dismiss such allegations and unwilling to allow room for public policy challenges.

In two cases, the absence of proof that the arbitral clause was signed and thus accepted by the defendant was considered illustrative of a sensitive issue to public policy—in spite of the technical inaccurateness of such reasoning—and thus the award was not confirmed.[18] Nonetheless, in similar cases the awards were granted recognition. It is fair to say that the STJ is aware of its important role in guaranteeing that foreign decisions are recognized without a

---

to escape from Napoleon's invasion. In 1821, King João VI returned to Portugal but left his heir Pedro as regent, who on September 7, 1822 declared Brazil independent from Portugal and was crowned Emperor Pedro I of Brazil. Brazil remained a monarchy from 1822 to 1889, when a military coup dethroned the aged Emperor Pedro II and instituted the Republic. A Federal Presidential system was then implemented, very much inspired by the American Constitution.

18 *See* Superior Court of Justice, SEC 967, (2006), where the Court concluded that the absence of proof that the defendant had chosen arbitration as the exclusive method of resolution of disputes because his signature was missing in the contracts where the clause was inserted was an offence to public policy. The Court asserted that the absence of an unequivocal choice by one party for arbitration is against the principle that arbitration can only prevail where there is a manifest choice to submit to it. Also, in Superior Court of Justice, SEC 866, (2005) the contract was concluded verbally and there was no proof that an arbitral clause was negotiated, thus no proof of its acceptance and public policy was invoked for denying recognition to the arbitral award. Nonetheless, in Superior Court of Justice, SEC 856, (2005) (where there were also no proof of the signing of the arbitral clause), the court reasoned that although there was no signed contract, it was established that there was an understanding between the parties, and both appeared before the arbitral tribunal.

review on the merits. Over the last nine years most arbitral awards have been granted recognition without serious—if any—exploration of the merits.[19]

As per STJ's Resolution Number 9, in addition to the allegation that a foreign decision is manifestly against public policy, the only arguments defendants are permitted to proffer in response to a recognition request are those related to procedural formalities. The requirements for the recognition of foreign judgments were originally set forth in the Introductory Law to the Civil Code, which has been recently changed by Decree Number 12,376, 2010 to Introductory Law to Brazilian Law (*Lei de Introdução às Normas do Direito Brasileiro*). The STJ has kept the same requirements in Resolution Number 9, Article 5, and added new ones in Article 4. In the discussion of the bill for a new Code of Civil Procedure, the judicial cooperation section sets forth provisions on the recognition and enforcement of foreign decisions, which are in accordance with Resolution Number 9, including its new requirements.

The requirements are: (i) the foreign court or authority has jurisdiction to issue the decision; (ii) the parties were properly served or default was legally verified, (iii) there is evidence of the authenticity of the judgment or decision, and that it is final and not subject to appeal; and (iv) the foreign judgment or decision has been certified by the Brazilian Consulate/Embassy of the country of origin and has been translated into Portuguese by a Brazilian sworn legal translator.

C *Formalities*

The fulfillment of the requirement of authentication and translation fall within the obligations of the requesting party to present evidence to prove that the award is authentic and issued by a competent arbitral tribunal. The Brazilian Court also requires a translated version that can be trusted. Resolution Number 9 adds that the authenticity of the foreign judgment must be certified by the Brazilian Consulate/Embassy at its place of origin. Therefore, the foreign arbitral award and other documents presented with the request for recognition shall be authenticated by the Brazilian consular authority in the country of origin of the award before arriving in Brazil. This is justified by the fact that Brazilian consuls abroad carry out notarial functions, enabling them to certify

19 *See* Nadia de Araujo, *O Superior Tribunal de Justiça e a homologação dos laudos arbitrais estrangeiros, balanço positivo de quarto anos de atuação*, 3 Revista Semestral de Direito Empresarial, 229 (2008), where the author shows that the STJ had deliberated, (at that time) on 24 cases, and only three had been denied. The numbers have since grown, but the ratio between cases granted and denied has remained unchanged.

the authenticity of documents that will be presented before public authorities in Brazil.[20]

The translation into Portuguese by a sworn translator (*tradutor juramentado*) is another requirement that cannot be circumvented. The lack of a proper translation will result in the denial of the recognition request. The STF has ruled that the translation needs to be performed by a sworn translator because it is automatically certified for its authenticity. Since 2005, the STJ has decided several cases in the same direction. If a sworn translator of the original language of the decision cannot be found, the parties can resort to an *ad hoc* translator or use an interpreter who is registered with the competent organ of the Brazilian Commercial Register. Recognition will be denied if the translation was performed in the country of origin, unless it was made pursuant to a specific provision in a bilateral or multilateral treaty or convention. The Code of Civil Procedure bill has maintained this rule. Also, the translated arbitration agreement (the submission to arbitration or the contract containing the arbitral clause) must be submitted in original or duly certified copy.

D *Procedure*

In 2005, the STJ regulated the procedure for recognition of foreign decisions by Resolution Number 9, replacing the 1971 STF regulation. Resolution Number 9 confirmed and updated many issues that the STF case-law had settled and introduced some innovations. One example of a modernizing rule added by Resolution Number 9 is the possibility of obtaining injunctive relief during the recognition process, which was not previously allowed by the STF. Nonetheless, Resolution Number 9 is subject to modification at any time by the STJ. Therefore, if this regulation were to be converted to statutory provisions, it would provide more legal certainly to the parties.

A new Code of Civil Procedure is currently under discussion by the Brazilian Congress and it is expected that this Code will pass review. In 2010, a Commission of Experts led by STF Justice Luiz Fux submitted a bill for a new Code of Civil Procedure to the Senate. This bill (Number 166) was discussed and modified by the Senate and is now under discussion at the House of Representatives (*Câmara dos Deputados*). The bill contains a new chapter on the recognition and enforcement of foreign decisions that gives statutory rank to the rules of Resolution Number 9. As stated above, this is a much anticipated change to advance international cooperation in Brazil as it will give parties more certainty as to the applicable legislation for foreign decisions.

20 It should be noted that such requirement may be dispensed with by bilateral cooperation treaties entered into by Brazil.

The number of cases submitted to the STJ for recognition has more than doubled over the last few years. While the STF had ruled on roughly seven thousand cases between 1934 and 2004, the STJ has examined more since 2005. Most of the cases refer to judicial decisions with a great majority concerning family law disputes. This is also true for foreign arbitral awards: while the STF had dealt with roughly twenty cases through the years, the STJ has received more than forty over the last nine years.

Rules Introduced by Resolution Number 9

Some additions of the STJ's Resolution Number 9 to the rules previously applicable to the homologation procedure have resulted from the practice of the STF, that solved issues then not foreseen by the law or its internal regulations.

For instance, Article 4(2), of Resolution Number 9 allows for partial recognition of a foreign judgment. The STF's interpretation of statutory law has allowed for partial recognition of foreign decisions many times and was acknowledged in the Resolution. This rule is applicable to foreign arbitral awards as well.[21]

It is also important to mention Article 4(3), which admits that during the procedure for recognition, provisional measures may be granted, as long as they are urgent and justified. In this respect the STJ has clearly followed a different path from the STF's previous work. In the past, the STF has decided that until the foreign decision was recognized, no effect of any kind could be derived from it. Thus, requests for provisional measures during the proceedings were all denied. Nonetheless, it was argued that the recognition process was a legal suit (in a procedural law sense) and thus, as in the course of any legal suit, provisional measures should be available, and there was no legitimate reason for the consistent denial of urgent measures by the STF. The STJ was susceptible to this line of reasoning and Resolution Number 9, in its Article 4(3) allowed for provisional measures as long as the same requisites for the granting of provisional measures in other ordinary legal suits were also fulfilled. This means that in order to gain access to provisional measures, parties have to prove a consistent *prima facie* claim (*fumus boni juris*), as well as the urgency of the relief sought (*periculum in mora*). Since 2005, while many provisional measures have been requested, very few have been granted. The STJ has been applying a strict level of scrutiny and have been very cautious in their

21 In SEC Number 1, the STJ decided on Oct. 19, 2011 that a foreign arbitral award could be partially homologated (recognized), excluding a minor part of the arbitral award that had been previously decided by a final judgment issued by the Brazilian Judiciary.

analysis of the requirements when granting such a measure.[22] As concerning requests for provisional measures in homologation of foreign arbitral awards, only one case has been granted.[23]

VI Leading Cases

One should bear in mind that there is no single precedent that could be pointed out as a 'leading case' as concerning the recognition and enforcement of foreign arbitral awards in Brazil. The example below should be seen as merely one illustration of certain tenets of the Court's understanding of the subject matter.

The STJ has recognized (*homologated*) around 40 cases of foreign arbitral awards. Among these decisions, cases dealing with commodities are a relevant group. Cotton (10 cases),[24] grains (2 cases)[25] and coffee (2 cases)[26] are the commodities contracts that have been frequently subject to arbitration, and thus to enforcement in Brazil as the responsible party domiciled in Brazil refused to voluntarily pay the awarded amount.

Brazil is one of the world's leading cotton producers and an important competitor of the United States in Asian and European cotton markets. This situation has come about as a result of trade liberalization, structural transformation of the Brazilian economy, and the emergence of new cotton producing regions using advanced technologies and benefiting from targeted

22 More than fifty requests have been reviewed, and only two have been granted.

23 Supreme Court of Justice, SEC Number 5,692/US, Rapporteur Justice Ari Pargendler, decided on Oct. 21, 2010. Prior to that judgment, in Supreme Court of Justice, MC 14,795, (2008) a provisional measure was denied in a process for the recognition of a foreign arbitral award, on the grounds that the measure was not allowed before the proceedings for recognition were completed. This was, based on old cases of the Supreme Court that were expressly overruled by the new Resolution. In Supreme Court of Justice, SEC Number 3,861, (2008), decided in the same year by President Cesar Asfor Rocha, the requested provisional measure was denied but on the grounds that there was not a clear risk of damage in existence, or an urgent matter under the wording of Resolution Number 9, Art. 4(3). For commentary on MC 14,795, see Valeria Galindez, *Comverse Inc. v American Telecommunications Ltda: Superior Court of Justice denies interim relief to secure enforcement of foreign arbitral award pending its recognition*, 15 No. 1 IBA Arb. News 154 (2010).

24 SEC Number 856, SEC Number 967, SEC Number 978, SEC Number 1,210, SEC Number 3,660, SEC Number 3,661, SEC Number 4,213, SEC Number 4,415, SEC Number 6,753 and SEC Number 6,760.

25 SEC Number 866 and SEC Number 507.

26 SEC Number 887 and SEC Number 839.

government support. Brazil's access to additional agricultural land and recent favorable cotton prices suggest the country's cotton production could increase even more than previously expected. Thus, it is not surprising that acting as an important player in this industry has made Brazilian exporter's use the main association dedicated to this trade: the International Cotton Association, formerly the Liverpool Cotton Association. One of the main features of this trade is the extensive use of arbitration clauses in the sales contract and engagement of their arbitral tribunal.

For this reason, we have chosen one of the cotton cases to discuss in this section. Foreign Decision (SEC) Number 6,335 deals with a contract for the future sale of cotton and the STJ granted the recognition (*homologation*). Nonetheless, it is interesting to discuss the issues raised by the debtor, in his attempt to evade payment. The issues were: (i) the arbitration clause was invalid because the contract was an adhesion contract; (ii) lack of proper notice of the debtor; (iii) that the foreign award was against Brazilian sovereignty; (iv) only the Brazilian judiciary had jurisdiction to decide the disputes arising out of the contract; (v) there was already an existing dispute brought before the Brazilian judiciary on the matter and thus the foreign award could not be recognized.

The Court discussed all the issues raised by the defendant and decided that the foreign arbitral award should be granted recognition. Firstly, the STJ reasoned that the contract was duly signed by the parties and contained an arbitral clause; and that its invalidity was an issue on the merit of the dispute, that only the arbitral tribunal could tackle, and thus outside the scope of its power in a recognition process. For the Court, the merits of the dispute relating to issues concerning the contract, were not part of the requisites of Articles 38 and 39 of the 1996 Law, which set forth an exclusive list of issues that can be raised during the recognition process. For this reason, the argument was not considered a matter that could prevent recognition. STJ ruled that this process is limited to the boundaries set forth by Law as only relating to certain formal requirements, except for public policy violations, which was not the case.

The second issue concerned the notification of the defendant to the arbitration. In this matter, the STJ also relied on the evidence that the notification was duly issued and the defendant had received it. As mentioned above, in arbitral proceedings the notification is simpler than in judicial cases, where a letter rogatory must be transmitted by the foreign authority to a Brazilian Court that will determine the notification. This is an important difference between the notification procedures to be followed in arbitral cases as opposed to judicial cases.

The defendant also alleged that the dispute had to be resolved in Brazil, because in the matter at hand, Brazilian jurisdiction was supposedly exclusive. The STJ disagreed. The question was not within the prescribed cases provided

for in the 1996 Law (as per Article 89 of the Code of Civil Procedure—these are basically disputes concerning real estate located in Brazil and succession in assets located in Brazil), the only possible situations where jurisdiction is exclusive. Thus, the arbitration clause that determined the proceedings in another country was considered as not being against Brazilian jurisdictional rules.

The last argument was a discussion of *lis pendens*. According to Brazilian law, although an action is brought in a Brazilian court, there is no interference with the homologation (recognition) process as there is no *lis pendens* for international matters in the Code of Civil Procedure. Thus, the award was granted recognition.

As a conclusion, it is fair to say that this case illustrates how the STJ has dealt with the main issues in the recognition processes and highlights the reasoning behind not harkening to the arguments raised by defendants against foreign arbitral awards. In the last nine years, almost all cases have been granted, which means that the STJ is a firm supporter of international arbitration.

VII Conclusions

The STJ has replaced the STF in the exercise of exclusive jurisdiction over all pending and future cases relating to the recognition of foreign decisions and arbitral awards. We believe that in the last nine years, the STJ has not only utilized case law developed by the STF as a solid guide, but also developed and implemented its own ideas on issues like public policy and recognition of foreign arbitral awards. It has also carved new rules in Resolution Number 9, allowing for partial recognitions of foreign decisions and the granting of provisional measures during the recognition procedure, by far one of its boldest ideas. Its achievements have led the way for the Bill of the Code of Civil Procedure, now pending approval at the House of Representatives (*Câmara dos Deputados*), that adopted Resolution Number 9's main features in the new legislation, providing parties with more certainty in the field of recognition and enforcement of foreign decisions. Once the new Code of Civil Procedure is enacted, these provisions will assure other nations that Brazil has a comprehensive and statutory body of rules in international cooperation.

In respect of arbitral awards, the STJ's nine years of activity has been very positive. The vast majority of requests were granted and the Court has adopted a clear pro-arbitration stance, in line with the purpose of the legislation, both national and international. The New York Convention has been mentioned in a few cases in the last years, but the Court still decides most cases by applying internal law (1996 Law) and the Court's regulation (Resolution Number 9).

One aspect that raises concerns is the lengthy time frame required for both the homologation ('recognition') procedure before the STJ and the enforcement before the Federal Courts.

Annex I

Chapter VI—The Recognition and Enforcement of Foreign Arbitral Awards

Art. 34. A foreign arbitral award shall be recognized and enforced in Brazil in accordance with the international treaties in force in the internal legal order, and in their absence, strictly in accordance with the provisions of this law.

Single paragraph. A foreign arbitral award shall be one that is made outside of the national territory.

Art. 35. To be recognized and enforced in Brazil, the foreign arbitral award is subject only to the homologation of the Supreme Federal Court.

Art. 36. The homologation for the recognition or enforcement of the foreign arbitral award shall be governed by the provisions of articles 483 and 484 of the Civil Procedure Code.

Art. 37. The homologation of the foreign arbitral award shall be petitioned by the interested party in accordance with the requirements of the procedural law, pursuant to art. 282 of the Civil Procedure Code and must be necessarily filed with:

I the original of the arbitral award or duly certified copy, authenticated by the Brazilian consulate and filed with an official translation.
II the original of the arbitration agreement or its duly certified copy, together with an official translation.

Art. 38. Homologation for the recognition or enforcement of a foreign arbitral award may be refused only upon de defendant's demonstration that:

I the parties to the arbitration agreement were under incapacity;
II the arbitration agreement was 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;

III was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or the right of defense has been violated impeding the ability to present his case;
IV the arbitral award exceeded the scope of the arbitration agreement, or it was not possible to separate matters submitted to arbitration from those so submitted.
V the arbitral institution was not in accordance with the arbitration agreement or arbitration clause.
VI the arbitration 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;

Art. 39. The homologation for the recognition and enforcement of the foreign arbitral award may also be refused if the Supreme Federal Court finds that:

I according to Brazilian law, the subject-matter.
II the decision contravenes the national public order.
Single paragraph: The national public order shall been deemed to not have been violated

Art 40. A refusal to grant the homologation for the recognition and enforcement of the foreign arbitral award for procedural defects, shall not impede the interested party from refile its petition, once the defects have been cured.

Annex II

SEC No.	Date of Filing	Date of Judgment	Status/Decision	Duration (approx.)
1	04/01/2005	19/10/2011	Partially granted	6 years and 9 months
349	26/01/2005	21/03/2007	Granted	2 years and 2 months
507	03/02/2005	18/10/2006	Granted	1 year and 8 months
611	04/02/2005	23/11/2006	Granted	1 year and 9 months
760	18/02/2005	19/06/2006	Granted	1 year and 4 months
802	24/02/2005	17/08/2005	Granted	6 months
826	01/03/2005	15/09/2010	Denied	5 years and 6 months
831	02/03/2005	03/10/2007	Granted	2 years and 7 months
839	02/03/2005	16/05/2007	Granted	2 years and 2 months

SEC No.	Date of Filing	Date of Judgment	Status/Decision	Duration (approx.)
856	04/03/2005	18/05/2005	Granted	2 months
866	04/03/2005	17/05/2006	Denied	1 year and 2 months
833	02/03/2005	16/08/2006	Denied	1 year and 5 months
874	09/03/2005	19/04/2006	Granted	1 year and 1 month
883	09/03/2005	16/08/2006	Denied	1 year and 5 months
885	09/03/2005	02/08/2010	Denied	5 years and 5 months
887	09/03/2005	06/03/2006	Granted	1 year
894	14/03/2005	20/08/2008	Granted	3 years and 5 months
918	18/03/2005	26/06/2007	Granted (still ongoing—AgRE)	2 years and 3 months
966	04/04/2005	01/12/2008	Extinguished without judgment	3 years and 8 months
967	05/04/2005	15/02/2006	Denied	10 months
968	05/04/2005	30/06/2006	Extinguished without judgment	1 year and 2 months
978	08/04/2005	17/12/2008	Denied	3 years and 8 months
1210	15/07/2005	20/06/2007	Granted	1 year and 11 months
1302	18/08/2005	18/06/2008	Granted	2 years and 10 months
SE 1305	19/08/2005	17/12/2007	Granted	2 years and 4 months
1657	01/02/2006	19/12/2007	Extinguished without judgment	1 year and 10 months
2410	01/12/2006	18/12/2013	Partially granted	7 years
SE 2654	09/04/2007	08/05/2007	Granted	1 month
2707	25/04/2007	03/12/2008	Denied	1 year and 8 months
3035	30/08/2007	19/08/2009	Granted	2 years
3660	21/05/2008	28/05/2009	Granted	1 year
3661	21/05/2008	28/05/2009	Granted	1 year
3709	09/06/2008	14/06/2012	Granted	4 years
3891	25/08/2008	02/10/2013	Granted	5 years and 1 month
4024	03/10/2008	07/08/2013	Granted (still ongoing—AgRE)	4 years and 10 months
4213	16/12/2008	19/06/2013	Granted	4 years and 6 months
4415	20/03/2009	29/06/2010	Granted	1 year and 3 months
4439	27/03/2009	24/11/2011	Granted	2 years and 8 months
4516	24/04/2009	16/10/2013	Granted	4 years and 6 months
2716	27/04/2009	30/11/2011	Extinguished without judgment	2 years and 7 months

TABLE (*cont.*)

SEC No.	Date of Filing	Date of Judgment	Status/Decision	Duration (approx.)
4837	07/08/2009	15/08/2012	Granted	3 years
SE 4980	23/09/2009	01/06/2011	Granted	1 year and 6 months
5828	30/06/2010	19/06/2013	Granted	3 years
SE 5861	08/07/2010	10/11/2010	Granted	4 months
6335	25/11/2010	21/03/2012	Granted	1 year and 4 months
6365	02/12/2010	06/02/2013	Granted	2 years and 2 months
6753	04/04/2011	07/08/2013	Granted	2 years and 4 months
6760	05/04/2011	25/04/2013	Granted	2 years
6761	05/04/2011	02/10/2013	Granted	2 years and 6 months
SE 7591	03/11/2011	10/04/2012	Granted	5 months
SE 7629	16/11/2011	16/11/2012	Granted	1 year
8847	29/08/2012	20/11/2013	Granted	1 year and 3 months

CHAPTER 4

Chile

Gonzalo Biggs

I Introduction

Chile has had a long and uninterrupted experience in both domestic and international arbitration.[1] Arbitration was adopted by a law of 1875 which regulated the organization and attributions of the courts and judges and whose Title XI applied to arbitrators (defined as judges). As early as 1878, cases concerning arbitration began to reach our Supreme Court and have continued arriving until our days. There is, thus, a long-standing jurisprudence on arbitration matters.

The 1875 law was complemented by the enactment, in 1902, of the Code of Civil Procedure ('CPC') which, for the first time, regulated the enforcement of the resolutions of foreign tribunals which were made expressly applicable to those of foreign arbitrators.[2] Consequently, these rules have been in force—with minor amendments—for a period of no less than one hundred and eleven years. In 1943, the Organic Code for the Judiciary came into force and its Title XI reproduced almost verbatim the arbitration provisions of the 1875 law.[3]

Regarding international arbitration, Chile's experience is unique. It was the first—and probably only country—in Latin America to host a complex assortment of international arbitrations which were established and functioned in Santiago during a six-year period (1882–1888). Four tribunals of three arbitrators each (one European, one Chilean and one Brazilian, which acted as President)—separate and independent from the others—were established to address the complaints against Chile from seven European countries for the

1 *See*, Gonzalo Biggs, *Evolución y Singularidad de la Institución Arbitral en Chile*, in: Homenaje a Arturo Alessandri Besa, Estudios de Derecho y Propiedad Intelectual, (Editorial Jurídica de Chile, 2009). (Translation: Tribute to Arturo Allesandri Bessa, Evolution and Uniqueness of the Arbitral Institution in Chile, in Law and Intellectual Property:)

2 The CPC came into force on August 28, 1902. Its Title XIX, of Book III, Subtitle 1, regulates the enforcement of the resolutions of Chilean tribunals. Subtitle 2, regulates those of foreign tribunals, and Article 246 applies to the resolutions of foreign arbitrators.

3 The "Código Orgánico de Tribunales" or "Organic Code for the Judiciary" was approved by law Nº 7421, of June 15, 1943 and is presently in force. Its Title XI, Arts. 222 though 243 regulate the designation, requirements and functions of arbitrators.

 | doi 10.1163/9789004284364_006

damages suffered by their citizens during the War of the Pacific. Upon the termination of the proceedings, Chile was ordered to pay a sum equivalent to 3.5% of the original complaints. The rules and procedures of this arbitration followed the model established by the Alabama arbitration of 1872—history's first international arbitration—which resolved a major dispute between the United States and Great Britain.[4]

This chapter consists of two sections. The first is an outline of the basic legal framework applicable to the recognition and enforcement of foreign judgments and international arbitral awards. The second section summarizes the jurisprudence of eight exequatur decisions of this past decade of our Supreme Court.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards and National Law

The basic legal framework and instruments relevant to the enforcement of foreign judgments and foreign arbitral awards, in Chile, includes the following:

- Articles 242 through 251 of the CPC;
- The Bustamante Code of Private International Law, of 1928 ('Bustamante Code');
- The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of June 10, 1958 ('New York Convention');
- The Inter-American Convention on International Commercial Arbitration, or Panama Convention, of January 30, 1975 ('Panama Convention');
- Decree—Law Nº 2.349, of October 28, 1978;
- Law Nº 19.971, on International Commercial Arbitration which entered into force on September 29, 2004;
- The role of Judicial Attorney's in the Supreme Court's decisions;
- Article 16 of Chile's Civil Code;
- Provisional measures;
- Letters Rogatory.

The above legal instruments are described in the paragraphs which follow.

4 *See*, Gonzalo Biggs, *Arbitration in Chile and Brazil* in Arbitragem e Comercio Internacional Estudos en Homenagem a Luiz Olavo Baptista (Editora Quartier Latin, Do Brasil Sao Paulo, 2013).

CPC—Articles 242–251

These provisions have been in force since 1902 and, as illustrated by the jurisprudence described ahead, continue to be invoked and applied by the Supreme Court in its decisions on exequatur requests.[5] The above provisions are included in a subparagraph of a broader section of the CPC that gives the general rules and defines judicial resolutions. They include final judgments, interlocutory decisions, decrees and writs.

Pursuant to Article 247 of the CPC, an exequatur procedure starts with the submission of legalized copies of the foreign judgment or foreign arbitral award to the Supreme Court of Chile, which holds full responsibility for the process until its completion.

Pursuant to Articles 248 through 251, upon the receipt of the exequatur request, the Court gives personal notice of the same to the party against whom recognition or enforcement is demanded and is given the right to respond within the standard term for claims. With the latter's response or, on its default, as the case may be, the Court may, if it finds it necessary, open an eight-day term for receiving evidence. After receiving the Legal Opinion of the Judicial Attorney, the Court issues its decision in favor or against recognition and enforcement. If the exequatur request is accepted, the Court will order the petitioner to demand its enforcement from the Civil Tribunal that would have received the request if it had started in Chile.

Our exequatur system has been described as one in 'cascade' (see Articles 242 through 245 of the CPC) which means it follows a three—step procedure. The first step consists in determining whether the respective parties are or not bound by an international treaty. If the response is positive, the foreign judgment or foreign award will have the force established by that treaty (in which case their enforcement will follow the procedures established by Chilean law, unless modified by those treaties). The provisions of Chilean law are, therefore, in this case, subsidiary to what is established in those treaties.

In the absence of a treaty, the next step is the rule of reciprocity which means that foreign resolutions will have in Chile the same force Chilean resolutions receive in the foreign country where the resolution or award was issued. If the above rules cannot be applied, the resolutions or arbitral awards of foreign tribunals will have in Chile the same force as if they had been issued in Chile, provided they fulfill the following requirements:

5 Chilean legal culture and the Supreme Court use the Latin word "exequatur" to refer to the procedural request for the recognition of foreign judgments or foreign arbitral awards in Chile.

1. That they have nothing contrary to the laws of Chile (for example, that the subject matter of the arbitration is not prohibited by Chilean law);
2. That they are not opposed to Chile's national jurisdiction;
3. That the party against whom the judgment or award is being invoked has been duly notified of the action. However, the latter can demonstrate that, for other motives, it was prevented from exercising its right of defense; and
4. That the foreign resolutions or arbitral awards are res judicata in the countries they were issued (CPC, Article 245).

There is an exception for arbitral resolutions in that their authenticity and effectiveness can be demonstrated by the certification or approval of the superior national tribunal of the country where the resolution is issued. However, as is noted ahead, this exception of Article 246 of the CPC has been subject to different interpretations.

The Bustamante Code

This Code was adopted, on February 20, 1928, in Havana, Cuba, by the presidential representatives of the State Members of the Pan American Union, the predecessor of the present Organization of American States. Since 1928, the immense majority of the Latin American countries have ratified the convention, but not the United States or Canada. However, most of the ratifying countries stated reservations to its application. For example, Chile stated that "before Chilean Law and in connection with the conflicts which arise between Chilean Law and foreign laws, the provisions of Chilean present or future law, shall prevail over those of the Code in the event of disagreement between one and the other."[6]

Chapter One, Title Ten, of the Code, regulates the enforcement of judgments issued by foreign tribunals and Article 432 applies those rules to the awards issued by arbitrators in any of the countries of the Contracting Parties, provided the controversy is the subject of a compromise under the laws of the country where enforcement is requested. In the Chilean jurisprudence described ahead, the Bustamante Code has been cited twice.

The first case is State Bank with Inverraz where the Supreme Court relied on Article 318 of the Code to extend its jurisdiction to international contracts.

6 Chile ratified the Code, on June 14, 1933, which was confirmed by decree No. 374, of the Ministry of Foreign Relations, of April 10, 1934, published in the Official Gazette, on April 25, 1934.

A member of the Court dissented, however, and cited Chile's reservation to the application of the Code in the event of a conflict between Chilean and Foreign Law; and on this basis, stated that Chilean Law should prevail. He, then, concluded that, pursuant to Article 5 of Chile's Organic Code for the Judiciary, the Chilean Courts—and not Foreign Courts—were solely authorized to judge and resolve the controversies object of the exequatur. The second case was *Western Technology v. Caucho Industrial* (*Cainsa*) where the Supreme Court, together with the CPC provisions, cited Articles 423, 424, 427, 428 and 429 of the Bustamante Code, to reject the exequatur request for the recognition and enforcement of an interlocutory resolution. As noted ahead, this decision has raised questions from this author.

The New York Convention

The adoption of this Convention by the State Members of the United Nations constituted a landmark in the history and evolution of international arbitration. It was approved by Chile, on July 31, 1975, and came into force, on October 30 of that same year. With minor differences, the provisions of the Convention are generally consistent with Articles 242 through 251 of Chile's CPC and Law No. 19.971 and are cited almost without exception by our Supreme Court in its decisions on exequatur requests. However, the language of Article V Nº 1, letter b) of the Convention raises an issue of interpretation with Articles 245 Nº 3 of Chile's CPC and 36 (1) (a) (ii) of Law Nº 19.971 which is addressed in our comments to the *Quote Foods v. Sacramento* case.

The issue arises because both the CPC and Law Nº 19.971 provisions require that the party against whom the exequatur is invoked must be 'duly notified' ("debidamente notificada") which, under Chilean law, means that the party must be notified in person. The New York Convention requires, instead, that the party must be given 'proper notice'. The question, then, is which interpretation prevails, that of the site of the arbitration or that where the recognition of the exequatur is requested? The text of the Convention provision is the following:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
    b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

Panama Convention[7]

Some authors have criticized this Convention for being a replica of the 1958 New York Convention. This is not our opinion for the reasons which follow. Until 1975, there remained in Latin America strong reservations against international arbitration which derived from the XIX century's abusive exercise by European countries of the doctrine of diplomatic protection. The region's reaction was the Calvo Doctrine which was incorporated into the Constitutions or laws of the great majority of the countries and which asserted that State differences with citizens from third countries were subject to the exclusive jurisdiction of the national State.

A striking expression of the Calvo Doctrine was the collective rejection by the Latin American countries, in 1964, of the World Bank's proposal for the adoption of the International Convention on the Settlement of Investment Disputes or ICSID. Thus, the adoption of the Panama Convention in 1975 marked a break with the past and the beginning of a new period for international arbitration. Indeed, a gradual process of incorporation of the countries of the region to ICSID and the New York Convention began in that year and culminated in their almost total acceptance of both international conventions.

The Panama Convention did not merely replicate the New York Convention. As opposed to the latter, which has no supervision mechanism, the Panama Convention assigned this responsibility to the Inter-American Commercial Arbitration Commission ('IACAC') which has exercised this function until this date. In addition, its Article 2 states that "arbitrators may be nationals or foreign". As described in our analysis of the jurisprudence, the Panama Convention has been cited in the Supreme Court's decisions: *Stubrin v. Inversiones Morice S.A.*; and *EDF International v. Endesa YPF*.

Decree—Law Nº 2.349, of 1978[8]

This legislation was enacted during the Latin American Debt Crisis. Its purpose was to validate international contracts and the submission of the Chilean State and its public institutions to the jurisdiction and procedures of foreign ordinary or international arbitration tribunals. The Decree also noted that such contracts, transactions and stipulations were already valid between private citizens, as had been recognized by the Bustamante Code. This broad assertion can be interpreted as a way of validating the above transactions and procedures between private citizens or entities, Chilean or foreign, without entering into the complex task of specifying or listing the legal provisions that could be

7 The Panama Convention entered info force on 1976 and was ratified by Chile on May 17, 1976.

8 Decree Law Nº 2.349 was adopted on October 13, and came into force on October 28, 1978.

in conflict with that purpose. As described ahead, this Decree Law was cited by the Supreme Court in its ruling of the *State Bank v. Inverraz* exequatur request.

Law 19.971 on International Commercial Arbitration of 2004

a) Description: Law Nº 19.971 has been in force for almost ten years and has rapidly become instrumental to our Supreme Court's decisions on exequatur requests.[9] It applies to international commercial arbitration without prejudice of the multilateral or bilateral treaties in force in Chile.[10] This harmonious coexistence of Law Nº 19.971 with the New York and Panama Conventions, and the Bustamante Code, has been confirmed by the constant citations our jurisprudence makes of these various instruments. In addition, its provisions are *lex specialis* which complement but, in case of conflict, prevail over those of Articles 242 through 251 of the CPC which now play a subsidiary role to that of Law Nº 19.971.

The law's structure follows UNCITRAL' s Model Law[11] and coexists in harmony, but separately, with our country's domestic arbitration law. Thus, Chile rejected the monist model followed by Spain, Germany, Mexico and other countries, where domestic and international arbitration law are integrated and regulated by a single legal text. In this author's opinion, the operation of Chile's dual legal system has been amply successful and should be maintained. Law Nº 19.971 defines and regulates international arbitration and compromise agreements; the composition and jurisdiction of arbitration tribunals; arbitration proceedings and their termination; and the form and content of arbitral awards, and their annulment.

b) Provisional Measures.

Article 1 Nº 2 states that, with the exception noted below, its provisions apply solely when the site of the arbitration is located in the national territory. The exception is Article 9 which states:

> *Article 9. Arbitration agreement and adoption of provisional measures by the tribunal.*

9 Law Nº 19.971 came into force on September 29, 2004.

10 Law 19.971 Nº 1, Art. 1.

11 UNCITRAL is the acronym for the United Nations Commission on International Trade Law which, on June 21, 1985, approved the Model Law on International Commercial Arbitration. (Resolution A/40/17, Annex 1).

> *It shall not be incompatible with the arbitration agreement that one party, either before the arbitration proceedings or during the course of the same, requests from a tribunal the adoption of provisional precautionary measures or that the tribunal grants such measures*

As noted ahead, in the *Western Technology v. Cainsa* case, the above provision was not invoked and the provisional measures ordered by an international arbitration tribunal were rejected by our Supreme Court for lacking finality.

c) Articles 35 and 36.

Articles 35 and 36 regulate, respectively, the recognition and enforcement of arbitral awards, and the grounds for denying recognition or enforcement. Article 35 follows closely Articles 246 and 247 of the CPC but adds that, the party invoking an award or requesting its enforcement, together with submitting the authenticated original or attaching a certified copy of the same, must:

i) attach the original or certified copy of the arbitration agreement, and

ii) if the award or the agreement have not been written in Chile's official language, a duly certified translation of those documents must also be submitted.

Likewise, Article 36 follows closely Article 245 of the CPC but, instead of listing the requirements for the recognition or enforcement of foreign arbitral awards, it enumerates, expands and complements with greater detail, the grounds for denying such recognition or enforcement. Thus, Article 36 states that:[12]

1) *Recognition or enforcement of an arbitral award can only be denied, whichever may be, the country where it was issued:*

a) *when the party against whom the exequatur is requested, proves before the competent tribunal of the country to which recognition or enforcement is requested that:*

i) *one of the parties to the arbitration agreement was affected by incapacity or, the agreement is not valid under the law to which it was submitted by the parties, or if nothing were to have been indicated thereof, by virtue of the law of the country where the award was issued, or*

ii) *The party against whom the award is invoked has not been duly notified of the designation of the arbitrator, or of the arbitration*

12 What follows is this author's translation of the Spanish text.

proceedings, or has been unable, for whatever other reasons, of exercising its rights, or

iii) *The award refers to a controversy not contemplated in the arbitration agreement or contains decisions which exceed the terms of that agreement; however, if the provisions of the award refer to questions submitted to the arbitration which can be separated from those which are not, recognition and enforcement may be given to the first, or*

iv) *The composition of the arbitral tribunal or the arbitral procedure have not adjusted to the parties' agreement or, in the absence of such agreement, has not adjusted to the law of the country where the arbitration took effect, or*

v) *The award is not yet binding on the parties or has been annulled or suspended by a tribunal of the country in which, or according to law, the award has been issued, or*

b) *When the tribunal verifies:*

i) *that, according to Chilean law, the object of the controversy is not susceptible to arbitration, or*

ii) *the recognition or enforcement of the award would be contrary to Chile's public order.*

2) *If the annulment or suspension of the award has been requested to a tribunal of those contemplated in paragraph v), of letter a), numeral 1 of this provision, the tribunal to which this recognition or enforcement is requested may, if it considers it appropriate, defer the decision and, at the instance of the party that requests the recognition or enforcement of the award, may also order from the other party to provide the adequate guarantees.*

The Role of the Judicial Attorney's Office

Judicial Attorneys are auxiliaries to the administration of justice and their opinions must be heard in those judicial instances listed in the law. In the exercise of their functions, they are independent from the Judiciary and defend the interests assigned to them in accordance with their convictions.[13] The Supreme Court's decisions are preceded by a report of its Judicial Attorney whose conclusions are generally confirmed. However, an exception was the Court's decision in the *Quote Foods v. Sacramento* case, cited ahead, where the Court overruled its Judicial Attorney.

13 Organic Code of the Judiciary, Arts. 350–364.

Article 16 of the Civil Code

Article 16 of the Civil Code reads as follows:

> *Goods located in Chile are subject to Chilean Law, regardless of whether their owners are foreign and not residents of Chile. This provision must be understood without prejudice of the covenants included in contracts validly executed in foreign countries. But the effects of contracts executed in a foreign country to be performed in Chile, shall be adjusted to Chilean laws.*

The application of the above provision to foreign judgments or international awards remains controversial and, in our opinion, must be assessed on a case-by-case basis. Early jurisprudence categorically rejected the enforcement of foreign judgments over goods located in Chile. However, this opinion has changed and exequatur requests for the enforcement of personal rights of foreign creditors over personal or real estate goods of debtors located in Chile are now, generally, recognized. What continue to be rejected are requests for the constitution of real estate rights—for example, easements—over goods located in Chile.[14] The decision cited ahead (*State Street Bank v. Inverraz*), made, in our view a correct interpretation. It stated that general guarantees established in loan agreements constitute personal sureties which do not affect specific goods and, therefore, do not breach Article 16 of the Civil Code.

Provisional Measures

There exists consensus among Chilean authors and jurisprudence that arbitrators in Chile have the power to issue injunctions or precautionary measures irrespective of the fact their enforcement belongs to the civil courts.[15] What has not been resolved, though, is whether injunctions or precautionary measures issued by foreign or international arbitration tribunals are enforceable in Chile. This matter is related to Article 9 of Law Nº 19.971 referred in section viii(b) above, and arose in the *Westech v. Cainsa* case commented ahead.

---

14 *See*, Paper prepared for the CAM Santiago lawyer, Julio Guzman Jordan ("Julio Guzman"), *Arbitraje y Medidas Precautorias* (CAM Santiago). (Translation: *Arbitration and Precautionary Measures*). Available in Spanish at http://www.camsantiago.com/articulos_online/39_Arbitraje_Medidas_Precautorias.pdf (last visited on Apr. 6, 2014).

15 Id.

Letters Rogatory

On October 18, 1976, Chile adopted the Inter-American Convention on Letters Rogatory which applies to letters rogatory and whose purpose, among others, is the performance of procedural acts of a merely formal nature, such as "service of process, summonses or subpoenas abroad" (Article 2(a) of the Convention (emphasis added)). Article 16 of the Convention states that:

> *The States Parties to this Convention may declare that its provisions cover the enforcement of letters rogatory in criminal, labor, and 'contentious—administrative' cases, as well as in arbitrations and other matters within the jurisdiction of special courts. Such declarations shall be transmitted to the General Secretariat of the Organization of American States.*

On May 5th, 1987, Chile ratified the Convention and, in connection with above Article 16, declared:

> [*T*]*hat its provisions cover the enforcement of letters rogatory in criminal, labor, and contentious-administrative cases, as well as in arbitrations and other matters within the jurisdiction of special courts.*

Pursuant to the above Article 16 and Chile's declaration, letters rogatory apply to the service of process or summonses from abroad, in arbitration matters held in Chile with other parties of the Convention. We believe the same rule would, likewise, apply to the service of process in Chile of arbitration matters held in other Convention countries.

III Leading Cases

This section lists the Supreme Court's resolutions of eight separate exequatur requests, which include: one foreign judgment: *State Street Bank v. Inverraz*, adopted by a Court of New York in accordance with the rules of that State and which was accepted; one foreign provisional measure resolution: *Western Technology v. Cainsa*, adopted in Dallas, Texas, by an American Arbitration Association tribunal pursuant to its rules and which was rejected; and six international arbitration awards as follows:

- *Quote Foods v. Sacramento*, adopted in Rotterdam by a sole arbitrator under the rules of a Dutch Association of that city and which was accepted;
- *Stubrin v. Morice Investments*, adopted in Buenos Aires by an arbitration tribunal under the rules of IACAC of the Panama Convention and which was accepted;
- *Comverse Inc v. American Telecommunications Inc*, adopted in New York by an American Arbitration Association Tribunal pursuant to its rules and which was accepted;
- *Kreditanstalt v. Inverraz*, adopted in Paris, by an International Chamber of Commerce ("ICC") Tribunal in accordance with its rules and which was accepted;
- *Stemcor v. Metalúrgica* (*"CCM"*), adopted in London by a sole arbitrator under the rules of the London Court of International Arbitration ("LCIA") and which was accepted;
- *Edfi v. Endesa and YPF*, adopted in Buenos Aires by an arbitration tribunal under the rules of the ICC and which was rejected.

Of the exequatur requests noted above, only two were rejected: *Western Technology v. Cainsa*, and *Edfi v. Endesa and YPF*. The other six requests were accepted. There was only one dissenting opinion by adjunct Minister, Mr. José Fernandez Richard, in the *State Street Bank v. Inverraz* case. Finally, in all eight cases, with the exception of *Quote Foods v. Sacramento*, the opinions and reports of the Judicial Attorney was accepted by the Supreme Court.

1 *State Street Bank (“the Bank”) v. Inverraz*[16]

A Exequatur Request

The Bank requested the Court the exequatur of a judgment of May 7, 2002, of a New York tribunal which condemned the Chilean company, Inverraz and affiliates, to pay dollar amounts above $100 million, for their non—fulfillment of several loan contracts.[17] The court stated that the request fulfilled Article 242 of the CPC and that, as there was no treaty on the subject between Chile and the United States of America, nor grounds for reciprocity, the matter was ruled by Article 245 of that Code. Notice was also made that Inverraz had accepted the jurisdiction of the courts of the United States of America and that the judgment was *res judicata*.

16 Supreme Court of Chile, *State Street Bank v. Inversiones Errazuriz Limitada* (***“INVERRAZ”***), *et al.* (2002).

17 Supreme Court Decision of May 14, 2007, Docket Nº 2.349-2005.

B Defendants

Defendant's recognized the loan contracts and accepted the jurisdiction of the New York courts. However, the contracts were signed before a Chilean Public Notary, taxes were paid in Chile and its effects applied to goods located in Chile. Consequently, the intended enforcement of the contracts violated Article 16 of Chile's Civil Code referred in above section x and this country's public order. They also disputed the assertion that due process had been followed and that the US judgment against them was *res judicata*.

C Judicial Attorney's Report

The Judicial Attorney's Report stated that:

- The illegality attributed to the Bank's contracts, including breach of Article 16 of Chile's Civil Code, had no merit because, as the originals of the contracts were written in English and signed by the Bank in New York, they became international contracts.
- Under Decree Law 2349, of 1978, and Article 318 of the 1928 Bustamante Code, the submission to foreign law and foreign tribunals included in international contracts were an expression of contractual freedom which was valid in Chile, and the certificate from the New York Tribunal, ratified by the Court of Appeals, confirmed that the judgment was *res judicata*.
- The sole objective of the exequatur recognition procedure was to determine whether the formal requirements of Chilean Law had been fulfilled and that the resolution of peremptory exceptions, related to the merits of the award, were matters under the jurisdiction of the tribunal in charge of its enforcement.

D The Court's Rulings

At its own initiative and for the better resolution of the case, the Court ordered to bring forth the proceedings of the following cases before the 27th Civil Court of Santiago: *Inverraz v. State Street Bank*; and *State Street Bank v. Inverraz* (see references to the same in the court's dissident vote mentioned ahead). Together with considerations of a formal nature and without prejudice of the dissident vote of one of its members mentioned ahead, the Court rejected Inverraz's opposition to the exequatur and stated that: i) the procedure was not for examining the merits of the request but for determining its formal justification; ii) there being no relevant international treaties between Chile and the United States of America, nor evidence demonstrating reciprocity between the two countries, the international standard rule of foreign judgments of Article 245 of the CPC applied to this case; iii) the form of foreign

judgments are determined by the laws of the country where they are adopted and, thus, under the last paragraph of Article 245 No. 1 of the CPC, procedural laws which apply in Chile do not, necessarily, apply to a foreign judgment; iv) the eventual expiration of the Bank´s claim by virtue of the lapse of a three year statute of limitations was a matter that pertained to the enforcement and not the exequatur tribunal; and v) legal opinions from several sources and a certificate from the secretary of the District Court of the State of New York, proved that due process had been followed and the foreign judgment against Inverraz was *res judicata*.

Regarding the charge that the enforcement of the New York judgment would violate the country's public order, because it would affect goods located in Chile which, under Article 16 of Chile's Civil Code, were subject to Chilean law, the Court noted that the contracts were written in English, extended under the laws of New York, their corresponding rights and obligations were regulated by the laws of that State and were subject to the latter's jurisdiction. But, as the contracts also included references to Chile's regulations on foreign exchange, taxation and related matters, the contracts became international and were valid in Chile according to Decree Law Nº 2349, of October 28, 1978. In addition, the Court stated that the contract guarantees were personal and did not affect specific goods of the borrower company; their purpose was to guarantee payment and prevent insolvency without paralyzing the borrower.[18] Moreover, as generally, loan agreements enter into effect with the disbursement of the funds, disbursements in these credit operations were made in United States of America and not in Chile, and, therefore, were not subject to Chilean law.

Without prejudice to the above, the Court cited Article 113 of the Commerce Code which states that contracts executed abroad but which, for some reason, must be fulfilled in Chile, must conform and adjust to Chilean Law, in accordance with the last paragraph of Article 16 of the Civil Code which states that the "effects of contracts extended in foreign countries to be executed in Chile, must conform to Chilean Law". The Court stated that the submission in Chile to the laws of another State did not contravene the Chilean legal system and was recognized in areas such as mortgages (Article 2411 of the Civil

18 On the Court's interpretation of Art. 16 of the Civil Code, see Gonzalo Fernandez, *Arbitraje Comercial Internacional en Chile: Marco Legal y Jurisprudencial*, in Cuatrecasas, Goncalvez Pereira, El Arbitraje Comercial Internacional en Iberoamerica, 313. (Legis 2009. Colombia).

Code),[19] international arbitration and contracts with the State. Reference was also made to Article 318 of the Bustamante Code which accepts the extension of jurisdiction in international contracts. In any event, by submitting to the laws and jurisdiction of New York, the Court concluded that the defendants had recognized the validity of the contracts they signed. In conclusion, the Court admitted the exequatur, rejected the defenses raised and authorized the enforcement of the judgment of the Court of New York before the corresponding Civil Court of Chile.

E Dissenting Opinion[20]

In the opinion of an adjunct minister, the Court should have not granted the exequatur on the following grounds:

1. Article 245 Nº 2 of the CPC rejects the enforcement in Chile of resolutions of foreign courts which are contrary to its national jurisdiction;
2. Under Article 5 of the Organic Code for the Judiciary, Chilean Courts have jurisdiction over all temporal matters raised within its territory, without prejudice to the exceptions established by the Constitution and the laws.
3. Article 16 of the Civil Code states: "Goods located in Chile are subject to Chilean law even if their owners are foreign and not Chilean residents".
4. Article 14 of the same Code states that the law applies to all the inhabitants of the Republic, including foreigners.
5. The Court had learned of a process before the 27th Civil Court of Santiago between the same parties and with the same causes of action as those of the present exequatur.
6. Without prejudice that Chile had ratified the Bustamante Code (cited by the court's decision), it did it with the reservation that, in the event of a conflict between Chilean and Foreign Law, Chile's present or future laws would prevail over those of that Code.
7. Under Article 5 of the Organic Code of the Judiciary, the Chilean Courts are those solely authorized to judge and resolve the controversies which are the object of the exequatur requested by the New York Bank.

19 Art. 2411 of the Civil Code, states "Contracts executed in a foreign country shall constitute mortgages over goods located in Chile provided they are registered in the competent Registry."

20 Adjunct **COURT** Minister, Mr. Jose Fernandez Richard. Chilean law authorizes the Supreme Court, under certain terms, to integrate the decisions of specific cases with external counsel.

2 *Westech v. Cainsa*[21]

A Exequatur Request

Westech, a leader in body equipment used in the construction and mining industry requested of the Supreme Court[22] the recognition and enforcement of a provisional resolution issued in Dallas, Texas, on June 2, 2009, by a tribunal of three arbitrators, in accordance with the rules of the American Arbitration Association ("AAA"). The resolution consisted of an injunction or precautionary order not to compete issued against the Chilean company, Cainsa.

On November 22, 2009, Westech and Cainsa executed three inter-related contracts by which: a) Westech revealed commercial secrets to Cainsa for the manufacture and sale by the latter of the products, and within the territory identified in the contracts; b) Cainsa contracted Westech for the commercialization of those products; and c) Cainsa contracted Westech for the technical assistance required for the marketing and sale of those products. The contracts included an arbitration clause and a provision establishing that the termination of one contract implied the termination of the other two.

Under the Use Agreement, the parties agreed on a non-competition clause by which, in the event their contracts were to terminate, the commercial activities of Cainsa would be restricted for a two year period to the areas listed in that Agreement. Because Cainsa failed to sell the minimum quotas for the years 2007 and 2008, on September 25, 2008, Westech rescinded the contracts and requested of Cainsa, the return and non-utilization of the confidential and privileged information received. In addition, it submitted a claim before the AAA demanding the termination of the contracts and enforcement of the non-competition clause.

On the basis it was, indeed, promoting the sale of equipment in violation of the non-competition clause, the Arbitration Tribunal issued an injunction ordering Cainsa to abstain, directly or indirectly, from: a) hiring or intending to hire a person who is or was a worker or independent contractor of Westech or its affiliates; b) interfering or intending to interfere in any contractual relationship, or of other kind, between Westech and one of its clients, suppliers or consultants on the restricted matters; c) obtaining or seeking to obtain orders from any person or entity that is or has been a client of Westech during the life of the Use Agreement; d) undertaking any competitive or restrictive activity; and e) using or divulging Westech's confidential information, commercial secrets or

21 Supreme Court of Chile, *Western Technology Services International Inc* (*"Westech"*) *v. Cauchos Industriales S.A.* (*"Cainsa"*), May 11, 2010, docket Nº 5468.09.

22 Id.

technology. In support of its request, Westech cited Articles 242 and 246 of the CPC, Article 35 of Law 19.971[23] and the New York Convention of 1958.

B The Defendant

Its defenses were that the proposed resolution violated Chile's public order by ordering the enforcement of an obligation which would affect its freedom to develop legal economic activities, and which, if admitted, would establish a de facto monopoly. In addition, it stated that the request did not fulfill the requirements of Article 246 of the CPC for a judgment or an award, and that a recourse against the arbitrator's provisional resolution before the courts of Dallas, Texas, was still pending.

C The Judicial Attorney's Report

The report stated that the exequatur should be rejected because Article 246 and the following provisions of the CPC, and Law No. 19.971, did not apply to the enforcement of precautionary measures of foreign tribunals, but only to foreign judgments or international arbitral awards.

D Supreme Court's Ruling

The Court noted that the resolution of the Arbitral Tribunal was not a final judgment or an interlocutory resolution that established permanent procedural rights, or decided a matter which could be the basis for a final judgment or interlocutory resolution.[24] Indeed, for the Court the request was for the recognition of a resolution of a preliminary nature which, according to the data of the process, the Arbitral Tribunal could extend or maintain in effect according to future circumstances.

Consequently, citing Articles 242, 245 and 246 of the CPC and Articles 43, 44, 427, 428 and 429 of the Bustamante Code and Law No. 19.971, the Court rejected the exequatur request.

E Author's Comment

It is regrettable that the Court left unresolved the issue of whether precautionary injunctions of international arbitration tribunals are enforceable in Chile

23 It should be noted, Westech did not cite Art. 9 of Law Nº 19.971 which, as mentioned in section VIII (b) of this paper, recognizes provisional measures.

24 Art. 158 of the CPC defines interlocutory resolutions as those which "decide a proceeding in a lawsuit, establishing permanent rights in favor of one of the parties, or resolves a procedure which should serve as the basis for the issuance of a final or interlocutory resolution."

or not. The subject matter is important because Articles 1(2) and 9 of Law No. 19.971, on international commercial arbitration (referred **in** above paragraph VIII(b), which are *lex specialis*, expressly recognize, as an exception, that requests of provisional measures either before or during the course of arbitration proceedings are not incompatible with an arbitration agreement.

Also to be noted is that: i) Article 246 of Chile's CPC refers, in general, to "resolutions adopted by arbitrator judges" and not to arbitral awards; ii) "Resolutions" are defined by Article 158 of the CPC as including, among others, final sentences or decisions, interlocutory resolutions, and decrees or writs ("decretos y autos"); the latter would include, in our view, the provisional measure issued in Dallas, Texas, by the arbitration tribunal;[25] and iii) Article 21 of the International Dispute Resolution Procedures of the American Arbitration Association confirms the right of international arbitration tribunals to issue Interim Measures of Protection, as follows: "**1.** At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property. **2.** Such interim measures may take the form of an interim award, and the tribunal may require security for the costs of such measures. **3.** A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate. **4.** The tribunal may in its discretion apportion costs associated with applications for interim relief in any interim award or in the final award."

3 *Quote Foods v. Sacramento*

A Exequatur Request

Quote Foods, a Dutch company, submitted an exequatur request to the Supreme Court of Chile[26] for the recognition and enforcement of an arbitral award adopted in Rotterdam, on July 18, 1997, by an arbitrator designated in accordance with the Arbitration Rules of a Dutch Association of that city. The award condemned the Chilean company, Sacramento, with legal domicile in Copiapo, to pay Quote Foods the sum of US$ 55.520.00 plus interests and legal

25 A different interpretation of the Court's decision—which this author does not share—stated that "This decision of the maximum tribunal lead us to conclude that exequatur procedures are not applicable to precautionary measures of foreign arbitration tribunals." *See*: Elina Mereminskaya, *Arbitraje Comercial Internacional en Chile: Una mirada jurisprudencial* (CAM Santiago). (Translation: International Commercial Arbitration in Chile: A jurisprudential look). Available in Spanish at, http://www.camsantiago.com/articulos_online/Arbitraje%20jurisprudencia_Mereminskaya.pdf (last visited on Apr. 13, 2014).

26 Supreme Court decision of July 5, 1999, Docket No. 3832–1999.

costs. In support of its request, the Plaintiff invoked the New York Convention of 1958 which, in his view, prevailed over Article 246 of the Chilean CPC.

B Defendants

Sacramento's defense was that Quote Foods' exequatur request was barred by the Supreme Court's earlier resolution of September 21, 1998 which denied a previous request from the same plaintiff.[27] A copy of this resolution was accompanied to demonstrate the triple identity, according to Sacramento, between that resolution and the new request. Ancillary, it opposed the exception of not having been legally summoned and notified of the arbitration proceedings, in contravention of Articles 40, 245 Nos. 1 and 3, of Chile's CPC, and Article V Nº 1(b), of the New York Convention,[28] and that the tribunal had, instead, wrongly validated a fax and certified letter mailed to Copiapo.

C Judicial Attorney's Report

The report confirmed that the Tribunal had communicated with the company in Copiapo through certified mail. However, it added there was no evidence to demonstrate that those communications had, indeed, been received by the defendants, or, that the award was *res judicata*. For these reasons, its opinion was that the exequatur should be rejected.

D Court's Ruling

The Supreme Court rejected the above arguments and granted the exequatur for the recognition of the Rotterdam Arbitral Award, of July 18, 1997, on the following considerations:

1. That the *res judicata* argument did not apply to the Court's rejection of the exequatur of September 21, 1998, because the latter was based on

27 The reasons for this rejection, according to Sacramento, were that the first exequatur consisted of un-translated simple copies of the contracts and did not include, together with the plaintiff's claim, the original arbitration agreement in violation of Art. IV, No. 1 (b) of the 1958 New York Convention.

28 Art. V Nº 1(b), of the New York Convention states as follows:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

formal circumstances or defects[29] unrelated to the substance of the dispute, now remedied by the second exequatur request.

2. That Sacramento had accompanied copies of the contracts agreed by the parties before the Dutch Arbitration Association. Consequently, Sacramento had already endorsed the notification procedures by certified mail established by that Association.
3. To Sacramento's charge that it was not summoned in person, the Court stated that the notification rules of Chile's CPC did not apply to arbitrations under the Rules of another country. In support of this conclusion, it cited the second paragraph of Article 245 No. 1 of Chile's CPC, which, together with recognizing the force which resolutions from foreign tribunals can have in Chile, adds:

   But the procedural laws applicable to the substantiation of a trial in Chile will not be taken in consideration.[30]

4. That notification by certified mail was recognized and valid under the laws of the Netherlands and the Regulations of the Dutch Association and it would not behoove Sacramento to impose unilaterally, the requirement that notifications of arbitration proceedings be adjusted to Chilean Law.

E Author's Comment

Without prejudice the Supreme Court rightly endorsed, in this case, notification by certified mail, as was established by the Rotterdam Association and originally accepted by Sacramento, what has remained outstanding is an indication of the notification rules that apply in the absence of such an acceptance by a defendant. The question is whether, according to the last paragraph of Article 245 Nº 1 of the CPC, quoted above, summons ("or emplazamiento") of actions against defendants, domiciled in Chile, in international arbitrations, should follow the rules of Chilean law or those of the site of the arbitration.

An issue of interpretation that has not been resolved by the Supreme Court arises because of the differences which exists in the languages of Chilean law and of the New York Convention. The language of Articles 245 Nº 3 of the CPC and 36 (1) (a) (ii) of Law Nº 19.971 state, uniformly, that the "party against whom the judgment (or award) is invoked must be duly notified" of the action

29 The Court cited Art. IV, Nº 1 (b) of the New York Convention.

30 "Pero no se tomarán en consideración las leyes de procedimiento a que haya debido sujetarse en Chile la substanciación del juicio".

(emphasis added). Duly notified of an action under Chilean law means that, pursuant to Articles 76 and 246 of the CPC (which applies to arbitrators the rules applicable to the resolutions of foreign tribunals), summons of actions from foreign arbitral tribunals to be enforced in Chile, must be forwarded by means of letters rogatory to the Supreme Court of Chile through the corresponding Ministry of Foreign Affairs.

On the other hand, Article V Nº 1(b), of the New York Convention states as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
   b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case (emphasis added);

4 *Stubrin v. Morice Investment*[31]

A Exequatur Request

The Stubrin family requested the Supreme Court of Chile,[32] the recognition and enforcement of an arbitral award issued on May 16, 2003, in Buenos Aires, Argentina, under the rules of the Panama Convention. The award condemned Morice to pay US$579.399.75 for its non-payment of the monies owed under a shareholders agreement of December 26, 2000.[33] In its support, Stubrin cited Article 242 of Chile's CPC and the 1958 New York and 1975 Panama Conventions, both in force in Chile and Argentina.

B Defendants

Based on the fact that, under Article V Nº 2 (b) of the New York Convention, the authority to which an exequatur is requested can reject its recognition and enforcement if it determines that it is contrary to its public policy, the defendants stated that the award did not comply with Article 246 of Chile's CPC and was, therefore, contrary to Chile's public order. This provision, in connection

31 The plaintiffs were the four members of the Stubrin family and the Defendant was Sociedad de Inversiones Morice, S.A. of Santiago, Chile.

32 Supreme Court Judgment of Jan. 11, 2007. Docket Nº 6.600-05.

33 The members of the Arbitration Tribunal were Messrs.Raul Novoa Galán, Edison Gonzales Lapeyre and Mario Orestes Folchi.

with Article 245 Nº 4 of that same Code, states that, to be recognized or enforced in Chile, foreign arbitral awards must be *res judicata* and this condition must be certified or authenticated by the superior tribunal of the country where the arbitral award is issued. As Stubrin had not attached a certification from the superior courts of Argentina, proving the authenticity of the award, the exequatur had to be rejected.

C Judicial Attorney's Report

The Report stated that: Under Article III of the New York, and Article 4 of the Panama Conventions, the exequatur should be granted because, under those provisions, foreign arbitral awards have the force of *res judicata*. The above was confirmed by the certifications from the Court of Appeals of Argentina, which demonstrated that the defendant's two recourses against the award had been rejected.

D The Court's Ruling

The Court confirmed that, under Article 242 of the CPC, the subject matter was governed by the rules of the New York Convention ratified by both Chile and Argentina. Pursuant to Article IV of the above Convention, the party that requests an exequatur must submit: i) the original or authenticated copy of the award; and ii) the original or authenticated copy of the compromise by which the parties submitted their controversies to arbitration.

As the above conditions had been fulfilled, and the Secretary of the Appeals Court of Argentina, and Secretary of the Arbitral Tribunal of the IACACC, had given evidence that the two recourses submitted against the award, had been rejected, this meant the latter was *res judicata*. Based on the above considerations, the Court granted the exequatur and authorized its enforcement in Chile. Court Minister Rodriguez Ariztía added that the exequatur request and award fulfilled the requirements of Article 35 Nº 2 of Law Nº 19.971 which also applied to the Court's ruling.

5 *Comverse v. American Telecommunications* (*"ATI"*)[34]

A Exequatur Request

US company Comverse requested the enforcement of an award issued in New York, on November 29, 2007, by an American Arbitration Association ("AAA") Tribunal against the Chilean company, ATI, and related companies. It condemned ATI to pay US$5.884.799.60 plus interests and procedural costs. Comverse stated that, on July 22, 2004, it entered a distribution contract with

34 Supreme Court, Sept. 8, 2009, Docket No. 325-2005.

ATI but that, after a series of failures, notified ATI that the contract would be terminated and submitted an arbitration claim before the AAA. Comverse cited, on its behalf, article 242 of the CPC and Articles III, IV and V of the New York Convention of 1958, adding that the documents attached demonstrated that the requirements of the New York Convention, for conceding the exequatur and authorizing the enforcement of the award, had been fulfilled.

B Defendant

ATI stated several objections, including that: i) there was no evidence the award was *res judicata* as required by Article 245 No. 2 of the CPC; ii) Article 246 of the CPC had not been complied with because the original of the translation of the judicial confirmation of the arbitral award had not been submitted; iii) because of economic limitations, it had not submitted the required evidence.

C The Judicial Attorney's Report

The report stated that Article 242 of the CPC established the general rules and Law No. 19.971 the special rules, and that i) the allegation that the defendant could not exercise its right of defense was untenable because it submitted a response, a counterclaim, a list of witnesses and documents but could not demonstrate a lack of due process; and ii) the certification of February 4, 2008 of the District Court of New York demonstrated that the award was res judicata. It recommended the granting of the exequatur.

D The Court's Ruling

It ratified the Judicial Attorney's Report and reiterated that; i) the purpose of the exequatur was, according to the principle of the "international regularity of foreign judgments and arbitral awards", to verify the fulfillment of minimal formal requirements but without analyzing the intrinsic justice or injustice of a resolution; ii) the dilatory exceptions raised pertained to the enforcement phase but, in any event, only those exceptions of Articles IV and V of the New York Convention, reiterated by Article 36 of Law No. 19.971, would be admissible; iii) none of the circumstances which, under Articles 1(b), or Article 5 of the New York Convention or number 1(b), of Article 36 of Law No. 19.971 authorize a tribunal to reject an exequatur were present; iv) under Article V, No. 1, of the New York Convention, which is similar to Article 36 No. 1, (a)(v), of Law No. 19.971, the recognition and enforcement of a foreign judgment or arbitral award can only be denied if it has been annulled or suspended by a competent authority of the country where, in accordance with the law, that judgment has been issued; and v) the certification received from the District Court of New York demonstrated that the award had been confirmed. For the above

reasons, the Court rejected the exceptions and oppositions raised, accepted the exequatur request and stated that its enforcement should be requested from the corresponding civil tribunal.

6 *Kreditanstalt v. Inverraz*[35]

A The Exequatur Request

The German public banking institution, Kreditanstalt ("KFW"), and the Chilean company, Inverraz, executed, on August 17, 1995, in Frankfurt, Federal Republic of Germany a financial agreement and, on August 30, 2000, a loan agreement. German law applied to them and the parties stated that disputes would be settled by the Arbitration Regulations of the International Chamber of Commerce ("ICC") of Paris.

Upon the non-payment of the credits and breach of the agreements, in December 2005, KFW submitted an arbitration claim before the ICC in accordance with its Regulations. On October 1st, 2007, in the city of Paris, an arbitral award was rendered by an ICC arbitral tribunal[36] which condemned Inverraz to pay KFW roughly US$59 million plus interest and arbitration costs. KFW requested on the basis of Articles 242 and 248 of Chile's CPC, Articles I through V of the New York Convention and Articles 1, 35 and 36 of Law No. 19.971, the grant of an exequatur and the enforcement of the award against Inverraz.

B The Defendant

The defendant stated the following:

1. The exequatur should not be granted because it did not fulfill the requirements of Articles 245 through 251 of the CPC; I through V of the New York Convention, and 1, 35 and 36 of Law Nº 19.971 of 2004.
2. Because of delivery delays of the German goods funded with the KFW loans, both parties adopted, in Chile, on October 23, 2002, a judicial compromise by which, after Inverraz signed a promissory note for US$17 million, they suspended the filing of new lawsuits and terminated all outstanding claims.
3. i) KFW did not attach the documents prescribed by Article IV (2) of the New York Convention); ii) Inverraz was not duly notified of the appointment of the arbitrators or arbitration procedures and could not submit

35 Supreme Court of Chile, *Kreditanstalt fur Wiederaufbau v. Inversiones Inverraz Limitada*, Dec. 15, 2009, Docket No. 5228-2008.

36 The members of the Arbitral Tribunal were Bernardo Cremades, Norbert Horn and Francisco Orrego Vicuña (a Chilean citizen).

its defense; iii) KFW mistakenly requested the enforcement of the award without first demanding its recognition, which are two separate instances; v) the award exceeded the compromise agreement; vi) the award has been suspended by the French courts; vi) the object of the difference was not subject to arbitration in Chile; vii) except for one of the arbitrators, the ICC tribunal had no knowledge of Chilean law; and viii) the eventual recognition or enforcement of the award would be contrary to Chile's public order.

4. It had not responded to KFW's claim because the ICC lacked jurisdiction under the judicial compromise reached in Chile, on October 23, 2002 (which was now *res judicata*), the supposed debts did no longer exist and, as the ICC's jurisdiction clause was ancillary to the terminated loan agreements, they had, likewise, ceased to exist. In addition, under clause three of that compromise agreement, both parties had extended themselves broad formal releases.
5. The ICC jurisdiction under the agreements of 1995 and 2000 had been annulled and superseded by the compromise agreement of 2002 which gave jurisdiction on all such matters to the courts of Frankfurt. The ICC award was, thus, null and void, and contrary to Chile's public order.
6. The enforcement of the ICC award had been suspended by the French courts by the submission of an annulment request by Inverraz which, according to French Professor, Charles Jarroson, operated *ipso jure*.
7. Articles 230 and 357 Nº 5 of Chile's Organic Code for the Judiciary prohibit public corporations to submit controversies to arbitration, and as KFW was a public corporation, the award rendered by the ICC was null and void.

C The Judicial Attorney's report

The report stated the following:

1. The recognition and enforcement of international commercial arbitral awards are governed by Articles 35 and 36 of Law Nº 19.971 which prevail, as *lex specialis*, over Articles 242 et al. of the CPC.
2. The above rules presume a legitimacy of international commercial awards that can only be revoked by some of the circumstances of Article 36 of Law Nº 19.971. Consequently, the only grounds for denying the recognition or enforcement of an award would be if the opponent provides evidence that one or more of the five grounds for denial of Article 36 Nº 1 paragraph 1(a) of Law 19.971 exist.

3. The allegation that KFW's requests for the recognition and enforcement of the award would not be valid because the Court has no authority thereof, as the Court normally assigns such enforcement to other tribunals.
4. The alleged lack of jurisdiction of the Arbitral Tribunal because the credits of KFW would have been extinguished by the judicial compromise reached in Chile constituted a peremptory exception to be considered by the tribunal in charge of the enforcement of the award. The same conclusion would apply to the defendant's charge that the award exceeded the compromise agreement.
5. Concerning the suspension of the award by the defendant's annulment request, it noted that under Chilean law the award would have to be effectively suspended or annulled by the judicial authority of the country where the award was issued.[37]
6. The assertion that the application of German Law to the financial and loan agreements would be contrary to Chile's public order had no basis because, under Article 113 of Chile's Code of Commerce, parties are allowed to submit themselves to foreign laws.

D The Court's Ruling

The Supreme Court of Chile rejected Invererraz' opposition to the recognition of the award and stated that its enforcement would have to be requested from the competent Civil Law Tribunal. Its reasons were the following:

1. Its function, after substantiating the respective contradictory procedure, is to review the applicable legal requirements, without analyzing in detail the merits of the respective suit, and, then, to grant or deny the corresponding authorization for the enforcement of the award by a competent tribunal.
2. Dismissed the allegation that the exequatur request had mistakenly demanded the enforcement of the award and not its recognition. It based its conclusion on Article 248 of the CPC and the text of KFW's request.
3. Defendant's charge that it was not notified of the appointment of the arbitrators or arbitration procedure and unable to present its defence, was contradicted by its recognition that it voluntarily followed a strategy of rejecting the tribunal's jurisdiction. The same would apply to his motion to suspend the enforcement of the award before the French Courts.

37 Art. 36 Nº 1(a)(v) of Law Nº 19.971 and Art. V (e) of the New York Convention.

4. The allegation that the award resolved matters not contemplated by the arbitration agreement because it referred to the Judicial Compromise of 2002, sanctioned by Article 36 Nº 1(iii)(a) of Law Nº 19.971, was not acceptable because Inverraz itself submitted that document to the arbitration tribunal.
5. Regarding the argument that the award had been suspended by its annulment request before the French Courts, the Court endorsed the report of its Judicial Attorney in that Article 36, Nº 1(a)(v) of Law Nº 19.971 (which is different from Article V(e) of the New York Convention) that an annulment request does not suspend the enforcement of an arbitral award.
6. The assertion that the award would be null and void because KFW was a public corporation and such corporations are prohibited by Chilean law to submit their controversies to arbitration, was rejected because Chilean law applies to Chilean and not foreign public corporations. In addition, it noted that KFW was in effect a commercial corporation.

7 *Stemcor v. Metalúrgica* (*"CCM"*)[38]

A The Exequatur Request

Stemcor UK Limited, requested of the Supreme Court,[39] an exequator for the enforcement of an award adopted in London by Ian Glick, as sole arbitrator, under the Rules of the London Court of International Arbitration ("LCIA"). The award condemned CCM to pay for the non-fulfillment of its obligations on two contracts for the sale of steel. In its support, Stemcor cited Articles 242 of Chile's CPC, 1 of law Nº 19.971, and the New York Convention, and stated that CCM had accepted Ian Click as sole arbitrator through its legal counsel, Kingsley Napley ("KN"); and had thereafter, ratified that designation and paid its part of the arbitration costs.

However, later on, KN attached a letter from the Chilean Law Firm of Schweitzer and Co., which stated they would be representing CCM and that KN would be in charge of the defense but CCM did not accept the arbitrator's jurisdiction. On September 2nd, 2009, the arbitrator stated CCM had not submitted a defense or presented its case. Thus, on November 23, 2009, it issued its award and condemned CCM to pay the full amounts demanded plus legal costs.

38 *Stemcor UK Limited v. Compañía Comercial Metalúrgica* (*"CCM"*).

39 Supreme Court Judgment of June 21, 2010, Docket 1724-2010.

B The Defendant

As noted below, CCM did not raise defenses to Stemcor's claim.

C The Judicial Attorney's report

The report was of the opinion that the exequatur should be granted. Its opinion was based on the following views: "Article 35 of Law Nº 19.971 establishes a kind of legal presumption of the legitimacy of arbitral awards issued abroad that can only be revoked by the existence of some of the circumstances listed in Article 36 of that same law which states as follows:

> Article 36: "Motives for denying recognition or enforcement:
> 1) Recognition or enforcement of an arbitral award, from whatever country it has been issued, may only be denied:
> a) at the instance of the party against whom it is requested, when that party demonstrates before the competent tribunal of the country where recognition or enforcement is requested: [. . .]
> v) that the award is not yet obligatory for the parties or has been annulled or suspended by the tribunal of the country in which, in accordance with the law, the award has been issued."

In this case, the matter was governed by Articles 242 of the CPC, 1 and 36 nº 1, letter (a), suparagraph (v), of Law Nº 19.971 which would prevail over Article 245 Nº 4 of the CPC. CCM had been notified, had approved the designation of the arbitrator, and paid the arbitration costs, but had raised none of the grounds listed in Article 36 of Law Nº 19.9715, for rejecting the recognition of the award. Consequently, its subsequent rejection of the arbitrator's jurisdiction, did not affect the validity of the award.

D The Court's Ruling

The Court emphasized that its role was limited to ascertaining whether awards fulfilled the requirements of Article 245 of the CPC but not its merits, justice or injustice. It noted the subject matter was an international commercial contract and that Articles 35 and 36 of Law Nº 19.971—similar to those of the New York Convention—applied to the case. Finally, it then ratified the Judicial Attorney's Report, accepted the exequatur and stated that the enforcement of the award had to be requested from the corresponding Civil Court.

8 *Edfi v. Endesa and YPF*[40]

A The Exequatur Request

EDFI submitted to the Supreme Court of Chile,[41] an exequatur request for the recognition and enforcement of an award issued, on October 22, 2007, by an arbitration tribunal established in Buenos Aires under the rules of the International Chamber of Commerce ("ICC").

On 2001, EDFI agreed, in Paris, with ENDESA International, and the Argentine corporation, ASTRA (absorbed thereafter by YPF of Argentina), the purchase of the shares of a group of Argentine energy companies ("EASA" and "EANOR"). The contract established that controversies would be resolved by international arbitration under the rules of the ICC, arbitrators would apply Argentine Law, the situs would be Buenos Aires and the languages French and Spanish. A dispute arose, and an Arbitration Tribunal was established which functioned in Buenos Aires under the rules of the ICC and applied Argentine Law on the merits.[42] The award ordered ENDESA and YPF to pay EDFI a significant sum of money. However, as the defendants had important assets in Chile, EDFI requested the recognition and enforcement of the award before the Supreme Court of this country.

EDFI stated that the Court of Appeals of Buenos Aires had declared the award to be null and void and that an extraordinary appeal of that decision had been rejected by its Supreme Court. However, a complaint to this Court not to give effect to this rejection remained pending. EDFI added that the above annulments did not impede the enforcement of the award in Chile, because: i) The Tribunal of Great Instance of Paris, in March 2008, had authorized its enforcement in France; ii) the award fulfilled the requirements of Article 242 of Chile's CPC, of the New York Convention and Law No 19.971; and iii) the annulment of an award does not affect its obligatory nature or allow the revision of its merits.

B The Defendant

YPF stated the exequatur should be denied because it had been annulled by a resolution of a competent Argentine Tribunal and EDFI´s recourse of June

40 The French company, "EDF International S.A.—EDFI" versus the Spanish company, "Endesa Internacional S.A." and the Argentine company "YPF. S.A" as the absorbing company of "Astra Compañía Argentina de Petróleos S.A., an Argentine company located in Buenos Aires.

41 Supreme Court, Sept. 8, 2010, Docket Nº 4390-2010.

42 The members of the Arbitration Tribunal were Jean Paul Beraudo, Rafael Illescas Ortiz and Henri C. Alvarez.

29, 2010, had been rejected, and was now *res judicata*. In addition, EDFI had not attached a certification of authenticity of the award from the Appeals Court of Buenos Aires, as required by Article 246 of the CPC. In its support, it invoked Article 36 (1) (a) (v) of Law Nº 19.971, Article V Nº 1(e), of the New York Convention and Article 5º Nº 1(e), of the Panama Convention. Endesa reiterated the YPF arguments and added that the Supreme Court of Chile lacked jurisdiction over an award issued in Argentina and involving parties from France, Spain and Argentina. The only competent courts, in its opinion, were those of Argentina.

C The Judicial Attorney's report

This report stated the exequatur should be rejected because: i) EDFI attached a simple copy of the award which did not comply with Articles 17 of Chile's Civil Code and 345 of its CPC, which prescribe the formal and authentication requirements of public documents not executed in Chile ii) the Supreme Court pursuant to Article 76 of the Constitution, lacked jurisdiction to resolve an award issued abroad with a plaintiff residing in France and defendants in Argentina; iii) Article 36 Nº 1(v)(a), of Law Nº 19.971, lists as one of the motives for denying the recognition or enforcement of an award, its annulment by a court of the country where, in accordance with its laws, the award was issued which, in this case, was the Appellations Court of Buenos Aires.

D The Court's Ruling

The court rejected the exequatur request submitted by EDFI. The court found that under Article 242 of the CPC, international treaties ratified by Chile have the force recognized by those treaties even if they don't satisfy the requirements of Chilean law. When these provisions become part of Chilean law, they can derogate, expressly or tacitly, legal provisions in conflict with them. It also found that under Article 246 of the CPC, the authenticity or efficacy of a foreign arbitral award is determined by the approval of the superior court where the award is issued. This is because the source of authority of arbitrators is the consent of the parties and not of governments.

In its opinion exequatur requests from Argentina are governed by international treaties ratified by both countries which include the New York Convention of 1958, the Panama Convention of 1975 and the Cooperation Agreement between the countries of Mercosur with Chile and Bolivia of August 7, 2009. To these instruments should be added Articles 35 and 36 of Law Nº 19.971, of 2004. Consequently, the objections to the authenticity of the award based on Article 17 of Chile's Civil Code would not apply because it

was issued by an ICC tribunal and the certification of its Secretary is sufficient proof of the authenticity of the award. In addition, in a similar exequatur proceeding (the Stubrin Case), the Court had reached the same conclusion.

Regarding the defense that the award had been annulled by the Courts of Argentina and the recourses and complaints against it been rejected by the Supreme Court of that country, the Court cited Articles V, Nº 1(e), of the New York Convention; 5 Nº 1(e), of the Panama Convention; and 36, of Law Nº 19.971. These provisions were consistent in rejecting the recognition or enforcement of arbitral awards—irrespective of the country from where they proceed—when the party against whom they are invoked, provide evidence that the award has been annulled or suspended by a tribunal of the country from where it has been adopted. Thus, the argument that the award had been executed in France was not valid because it had been requested and recognized before its annulment by the Argentine courts.

IV Conclusions

Our conclusions from the analysis of the above jurisprudence, are that:

1. Without prejudice the Supreme Court of Chile is not governed by the principle of *stare decisis*, it has shown a consistent and uniform understanding of the rules applicable to the recognition and enforcement in Chile of international arbitral awards.
2. Although basically consistent with the provisions of the CPC and the international treaties ratified by Chile, Law Nº 19.971, of 2004, is *lex specialis* which, in cases of discrepancy, prevails over the provisions of the CPC and those treaties.
3. The report of the Supreme Court's Judicial Attorney plays a decisive role in the exequatur requests submitted to that Court.
4. The application of Article 16 of the Chile's Civil Code by international arbitration tribunals remains a complex subject which, in the opinion of this author, has not yet received a definitive interpretation.
5. In the opinion of this author: i) there is no final interpretation on the admissibility in Chile, of exequatur requests for the recognition and enforcement of provisional or precautionary injunctions from international arbitration tribunals; and ii) there is still room for debate on whether the summons by international arbitration tribunals of Chilean defendants is subject to Chilean law or to that of the site of the arbitration.

Annex

Chapter VIII—Recognition and enforcement of awards

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 of the award or a duly certified copy thereof, and the original of the arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award is not made in an official language of Chile, the court may request the party to supply a translation of such documents to this 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:
        i) That 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) That the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
        iii) That 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, the former may be recognized and enforced; or

iv) That 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) That 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) That according to the law of Chile, the subject-matter of the dispute is not capable of settlement by arbitration;

ii) That recognition or enforcement of the award would be contrary to the public policy of Chile.

2) If an application has been made to a court pursuant to paragraph v) of letter a) of numeral 1) of this article, the court before which recognition or enforcement is sought may, if it considers it proper, adjourn its decision and, on the application of the party claiming recognition or enforcement of the award, may also order the other party to provide appropriate security.

CHAPTER 5

Colombia

Rafael Bernal and Hernando Otero

I Introduction

The year 2012 was a turning point in Colombia's experience with the recognition of foreign arbitral awards. Before then, the country was often mentioned as a risky jurisdiction. This view was often supported by reference to a November 1992 case between *Sunward Overseas S.A* and *Servicios Marítimos Limitada Semar Ltda*, in which the Supreme Court had granted the recognition of the award but had done so applying both the New York Convention and the country's Civil Procedure Code.[1] A number of recent cases however have dispelled the concerns arising out of the *Sunward Overseas* case. Those cases, together with a new arbitration statute, have in a very short period of time set the conditions for Colombia to become perhaps one of the more favorable jurisdictions in the Americas for the enforcement of foreign arbitral awards.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

Colombia has a long history with international treaties on the recognition of foreign arbitral awards. The country is a party to a number of international agreements, notably the following:[2]

1 Supreme Court, Nov. 2012, *Sunward Overseas S.A. and Servicios Marítimos Limitada Semar Ltda*. This precedent was observed by subsequent Supreme Court rulings. *See* Juan Antonio, Gaviria Gil, *Commentaries on the new Colombian Arbitration Law*, in REVISTA DE DERECHO PRIVADO 24 (2013): 259–281. A July 1997 ruling by the Constitutional Court had also stated that an international arbitral award needed to be submitted for recognition to guarantee the observance of the national legal order in accordance with the Civil Procedure Code. *See* Constitutional Court, July 1997, Ruling C-347.

2 Colombia is also a party to another regional convention worth mentioning, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention of 1979). Colombia signed the Convention on May 8 , 1979, and ratified it through the enactment of Law 16 of Jan. 22, 1981. Colombia's instruments of ratification were deposited with the General Secretariat of the Organization of American States

 | DOI 10.1163/9789004284364_007

A. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention of 1958): Colombia acceded to the Convention on December 24, 1979.[3] The country signed the Convention and Congress ratified it on September 25, 1979, through Law 37 of 1979.[4] The law was later declared unconstitutional for procedural reasons. Therefore a second law, Law 39 of 1990, was enacted in its place.[5]
B. Inter-American Convention on International Commercial Arbitration (Panama Convention of 1975): Colombia signed the Convention on January 30, 1975, and ratified it through the enactment of Law 44 of September 19, 1986.[6] The country deposited its instruments of ratification with the General Secretariat of the Organization of American States on December 29, 1986.[7] In accordance with Article 10 of the Panama Convention, it entered into force thirty days after on January 28, 1987.

Colombia is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) since August 14, 1997.[8] The ICSID Convention provides that "Contracting States shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[9]

III Relevant Provisions in Free Trade or Bilateral Investment Agreements

More recently, Colombia has entered into a number of free trade agreements that touch upon the enforcement of foreign arbitral awards. These treaties

on Sept. 10, 1981. In accordance with Article 11 of the Montevideo Convention, it entered into force thirty days after on Oct. 10, 1981.

3 "Status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards". Available on the UNCITRAL website, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, last visited Nov. 11, 2013.

4 Law No. 37, July 6, 1979.

5 Law No. 39, Nov. 20, 1990.

6 Law No. 44, Sept. 19, 1986.

7 *See* Organization of American States. Inter-American Convention on International Commercial Arbitration. Available at http://www.oas.org/juridico/english/sigs/b-35.html.

8 Colombia signed the ICSID Convention on May 18, 1993, and the country's legislature approved the Convention through the enactment of Law No. 267 of 1996.

9 ICSID Convention, Art. 54(3).

impose on Colombia international law obligations to provide for effective means of recognizing and enforcing foreign arbitral awards. For example, the Colombia-United States Trade Promotion Agreement provides as follows:[10]

> Article 21.21: Alternative Dispute Resolution.
>
> 1. *Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.*
> 2. *To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.*
> 3. *A Party shall be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration.*

The Free Trade Agreement between the Republic of Colombia and Canada[11] and the Free Trade Agreement between the Republic of Colombia and the Republics of El Salvador, Guatemala and Honduras[12] have similar provisions.

IV National Law

On July 12, 2012, Colombia enacted the "National and International Arbitration Statute" (Law 1563 or Statute).[13] It entered into force on October 12, 2012. The Statute streamlines a number of relevant provisions previously dispersed

10 Colombia-United States Trade Promotion Agreement (Washington D.C., Nov. 22, 2006). A Protocol of Amendment to the Agreement was executed on June 28, 2007. The Agreement was ratified in Colombia through Law No. 1143 of 2007. The Protocol was ratified through Law No. 1166 of 2007. The Agreement and the Protocol entered into force on May 15, 2012.

11 Agreement between the Republic of Colombia and Canada (Lima-Peru, Nov. 21, 2008), Art. 2118. Ratified in Colombia through Law No. 1363 of Dec. 9, 2009. The agreement entered into force on Aug. 15, 2011.

12 Free Trade Agreement between the Republic of Colombia and the Republics of El Salvador, Guatemala and Honduras (Aug. 9, 2007), Article 18.24. Ratified in Colombia through Law No. 1241 of June 30, 2008. The agreement entered into force on Mar. 27, 2010.

13 Law No. 1563, July 12, 2012.

among other statutes and incorporates others to reflect developments resulting from court decisions in past years. Generally speaking, the Statute strengthens the jurisdictional foundation of arbitration in the country and seeks to shield it from judicial intervention except in those instances in which it is necessary to assist the arbitral process and the arbitral award.

With this in mind, the Statute sets forth cornerstone principles regarding the application and scope of its provisions. First, Article 64 of the Statute emphasizes that the agreement of the parties to international arbitration must be understood to encompass the authority to submit it to international adjudication and to be governed by a chosen set of rules.[14] This principle finds an important corollary in Article 62 which provides that neither the State nor State-owned or controlled entities parties to an agreement to arbitrate, shall invoke domestic law to challenge its capacity or its ability to arbitrate a difference contemplated by the arbitration agreement.[15]

Secondly, the Statute provides that "judicial authorities" may not intervene except in those cases expressly authorized by the Statute.[16] As a result, a judicial authority seized of a dispute which is covered by an arbitration agreement shall refer the parties to arbitration if either party requests it, no later than when the response to the claim is due.[17] In addition, a party that fails to raise an objection to jurisdiction based on the invalidity of the arbitration agreement "as soon as possible" or "within the term provided to do so" is precluded from doing so thereafter.[18]

V Application for Recognition and Enforcement before Local Courts

The Statute governs the recognition and enforcement of foreign arbitral awards without prejudice to any treaty to which Colombia is a party.[19] Therefore, the Statute does not govern the recognition of foreign

14 Statute, Art. 64. Article 79 of the Statute reinforces this notion by recognizing that an arbitral tribunal has the power to rule on its own jurisdiction.

15 Statute, Art. 64.

16 Statute, Art. 67.

17 Statute, Art. 70. In this regard, the Statute is more restrictive than New York Convention Art. II.3, as it does not provide an exception ("unless it finds that the said agreement is null and void, inoperative or incapable of being performed.").

18 Statute, Art. 66.

19 Statute, Arts. 62, 114.

judgments or of ICSID awards.[20] In addition the Statute expressly provides that international arbitration awards resulting from proceedings seated in Colombia shall be considered equivalent to local arbitral awards and therefore do not require recognition (except when the recourse to set it aside has been waived).[21]

A *Applicable Awards*

According to the Statute, foreign arbitral awards requiring recognition (or *exequatur*) are those rendered by an arbitral tribunal seated outside Colombian territory.[22] Awards issued by an international tribunal seated in Colombia are also technically non-domestic awards, but by express provision of the Arbitration Statute shall be considered domestic and do not require recognition to be enforced.[23]

The Statute refers simply to "foreign awards" and does not determine what qualifies as an award and therefore subject to recognition and enforcement.[24] A reading of the provisions on domestic arbitration indicates that an arbitral tribunal has discretion to issue provisional measures (but not preliminary procedural orders) in the form of an award.[25] This may suggest that any decision resolving (with finality) the merits of an issue may be considered an award under Colombian law. A decision of the Supreme Court in 2011, but under the previous arbitration regime, endorsed this approach by granting recognition to an ICC partial award, finding that: "*by its nature and scope*, [the 'partial award'] *displays the character of a judgment, bringing to an end several of the claims in the main* [statements] *of claim and counterclaim.*"[26]

---

20 Statute, Art. 114. Article 114 expressly excludes the application of local civil procedure statute.

21 Id.

22 Id.

23 Id.

24 Id.

25 Statute, Arts. 80, 83. Note that Article 88 of the Statute also provides that provisional or interim measures ordered by an international arbitral tribunal shall be binding in Colombia without any recognition and may be enforced directly before the courts.

26 Supreme Court, Dec. 19, 2011, *Drummond Ltd. v. Ferrovías en Liquidación y Ferrocarriles Nacionales de Colombia S.A.—FENOCO*.

B *Competent Courts*

The jurisdiction over the recognition of foreign arbitral awards is divided between the Supreme Court and the Council of State. The Supreme Court is the highest court for commercial disputes. The Council of State is a co-equal high court and is the highest court for disputes in which the State or a State entity is a party (including for the setting-aside or "*anulación*" of domestic awards or awards of international tribunals seated in Colombia).

In accordance with the Statute, the application for recognition of foreign arbitral awards between private parties is filed before the Civil Chamber of the Supreme Court.[27] The application for recognition of awards in disputes in which one of the parties is a State organ or entity is filed before the Third Section in full (*en banc*) of the Council of State.[28] The process is often referred to as an "*exequatur*". Once the foreign arbitral award has been recognized,[29] enforcement of awards may be sought before the courts of general jurisdiction, the Circuit Civil Courts (*Juzgados Civiles del Circuito*).[30] Enforcement of awards in which a State organ or entity is a party, may be sought before the Administrative Tribunals (*Tribunales Administrativos*).[31]

C *Conditions*

Perhaps one of the more important developments in the country's new Arbitration Statute is the provision that mandates that the recognition of a foreign arbitral award will be governed exclusively by the provisions of the Statute and those in relevant treaties and conventions to which Colombia is a party.[32] This provision should put an end to longstanding concerns over the application of the 1992 decision in *Sunward Overseas v. Servicios Marítimos Limitada Sema.* In that case, the Supreme Court had conditioned recognition of the fulfillment of provision of the country's civil procedure code in force at the time.[33] The code allowed the party against whom enforcement was sought

27 Statute, Art. 68.

28 Id.

29 Statute, Art. 116.

30 Statute, Art. 68.

31 Id.

32 Statute, Art. 114.

33 The civil procedure code in force at that time has now been derogated and has been replaced by the General Procedure Code (Law No. 1564 of July 12, 2012 or *Código General del Proceso*). Art. 605 of the General Procedure Code now provides the recognition ("*exequátur*") of foreign arbitral awards "will be subject to the provisions that govern that subject matter" (i.e. Arbitration Statute).

to request the taking of new evidence. In line with this approach, Article 112 of the Statute provides the only grounds upon which recognition of a foreign arbitral award may be refused.[34] These grounds mirror those provided in the New York Convention.[35]

D *Formalities*

A written application for the recognition of the foreign arbitral award must simply be accompanied by an original or a copy of the award.[36] Note that in contrast to Article IV of the New York Convention, the applicant is not required to provide a copy of the arbitration agreement. Furthermore, the Statute makes no mention of authentication of the award original or of certification of its copy. In any case, Colombia is a party to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents (Hague Convention) since January 2001. As a result, in practice it is advisable to obtain an Apostille before the appropriate Colombian consular official. Finally, if the award is not in Spanish, the competent court may require a translation.[37]

The relevant provisions do not establish a specific time limit to present an application for the recognition and enforcement of a foreign arbitral award. Resorting to the general time limits applicable in private law, practice suggests that an application should be filed within 10 years. An application for enforcement once the award has been recognized, should be filed within a 5 year time period.[38]

E *Procedure*

Once the application for the recognition of the foreign arbitral award is filed, the competent court will review the application for admissibility.[39] When the application is found to be admissible, the opposing party is served and summoned for a 10 day period.[40] During this time the respondent can oppose the enforcement but only on one of the limited grounds in the Statute that mirror those in the New York Convention. Once the summons period has elapsed the competent court has a 20-day period to render a final decision.[41]

---

34 Statute, Art. 112.

35 Id.

36 Statute, Art. 111(2).

37 Id.

38 Civil Code, as amended, Art. 2536. *See also* Law 1437 of 2011, Article 164 (2)(k).

39 Statute, Art. 115.

40 Id.

41 Id.

The decision regarding the recognition of a foreign arbitral award is in principle not subject to appeal.[42] Losing parties may in any case, in practice, challenge the decision resorting to a constitutionally-sanctioned and extraordinary legal remedy ("*Acción de Tutela*") to protect a person's constitutional rights (invoking a violation of due process). The Supreme Court however has rejected this approach in the past.[43]

VI Leading Cases

The enactment of the Statute is so recent, that decisions based on its provision have yet to be handed down. That said the most recent decisions give arbitration practitioners optimism the country has turned a corner towards a favorable disposition on the recognition of foreign arbitral awards.

In 2011, the Supreme Court in the case *Petrotesting Colombia SA & Southeast Investment Corp* (*Petrotesting*) *v. Ross Energy SA,* made important headway in this regard.[44] The Petrotesting case arose out of an ICDR arbitration clause in a joint operation contract between the parties for the operation of an oil field. A sole arbitrator tribunal seated in New York issued an award on June 19, 2006, in favor of the claimants. Following the filing of the application for recognition in 2007, the respondent opposed it on a number of grounds. Two of them deserve special attention. First, the respondent argued that the dispute was subject to a separate proceeding before a Colombian court.[45] Secondly, the respondent argued that under Colombian law, contracts involving the exploration of hydrocarbons were mandatorily subject to the jurisdiction of Colombian courts.[46] The Supreme Court's analysis of these grounds is telling.

---

42 Statute, Art. 113.

43 Constitutional Court, May 26, 2005, Ruling T-557, § 4.2.3. Alternatively, a losing party may also in practice resort to another remedy ("*Recurso Extraordinario de Revisión*") before the very court that has granted or refused recognition on extraordinary grounds (including *res judicata*, fraud, corruption, etc.).

44 Supreme Court, Civil Appeals Chamber, July 27, 2011, *Petrotesting Colombia SA & Southeast Investment Corp* (*Petrotesting*) *v. Ross Energy SA.*

45 *Petrotesting*, Section II, paragraph 6.2.(a).

46 *Petrotesting*, Section II, paragraph 6.4.(a). Ultimately the Court ruled that the joint-venture contract merely establishing the terms of the joint-venture between the partners was not strictly a "petroleum contract."

First it established that the only available grounds to refuse enforcement of an award were those in the New York Convention:

> *Based on the provisions of Article V of the New York Convention* (. . .) *consistent with its jurisprudential understanding, the grounds provided in that provision limit the defenses that can be invoked by the defendant in these types of processes, and given that the one at issue does not fall within any of those provided, it cannot prosper.*[47]

Thereafter, the Supreme Court turned to an analysis of Colombian public policy as a ground to refuse enforcement of a foreign arbitral award. In its analysis, the Court invoked the Panama and the Montevideo Conventions to justify an updated and dynamic approach to the notion of "public policy" that does not simply look to any inconsistency as a violation of the Colombian legal order:

> [*A*]*mong the different doctrinal conceptions that attempt to explain the topic in order to reduce the scope of the notion of 'public order' to reasonable limits and prevent that its use may lead to the systematic banishment of foreign law in spite of the senseless damage to the national values immersed in universal society, the one that predominates in the American continental environment, as evidenced by the specialized conferences promoted by the OAS and dating from 1975* (*Panama*) *and 1979* (*Montevideo*)*, is one that understands and defines 'public order' as a reserve clause to prevent foreign law normally qualified as competent to govern the particular case, from being accepted if its application demonstrably contradicts fundamental principles that inspired the national legal system.*[48]

The precedent in *Petrotesting* was followed by the Court in a December 2011 case: *Drummond Ltd. v. Ferrovías en Liquidación y Ferrocarriles Nacionales de Colombia S.A.*[49] In its analysis, the Court citing to *Petrotesting* reaffirmed its analytical approach based on the understanding that the New York Convention sets forth the only grounds upon which recognition may be opposed.[50]

---

47 *Petrotesting*, Section II, paragraph 6.2.(b).

48 *Petrotesting*, Section II, paragraph 6.5.(d).

49 Supreme Court, Dec. 19, 2011, *Drummond Ltd. v. Ferrovías en Liquidación y Ferrocarriles Nacionales de Colombia S.A.—FENOCO.*

50 *Drummond*, Section II, paragraph 6.

The Court also reaffirmed its previous approach to public policy, citing to a 2004 decision in which it recognized a foreign judgment:

> *In regards to respecting the rules of internal public order, it is important to note that this requirement does not translate into requiring decisions rendered by foreign courts to abide by all of the mandatory rules that are part of Colombian substantive law, as suggested by the opposing party, as this would be the equivalent of saying that, at least in part, the decision had to be issued in accordance with local law—an argument that contradicts the very essence of exequatur as a necessary procedure to grant enforceability in Colombia to judgments issued in a foreign country and pursuant to the law in force in the country in which the dispute arose.*[51]

VII Conclusions

Any review of Colombia's experience with the enforcement of foreign arbitral awards must have been undertaken after 2012 to be considered current. Indeed, in addition to the two very important decisions issued by the Supreme Court in 2011, the country enacted a new Arbitration Statute with specific provisions that came into force in October 2012. Together these developments have substantially changed the legal environment with which foreign arbitral awards will be recognized and enforced in the country. In sum, Colombia is now an example of a jurisdiction that appears to show a favorable disposition in line with international standards.

Yet, it is for these same reasons that it is too soon to indicate with certainty what the future practice will bring. Though the necessary pieces are all in place and the country's highest courts seem to be on board, only their forthcoming decisions will evidence the true state of affairs. Even then, the country's lower courts will also need to show restraint to not allow extraordinary legal remedies originally envisioned to correct gross violations of due process, to undermine the appropriate and specific provisions regarding the recognition and enforcement of foreign arbitral awards now in force.

---

51 *Drummond*, Section II, paragraph 6.b. The Court quoted its previous decision in *García Fernandes Internacional Importaçâo e Exportaçâo S.A v. Productos de Colombia S.A.* (*Prodeco*), August 6, 2004.

Annex

National and International Arbitration Statute—Law 1563 of 2012
Section Three—Chapter IX—Recognition and Enforcement of Awards

Article 111—Recognition and Enforcement
Arbitral awards shall be recognized and enforced as follows:

1. An arbitral award, irrespective of the country in which it was issued, shall be enforceable before the competent judicial authority, at the request of the interested party.
2. The party invoking an award or applying for its enforcement shall present the original award or a copy of it. If the award is not written in the Spanish language, the competent judicial authority may request the party to provide a translation of the award into this language.
3. Awards issued in international arbitrations seated in Colombia shall be considered national awards and, therefore, shall not be subject to the procedure for recognition and may be enforced without it, except when the action to set it aside has been waived, in which case its recognition shall be necessary.
4. The enforcement of foreign awards, that is those issued by an arbitral tribunal seated outside Colombia, shall require prior recognition by the competent judicial authority.

Article 112—Grounds for Refusing Recognition
The recognition of an arbitral award, irrespective of the country in which it was issued, may only be refused in those instances and pursuant to the exhaustive grounds indicated hereafter:

(a) At the request of the party against whom it is invoked, when that party proves before the competent judicial authority of the country where recognition or enforcement is sought:
    (i) That at the time of the arbitration agreement it was under some incapacity; or the said agreement is invalid 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) That the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) That the award deals with a dispute not contemplated by the arbitration agreement or contains decisions on matters beyond the terms of the arbitration agreement. However, if the decisions of the award on matters submitted to arbitration can be separated from those not so submitted, the former may be recognized and enforced; or
(iv) That 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 was conducted; or
(v) That the award has not yet become binding on the parties or has been set aside or suspended by a judicial authority of the country seat of the arbitration; or

(b) When the competent judicial authority finds:
(i) That, in accordance with Colombian law, the subject matter of the dispute is not capable of settlement by arbitration; or
(ii) The recognition or enforcement of the award would be contrary to the international public policy of Colombia.

If an application for setting aside or for the suspension of the award has been made before a judicial authority of the country seat of the arbitration, the Colombian judicial authority, if it considers it appropriate, may adjourn its decision on the recognition of the award and, at the request of the party requesting it [i.e., the enforcement], order the other party to provide appropriate security.

Article 113—Functional (Subject Matter) Jurisdiction
The decision adopted by the competent judicial authority in the award recognition procedure that in accordance with this section is requested from it, shall be conducted in a sole instance and shall not be subject to appeal or other recourse.

Article 114—Rules Applicable to Recognition
The recognition of an arbitral award will be governed exclusively by the provisions in this section and by those in treaties, conventions, protocols and other acts of international law signed and ratified by Colombia. Accordingly, the provisions established in the Civil Procedure Code regarding the grounds, requirements and procedures to refuse such recognition, shall not apply and will be applicable only to the recognition of foreign judicial judgments.

Article 115—Procedure for Recognition
The party applying for recognition shall submit the application before the competent judicial authority together with the documents referred to in Article 111.

If the competent judicial authority finds the application is complete, it shall [find it] admissible and shall serve the other party or parties [to respond] within ten (10) days.

Once the service period has elapsed and without further procedure, the competent judicial authority shall decide within a subsequent twenty (20) day period.

Article 116—Enforcement
Once the award has been recognized in part or in full, its enforcement shall be heard by the competent judicial authority.

CHAPTER 6

Costa Rica

Roy de Jesús Herrera Muñoz

If you know the enemy and know yourself,
you need not fear the result of a hundred battles.
If you know yourself but not the enemy,
for every victory gained you will also suffer a defeat.
If you know neither the enemy nor yourself,
you will succumb in every battle
—*The Art of War*

I Introduction

Costa Rica's privileged geographical position, and its political stability sustained in the most well established democracy in Latin America are elements that have allowed Costa Rica to become a magnet for investors, and the country has managed to consolidate the enabling environment for the development of international arbitration. In this article, the enforcement and recognition of international commercial awards in the country will be discussed thoroughly, as well as the treaties, legislation and the progress that has been achieved in Costa Rica regarding this topic.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

To date, Costa Rica is a party to two conventions governing international commercial arbitration. These are the Panama Convention (Inter-American Convention on International Commercial Arbitration) and the New York Convention.

The Panama Convention was entered into force on June 16, 1976. Costa Rica ratified the Convention on January 2, 1978, and deposited the instrument with the OAS on January 20, 1978. In accordance with Article 1, this is the primary Convention used by OAS member states in regulating commercial arbitration. According to its Article 1, the Panama Convention is applicable when there

 | DOI 10.1163/9789004284364_008

is *"[a]n agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction."* The Convention further states in Article 3 that *"[i]n the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission."*

Article 2 establishes that *"[a]rbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridical person"* and those arbitrators can be either nationals or foreigners. The Panama Convention iterates in Article 7 that *"it shall be open for signature by the Member States of the Organization of American States."* This clause highlights the only major difference between this convention and other arbitration treaties, that is, its scope is reduced to the Member States of the OAS.

Concerning the execution and recognition of arbitral awards, the Panama Convention declares that an award "that *is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment . . . [i]ts execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts . . ."* [Article 4] There are, however some means to refuse the recognition and execution of the decision when a party requests it to the competent authority of the State. According to Article 5, arbitral awards may be refused when the party petitioning for such proves the following:

1. *That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made; or*
2. *That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or*
3. *That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or*
4. *That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the*

agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or

5. *That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.*

An arbitral award may also be refused under Article 5 if the competent authority of the State in which the recognition and enforcement is requested finds that:

a. *the subject of the dispute cannot be settled by arbitration under the law of that State; or*
b. *the recognition or execution of the decision would be contrary to the public policy of that State.*

The New York Convention

Costa Rica signed the New York Convention on June 10, 1958; ratified it on October 26, 1987; and officially came into effect in Costa Rica on January 24, 1988. The New York Convention carries a broader scope and does not place restrictions as to which countries can be part of this convention, or who can sign it. Article 1 states that "[*e*]*ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration*". It also establishes in Article III the binding enforcement of the arbitral awards by saying that *"each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . ."*

In this Convention, there are some means to refuse the recognition and enforcement of the decision at the request of the party against whom it is invoked only if that party furnishes to the competent authority where the recognition and enforcement is sought, in the following terms:

(*a*) *The parties to the agreement referred to in article II were, under the law applicable to them, 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*

(*b*) *The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*

(*c*) *The award deals with a difference 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*

(*d*) *The composition of the arbitral authority 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*

(*e*) *The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*

An arbitral award may also be refused if the competent authority of the State in which the recognition and enforcement is requested finds that:

(*a*) *The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*

(*b*) *The recognition or enforcement of the award would be contrary to the public policy of that country*.

III Relevant Provisions in Free Trade or Bilateral Investment *Agreements*

CAFTA-DR is a free trade agreement between the United States, the Dominican Republic and five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua) This Agreement was signed on August 5, 2004. The main objective of CAFTA-DR, according to its Article 1, is to encourage expansion and diversification of trade between the parties; to eliminate barriers to trade and facilitate the cross-border movement of, goods and services between the territories of the parties; to promote conditions of fair competition in the free trade area; to substantially increase investment opportunities in the territories of the Parties; to provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory; to create effective procedures for the implementation and application of the

Agreement, for its joint administration, and for the resolution of disputes; and to establish a framework for further bilateral, regional, and multilateral cooperation to expand and enhance the benefits of the Agreement.

There were several issues that were dealt with by this agreement, these include, national treatment and market access for goods; rules of origin and origin procedures; customs administration and trade facilitation; sanitary and phyto-sanitary measures; technical barriers to trade; trade remedies and government procurement.

IV National Law

Costa Rica has a dual system when it comes on to international arbitration regulation. Law 7727, Law on Alternative Solution of Conflicts and Promotion of Social Peace (*Ley Sobre Resolucion Alterna de Conflictos y Promoción de la Paz Social*) applies to domestic arbitration. Law 8937, the International Commercial Arbitration Law applies to international arbitration cases. Law 8937 is based on the UNCITRAL Model Law, and for that reason the requirements for an arbitration to qualify as "international" are the same as described in Article 1(3) of the UNCITRAL Model Law.

Law 8937 is consistent with the UNCITRAL Model Law with some peculiarities, For example, Article 10 of Law 8937 is contrary to the Model Law. Instead of an agreement between the parties as to the number of arbitrators to be selected, the fallback rule proposes three arbitrators. Additionally, Law 8937 addresses two topics not found in the UNCITRAL Model Law, which are Article 37 touching on the subject matter of arbitration, and Article 38 concerning confidentiality of the arbitration proceedings.

It can be said that Costa Rica has adequate legislation to properly conduct international arbitration proceedings. However, the application of the rules established in law 8937 are still in the developmental stages. Case in point is Law 8937's confidentiality clause noted above, which has served to prevent the release of information on any arbitration proceeding in Costa Rica. Despite the lack of knowledge on how arbitration decisions are derived, as we will explain later, there have been some requests to enforce international arbitral awards in Costa Rica.

V Application for Recognition and Enforcement before Local Courts

The mechanism to recognize international commercial awards in Costa Rica is known as exequatur. This sort of proceeding is designed to be fast, since its primary goal is to ensure that the final decision of another jurisdiction

(including arbitrations) meets all the requirements established by the Costa Rican Civil Procedural Code. Moreover, this final decision has to have an obligation necessitating enforcement in Costa Rica. The exequatur is the response provided by the states, in order to guarantee the application of international commercial awards worldwide.

The exequatur was brought to life in order to solve disputes between people of different nationalities. It is very common, nowadays, in a globalized world, that the parties involved in international commercial issues are not located within the same jurisdiction. Hence, the enforcement of final decisions issued in other jurisdictions may become a problem. The role of the exequatur in the enforcement of a final decision is not to apply Costa Rican law, but to guarantee the principle of legal certainty by making sure that the obligations that are born from the foreign final decision are enforced in Costa Rica.

A *Competent Courts*

The recognition and enforcement of an international commercial arbitral award has two phases. Firstly, an international arbitral award has to undergo a study to make sure that it was made in compliance with the principles of international private law, and that it meets the requirements to be enforced in Costa Rica. This study is done by the First Chamber of the Supreme Court of Costa Rica. Secondly, the First Chamber issues an order to the competent court to enforce the award (a Commercial Court if the award only involves private parties; an Administrative Court if the awards implicates the state of Costa Rica in any way).

The First Chamber of the Supreme Court of Costa Rica is in charge of recognizing an international award. This Chamber is currently composed of five magistrates, and five substitutes. The Chamber also has an office with one clerk in charge of reviewing exequaturs. Certainly, the lack of adequate personnel becomes one of the biggest obstacles in enforcing international awards in Costa Rica. It is important to note that this office also has to deal with any requests concerning divorces, successions and any other proceeding held outside of the jurisdiction and seeking enforcement in Costa Rica. Therefore, having only one person in charge of the study of the exequaturs makes this proceeding substantially slow. As it relates to international arbitration, this office has to issue a final decision concerning the recognition of the arbitral award, which is subject to the vote of the magistrates. Once the magistrates vote on the decision and make any changes that are deemed necessary, the First Chamber Court will then issue its decision and serve a notice to all parties involved. The notice will clearly identify the court that will be in charge of the enforcement of the international arbitral award which will be either the Administrative Court or a Commercial Court.

When the latter scenario comes into effect, in order to establish the Court with jurisdiction, a second element appears. If an international arbitral award is being enforced in Costa Rica, the reasons are that the contract had effects in Costa Rica, or one of the parties involved is domiciled and/or has assets in our jurisdiction. In most cases, the award will be enforced in the territorial jurisdiction were the defendant is domiciled. However, there is a possibility that the defendant is not domiciled in Costa Rica, but the plaintiff seeks to enforce the award in Costa Rica. In this case, the plaintiff can choose the Commercial Court to enforce by seizing any property of the defendant.

B *Exequaturs*

Exequaturs are a common proceeding in Costa Rica, however, its juridical basis is not very extensive. Article 707 of the Civil Procedural Code states that when the enforcement of an international award is requested, the First Chamber will give the defendant ten days to submit arguments against enforcement of the arbitral award in Costa Rica. It is important to highlight that this is the only chance of making specific remarks, as there will not be another proceeding to discuss the litigious matter. Therefore, these remarks will be excessively moderated. Once the ten day period passes, the Court has to issue a final decision regarding enforcement of the award in Costa Rica. It is important to take into consideration that this final decision taken by the First Chamber does not have any recourse.

Enforcement Procedure

Once the First Chamber of the Supreme Court of Costa Rica renders its final decision to the parties involved with respect to the recognition and enforcement of an international arbitral award, the Chamber will determine the court with jurisdiction to enforce the award. The mechanism to enforce the award is different from that of the exequatur, and it is known as the enforcement proceeding.

As previously explained, if the First Chamber grants the recognition of the international arbitral award, in its final decision it will determine the court with jurisdiction to enforce the award. If the defendant is not located within our jurisdiction, then the plaintiff will choose the court in order to seize any property of the defendant. Moreover, it is important to take into account that if the Costa Rican government is the defendant or co-defendant, then the enforcement of the award will have to be done before the Administrative Court.

The enforcement proceeding is part of the summary proceedings established in the Costa Rica Procedural Code. Therefore, contrary to an ordinary proceeding, it is designed to be fast by limiting the decisions that can be appealed. The enforcement proceeding will begin by making the corresponding claim. Even though this claim may be similar to the request for exequatur, it

is important to note that the main objective in the exequatur proceeding is to obtain the recognition of the international award. In contrast, in the execution proceeding, the main arguments will be tied to the enforcement of the award.

If a cautionary measure of any sort is deemed necessary to assure the enforcement of the international award, it should be filed with the initial request. Typically, the most reoccurring cautionary measure is the seizure of property, which can range from shares to the freezing of bank accounts. Although the seizure of property occurs very often, this decision is subject to the court's approval.

Once the claim is filed, the court will give the defendant the chance to answer the claim. In the answer, the defendant will address the series of facts stated by the plaintiff, and say if they are true, partially true or false. The defendant will also have the opportunity to make further remarks in consideration of the facts stated by the plaintiff. Having been presented with the demand, the answer and any filed motions, the Court will start the process of evaluating the evidence. When all the evidence is assessed, the Court has fifteen days to issue a final decision.

C *Conditions and Formalities*

Article 705 of the Costa Rican Civil Procedural Code establishes the minimum requirements for the enforcement of international arbitral awards in Costa Rica. Those requirements are as follows:

1. The arbitral award has to be authenticated. This means that the international authority that issued the arbitral award has to certify that the award is original.

   In order to avoid any inconvenience with respect to this requirement, it is important to follow the Apostille Treaty if the country where the arbitral award was issued is a signatory to this Convention.[1] Costa Rica is a party to this Convention, and in practice it makes it simpler for domestic courts to recognize any document coming from foreign jurisdictions. Therefore, using the requirements of the Apostille Treaty may come in handy to avoid any excessive legal compatibility issues.
2. The defendant is given time to answer the initial claim and is properly served. This is to make sure that defendants have due process of

1 The Hague Convention Abolishing the Requirement for Legalization for Foreign Public Documents (Hague, Oct. 5, 1961), *entered into force* Jan. 24, 1965.

law and the opportunity to defend themselves against the arguments filed by the plaintiff. It is important to take into consideration that the notice of claim has to be made according to the law of the country applicable to the arbitration. For instance, if the arbitral proceeding is being held in Costa Rica, and the parties involved are Canadian, the notice has to meet the requirements established by Canadian law, and not those developed by Costa Rican law. If it is possible, it is important that at some point in the arbitral process, the arbitrators establish in a clear way that the defendant was properly served, answered the claim, or filed any motions against the claim, or despite being served of the notice, decided not to answer the claim. This is one of the requirements for any court when they issue their final decision in Costa Rica. Hence, by making sure international arbitrators follow the same format, it becomes easier for Costa Rican Courts to recognize the validity of the award.

3. The object of the claim may not be exclusive to Costa Rican Courts. There are different matters that are exclusive to our jurisdiction, hence if the award discusses one of those, the award will be deemed unenforceable before Costa Rican courts.
4. There cannot be ongoing proceedings or a final decision that produces double jeopardy.
5. It is possible to enforce the award in the country of origin.
6. The subject matter of the award cannot be contrary to public order.

Additionally, Article 36 of Costa Rica's International Commercial Arbitration Law, establishes another series of requirements that are important to keep in mind. These are:

> (*1*) *That the 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*

arbitral 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.*

D *Procedure*

The exequatur proceeding commences when the party seeking enforcement makes the request of execution to the First Chamber of the Supreme Court of Costa Rica. After the request to recognize and enforce the award is filed before the Supreme Court, the First Chamber will issue a decision regarding the admission of the request. In this decision, the Chamber will mainly evaluate the requirements established in Article 705 of the Civil Procedural Code. In the same decision, the Chamber will grant the defendant a ten day period to make any remarks with regard to the request of exequatur.

Once the defendant files an opposition to the recognition and enforcement of the award, the First Chamber will issue a final decision. It is important to

point out that the First Chamber will also issue a final decision in the absence of an opposition. When the First Chamber issues its final decision, the text will include the court with jurisdiction to enforce the award.

Before issuing its final decision, the First Chamber may admit remarks from the parties involved, and these remarks may delay the proceeding. It is very common that both parties make remarks during the exequatur proceeding. It is important to take into account that the office in charge of producing the final decision is also in charge of processing every single request for exequatur, including family, civil, penal and commercial affairs. Therefore, their work load is huge, which slows things down enormously. As a result, to date, the recognition of an arbitral award in Costa Rica may take as long as 12 months, excluding the enforcement proceeding.

The administrative costs of filing a request for exequatur are low. The biggest expense is more than likely the apostille. The cost of an apostille will vary depending on the country of origin of the arbitral award. Nonetheless, the median should be around US$50 per document. Further, in order to file the request for exequatur, the interested party has to attach a number of legal stamps that will vary according to the total amount claimed in the recognition and enforcement of the award.

VI Leading Cases

To date, there have only been three exequaturs related to commercial arbitrations filed before the First Chamber of the Supreme Court of Costa Rica. Therefore, the development of case law in our jurisdiction is extremely limited. Moreover, the decisions made by the First Chamber have been mainly about the requirements or lack thereof, established by Article 705 of the Civil Procedural Code of Costa Rica. At the time, the requirements established by Article 36 of the International Commercial Arbitration Law were not applicable since that particular law had not come into effect.

The most approximate decision issued by the First Chamber to the enforcement of an exequatur has been Resolution 44 of the First Chamber of the Supreme Court in 1989, in which Buques Centroamericanos S.A. requested the enforcement of a decision taken by a New York court, in relation to the execution of an arbitral award against the Costa Rican Petroleum Refinery, RECOPE (acronym in Spanish).[2] The plaintiff requested the enforcement of the decision taken by the court in New York, in Costa Rica. Nonetheless, the

2 Corte Suprema de Justicia, Dec. 1989, *Buques Centroamericanos S.A. v. Refinadora Costarricense de Petróleo, S.A.*

arbitral award was previously enforced before the American Court. Therefore, it was not exactly an arbitral award being enforced, but rather a judicial order by an American court.

VII Conclusions

Costa Rica has a strong and suitable framework towards the enforcement of international commercial arbitral awards because the country has accepted all forms of enforcement of decisions, and it has become a beacon on two main points: Firstly, it has accepted and abided by all the international treaties to which it is a party. And it has enforced awards through its local legislation, the Law on International Commercial Arbitration (*Ley de Arbitraje Comercial*); which since 1995 has become increasingly stronger as a means of dispute resolution and it is common for the arbitral clause to become the prime one in a contract.

At the local level, important support has been given to arbitration. The *Sala Primera* (the most important Court of civil and commercial matters in the country) has respected the principle of minimal intrusion. Also, training has been given to judicial officers such as the Congress of International Arbitration (which will have its fifth edition in February 2014), and not only that, but several judges of the same court are deeply concerned about arbitration.

Additionally, the support of public institutions towards having Costa Rica host international arbitrations has been extensive. First, there has been significant support and approval of the UNCITRAL Model Law. The Congress of International Arbitration has also received support from government officials as it has been declared a national interest in the last three years. But all these are sheltered and harbored by the general political atmosphere and political stability of the country, which solidifies the safety and permanence of these policies and offers a climate of legal firmness to foreign investors.

These have not only given a positive impact for the country but also pose serious challenges for the future as there is a lack of experience and too much paperwork when an arbitral awards must be enforced. Therefore, Costa Rica's main problem in this realm is its lack of expertise, since the country has not had enough experiences with enforcement of awards that could improve the system. Hence, the main issue regarding the enforcement of arbitral awards revolves around a country's peculiarity, which is the importance of notifying the defendant in these cases. One of the most important features to enforce an award in Costa Rica is that the defendant has been given notice, represented or declared rebel, under the law of the country of origin, and who has been legally

notified of the judgment, or award, that in accordance with Article 705 of the Civil Procedure Code (*Código Procesal Civil*), which states:

> *ARTICLE 705—Requirements*
>
> *For the foreign ruling or award to take effect in the country, the following requirements must be meet:*
>
> *1*) *To be properly authenticated.*
> *2*) *That the defendant has been formally represented or declared rebel, under the law of the country of origin, and has been legally notified of the judgment, or award.*
> *3*) *That the alleged claim is non-exclusive to Costa Rica jurisdiction.*
> *4*) *That there is neither an ongoing process in Costa Rica, or a final ruling by a Costa Rican court.*
> *5*) *That it is enforceable in its country of origin.*
> *6*) *It is not contrary to public policy.*

Annex

Law 8937 of 2011—Chapter VIII—Recognition and Enforcement of Awards

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 original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation of the award 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 arbitral 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 or 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) according to the law of Costa Rica, the subject-matter of the dispute is not capable of settlement by arbitration;

ii) the recognition or enforcement of the award would be contrary to the public policy of Costa Rica.

2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph v) of subsection a) of paragraph 1) of this article, the court where recognition or enforcement is sought may adjourn, if it considers it proper, its decision and on the application of the party claiming recognition or enforcement of the award, may also order the other party to provide appropriate security.

CHAPTER 7

Dominican Republic

Lorena Pérez McGill[1]

I Introduction

The Dominican Republic has a long civil law tradition influenced by French law and based on the Napoleonic Code. International arbitration has been at the forefront of alternative dispute resolution in the Dominican Republic in the last few years, mostly as a result of negotiations with its international trade partners and as a result of the country's efforts to attract foreign investment.

The 1990s brought an increase in foreign investment and economic growth to many countries in Latin America, including the Dominican Republic. Besides bringing political stability and macroeconomic balance to the region, the rise of democracy changed the historically restrictive and protectionist tendencies in Latin America. Open and liberal states blossomed in the midst of this political and economic shift, which also prompted the privatization of state-owned entities by way of foreign investment. To protect and promote foreign investment, the Dominican Republic entered into regional and bilateral agreements with its trading counterparts, such as Agreements on Reciprocal Promotion and Protection of Investments (APPRIs or BITs). In the last several years, the Dominican Republic has pursued a "policy of openness by unilaterally reducing its tariffs, and by stepping up integration at the multilateral and hemispheric levels through participation in the Doha Round, and the negotiation and conclusion of regional agreements with the United States and Central America . . ., the European Union, the Caribbean and Canada."[2] Through these

1 The opinions expressed herein are the author's own and do not necessarily represent those of the General Secretariat or of the Organization of American States. Special thanks to Ms. Mariel Vilchez, Counselor at the Minister of Foreign Relations' Section of Treaties and Conventions at the Legal Affairs Directorate; Judge Edynson Alarcón, of the Civil and Commercial Chamber of the Court of Appeals of the National District (First Chamber); and Judge Yokaurys Morales Castillo, Presiding Judge of the Civil and Commercial Chamber of the Court of First Instance of the National District, for the information and documentation provided to the author. Special thanks also to Ms. Vilma Arce-Stark for her editorial comments.

2 *World Trade Organization's Trade Policy Review Report by the Dominican Republic*, WT/TPR/G/207, 5 (Oct. 20, 2008). Available at http://www.sice.oas.org/ctyindex/DOM/DOMNatlDocs_e.asp (last visited on June 28, 2014).

 | DOI 10.1163/9789004284364_009

agreements and national legislation, the country has furthered the protections offered to its foreign investors, and opened new avenues for increased trade.

The Dominican Foreign Investment Law, No. 16-95, issued in 1995,[3] is the main source of protection for foreign investment in the Dominican Republic. Law 16-95 marked the country's departure from the Calvo Doctrine,[4] and introduced standards for the protection of foreign investment in line with international standards.[5] Likewise, Commercial Arbitration Law No. 489 (Law No. 489 or Arbitration Law),[6] is the applicable law for both local and international arbitration proceedings in the Dominican Republic, and includes provisions for the recognition and enforcement of foreign arbitral awards in the Dominican Republic.

This chapter discusses the enforcement mechanisms for foreign arbitral awards in the Dominican Republic, including those in international conven-

---

3 Law No. 16-95 on Foreign Investment (Nov. 20, 1995); enacted through Regulation No. 380-96 (Aug. 28, 1996). Regulation No. 380-96 was amended by Presidential Decree No. 163-97 and later revoked in 2004 by the new Foreign Investment Law Implementation Regulation, No. 214-04 (Mar. 11, 2004). Law No. 16-95 was further amended in 2003 by Law No. 98-03 (June 18, 2003), which created the Export and Investment Center of the Dominican Republic (*Centro de Exportación e Inversión de la República Dominicana* or CEI-RD).

4 Named after Mr. Carlos Calvo, an Argentinean jurist, the Calvo Doctrine is a foreign policy doctrine that holds that jurisdiction in international investment disputes lies with the country in which the investment is located, and thus proposes to prohibit diplomatic protection or intervention before the exhaustion of local remedies. Under the Calvo Doctrine, investors had no recourse other than the local courts of the place of the investment. Defined as an expression of legal nationalism, the Calvo Doctrine was applied by many countries in Latin America and in other countries through the Calvo Clause, a contract provision by which aliens waived their rights to invoke diplomatic protection, as well as their national laws and accepted the jurisdiction of the courts of the host country where the investment was made. *See Black's Law Dictionary* 205 (2d. ed. 1998). Law No. 16-95 states that "investors, both local and foreign, shall have similar rights and obligations in matters related to investment."

5 Law No. 16-95 states that "the Dominican State acknowledges that Foreign Investment and technology transfer play a role in the country's economic growth and social development, as they help the creation of employment and currency, promote the privatization process and contribute efficient methods for production, marketing and management." *See*, Fabiola Medina, *Dominican Republic* in: J. Hamilton, O. Garcia-Bolivar and H. Otero, Latin American Investment Protection: Comparative Perspectives on Laws, Treaties and Disputes for Investors, States and Counsel, 220 (Brill, 2012). *See also*, Leonardo Antonio Abreu Padilla, *Acuerdos para la Protección de Inversiones Suscritos por la República Dominicana*, 22 (Secretaria de Estado de Relaciones Exteriores, 2002).

6 Law 489 on Commercial Arbitration of Dec. 19, 2008, published in Official Gazette No. 10502 of Dec. 30, 2008.

tions and other treaties; and the jurisdiction of local courts including some relevant decisions.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

The Dominican Republic recently ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Inter-American Convention on International Commercial Arbitration (Panama Convention). In 2001, the President of the Dominican Republic promulgated a resolution communicating the ratification of the New York Convention (Presidential Resolution No. 178);[7] and in 2007, promulgated a resolution communicating the ratification the Panama Convention (Presidential Resolution No. 432).[8] The Dominican Republic ratified both Conventions without reservations.

Additionally, on March 20, 2000, the Dominican Republic signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention or ICSID Convention). As of the date of this publication, the country has not yet ratified the ICSID Convention.[9]

III Relevant Provisions in Free Trade or Bilateral Investment Agreements

In the mid-1900s, the Dominican Republic entered into the Friendship and Commerce agreements with several developed countries.[10] These agreements are broader than the typical investment agreement in that they cover various

7 Resolution 178-01, approval of Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Nov. 8, 2001.

8 Resolution 432-07, approval of the Inter-American Convention on International Commercial Arbitration, Apr. 10, 2007.

9 ICSID, *List of Contracting States and other Signatories of the Convention* (*as of April 11, 2014*), available online at https://icsid.worldbank.org (last visited on June 29, 2014).

10 *See, e.g.*, the Treaty between the Dominican Republic and the German Federation, signed on Dec. 23, 1957 and ratified by the Dominican Congress on Feb. 5, 1958; and the Agreement between the Government of the Dominican Republic and the Government of the United States of America on Investment Guarantees, signed May 2, 1962.

topics including trade, maritime and consular relations. More recently, the Dominican Republic has entered into investment agreements with several countries with significantly different levels of development.

Beginning in the 1990s, the Dominican Republic negotiated international agreements with many of its trade partners for the promotion and protection of foreign investment. Several examples include the negotiation of Bilateral Investment Treaties (BITs) with Spain,[11] Ecuador,[12] China,[13] France,[14] and Cuba.[15] More recently, the Dominican Republic negotiated BITs with Chile,[16] Argentina,[17] Finland,[18] the Swiss Confederation,[19] the United Kingdom,[20] the

11 Agreement for the Reciprocal Protection and Promotion of Investments between the Kingdom of Spain and the Dominican Republic, signed *ad referendum* on Mar. 16, 1995, available in Spanish at: http://www.sice.oas.org/Investment/BITSbyCountry/BITs/DOR_Spain_s.pdf. Last visited on June 29, 2014.

12 Agreement for the Reciprocal Promotion and Protection of Investments between the Republic of Ecuador and the Dominican Republic signed on June 26, 1998 and modified on May 26, 1999, available in Spanish at http://www.sice.oas.org/BITS/ecrd_s.asp. Last visited on June 29, 2014.

13 Agreement for the Reciprocal Protection and Promotion of Investments between the Government of the Republic of China and the Government of the Dominican Republic, signed on Nov. 5, 1998, available in Spanish at http://www.sice.oas.org/Investment/BITSbyCountry/BITs/DOR_China_s.pdf. Last visited on June 29, 2014.

14 Agreement on the Reciprocal Protection and Promotion of Investments between the Dominican Republic and the French Republic, signed on Jan. 14, 1999.

15 Agreement between the Government of the Dominican Republic and the Government of the Republic of Cuba for the Reciprocal Promotion and Protection of Investments, signed on Nov. 15, 1999 and ratified by the Dominican Congress on Jan. 9, 2001.

16 Agreement between the Dominican Republic and the Republic of Chile on the Reciprocal Promotion and Protection of Investments, signed on Nov. 28, 2000, available in Spanish at http://www.sice.oas.org/Investment/BITSbyCountry/BITs/CHI_DomRep_s.pdf. Last visited on June 29, 2014.

17 Agreement on the Reciprocal Protection and Promotion of Investments between the Dominican Republic and the Argentine Republic, signed on Mar. 16, 2001, available in Spanish at http://www.sice.oas.org/Investment/BITSbyCountry/BITs/ARG_DomRep_s.pdf. Last visited on June 29, 2014.

18 Agreement between the Government of the Dominican Republic and the Government of the Republic of Finland on the Promotion and Protection of Investments, signed on Nov. 27, 2001, entered into force on Apr. 21, 2007.

19 Agreement between the Swiss Confederation and the Dominican Republic on the Promotion and Protection of Investments, subscribed on Jan. 27, 2004.

20 Agreement between the Government of the Dominican Republic and the Government of the United Kingdom of Great Britain and Northern Ireland on the Promotion and Protection of Investments signed on July 11, 2002 but rejected by Congress on May 23, 2007.

Kingdom of Morocco,[21] and Panama.[22] The treaties include standard language stating that arbitral awards resulting from disputes between foreign investors and host States over the protected investments shall be final and binding between the parties and are enforceable in conformity with the internal laws of the contracting party in which territory the investment was made.[23] Apart from this boilerplate language, however, these agreements and treaties do not generally address the recognition and enforcement of commercial arbitral awards.

In a continuing effort to promote and protect foreign investment, in recent years the Dominican Republic negotiated regional agreements with its main trading partners that resulted in free trade agreements with Central America through the Central American Integration System and the Central American Common Market (CACM);[24] the Caribbean Community and Common Market (CARICOM);[25] the United States;[26] and the European Union.[27] Some of these recently negotiated agreements provide an obligation

---

21 Agreement between the Dominican Republic and the Kingdom of Morocco on the Reciprocal Promotion and Protection of Investments, signed on May 23, 2002 and pending Congress ratification.

22 Agreement on the Reciprocal Promotion and Protection of Investments between the Republic of Panama and the Dominican Republic, signed on Feb. 6, 2003, available in Spanish at http://www.sice.oas.org/Investment/BITSbyCountry/BITs/DOR_Panama_s.pdf. Last visited on June 29, 2014,

23 *See* Art. XI.5 of the 2006 Model Dominican Republic Trade Agreement; Art. 9.5 of the Agreement with Finland of Apr. 21, 2007, *supra* note 18; Art. XI.5 of the Agreement with Argentina *supra* note 17; Art. XI.5 of the Agreement with Chile *supra* note 16; Art. 11.4 of the Agreement with China *supra* note 13; and Art. 11.2(2) of the Agreement with Spain *supra* note 11.

24 The Dominican Republic became an Associated State of the Central American Integration System through the signature of a Partnership Agreement (Sistema de la Integración Centroamericana—SICA) on Dec. 10, 2003. In June, 2013, it became a full member of SICA. The Central American Common Market (CACM) was established in 1965, as set forth in the 1960 General Treaty of Central American Integration and in 1991, as a result of the signing of the Protocol of Tegucigalpa to the 1962 Charter of the Organization of Central American States (ODECA), became part of the Central American Integration System, SICA.

25 The Dominican Republic became a trade partner with CARICOM countries through a bilateral investment treaty between CARICOM and the Dominican Republic that came into effect on Feb. 5, 2002, *see*, http://www.sice.oas.org/TPD/CAR_DOM/CAR_DOM_e.ASP. Last visited on June 29, 2014.

26 The Dominican Republic is a signatory of the Central America-Dominican Republic-United States Free Trade Agreement (DR-CAFTA), which entered into force in the Dominican Republic on Mar. 1, 2007, *see* http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp#EiF. Last visited on June 29, 2014.

27 Through the Caribbean Forum (CARIFORUM), the Dominican Republic became a partner with the European Union in 2008, when CARIFORUM entered into an Economic

for the State parties to provide for the recognition and enforcement of foreign commercial arbitral awards in their jurisdictions. For example, the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA) provides that "each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes" and that "a Party shall be deeme3d to be in compliance . . . if it is a party to and is in compliance with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration."[28]

IV National Law

In 2008 the Dominican Congress approved Law No. 489, an arbitration law that includes provisions on the recognition and enforcement of international arbitral awards. The Dominican Arbitration Law is based on the Model Law of the United Nations Commission on International Trade Law (UNCITRAL).

V Application for Recognition and Enforcement Before Local Courts

The Recognition and enforcement of foreign arbitral awards in the Dominican Republic is governed by Law No. 489 and other applicable treaties, pacts or conventions.[29] Chapter VIII of Law No. 489 addresses the recognition and enforcement of foreign arbitral awards.

A *Applicable Awards*

Law No. 489 governs both local and international arbitration proceedings in the Dominican Republic. Article 1(2) of the law states that the provisions on

---

Partnership Agreement with the European Union, *see*, http://www.sice.oas.org/Trade/CAR_EU_EPA_e/careu_in_e.ASP. CARIFORUM is a subgroup of African, Caribbean and Pacific group of States that serve as a base for economic dialogue with the European Union, *see* http://www.caricom.org/jsp/community_organs/cariforum/cariforum_main_page.jsp?menu=cob.

28 DR-CAFTA, Art. 20.22: 2 and 3. *See also* CARICOM, Revised Chaguaramas Treaty (including Protocol IX, Art. 223).

29 Law 489 on Commercial Arbitration of Dec. 19, 2008, published in Official Gazette No. 10502 of Dec. 30, 2008, Art. 42. Dominican Arbitration Law No. 489 superseded Arts. 1003 to 1028 of the Dominican Code of Civil Procedure.

the recognition and enforcement in Chapter VIII apply "when the place of arbitration is outside the Dominican Republic."[30] Similarly, Article 42 provides that "foreign awards made abroad" are subject to recognition and enforcement in the Dominican Republic.[31]

B *Competent Courts*

In accordance with Articles 9 and 41 of the Arbitration Law, the party seeking recognition of a foreign arbitral award in the Dominican Republic shall file a request before the Civil and Commercial Chamber of the Court of First Instance of the National District.[32] Recognition of foreign arbitral awards in the Dominican Republic are granted via exequatur orders that are enforceable throughout the Dominican Republic.[33] Once an exequatur is granted, enforcement should also be sought before the First Instance court.[34]

C *Conditions*

Pursuant to Article 42 of the Arbitration Law, foreign arbitral awards are enforced in accordance with its provisions and those in the relevant treaties and conventions, including free trade agreements and bilateral investment treaties.[35] Article 45 of the Arbitration Law closely tracks the New York and Panama Conventions setting forth the only grounds upon which the recognition or enforcement of an arbitral awards may be refused.[36] In contrast to those Conventions however, recognition and enforcement may also be refused by the competent court if it finds "lack of due process resulting in the party's inability to exercise its right to present its defense."[37] This arguably provides a lower and more ample threshold for refusal.

30 Art. 1.2. of Law 489, indicating that the rules within that law apply to arbitrations even when they take place outside the Dominican Republic.

31 Law No. 489, Art. 42.

32 Law No. 489, Art. 9.6.

33 Law No. 489, Articles 9.6 and 42. An exequatur is a legal document issued by a sovereign authority granting a right to be enforced in the authority's domain of competence.

34 Law No. 489, Art. 9.4.

35 Law No. 489, Art. 42.

36 Law No. 489, Art. 42.

37 Law No. 489, Art. 45.2. Similarly to the New York and Panama Conventions, the court may also refuse recognition and enforcement on public policy and arbitrability (i.e. subject-matter) grounds.

D *Formalities*

Article 43 of the Arbitration Law provides that the party requesting an exequatur for the enforcement of a foreign arbitral award shall file a request with the Civil and Commercial Chamber of the Court of First Instance of the National District (in Santo Domingo), and furnish an original copy of the award and the arbitration agreement or the disputed contract.[38] Article 26 of the Law also provides that for purposes of obtaining an exequatur order, Spanish will be the proper language.[39]

E *Procedure*

The granting of an exequatur order for the enforcement of a foreign arbitral award is provided pursuant to a non-contentious ("graciosa") jurisdiction before the Dominican courts.[40] As a result, the exequatur order may not be deemed final and may be appealed. Indeed, Article 44 of Law No. 489 provides that any response to an exequatur order authorizing the enforcement of the award, shall be heard and decided by the competent appellate court in a single and last resort proceeding.[41] Some judges in the Dominican Republic interpret this article as granting the party against whom the enforcement of the foreign arbitral award is sought, the opportunity to challenge the exequatur order so as to safeguard that party's due process rights in a proceeding that, in principle, was uncontested.

---

38 Law No. 489, Art. 42.

39 Law No. 489, Art. 26.

40 Law No. 489, Arts. 9.7 and 44. Non-contentious jurisdiction, also referred to as voluntary jurisdiction ("*jurisdicción voluntaria*"), refers to jurisdiction over a matter where there is no dispute between the parties. *See* Cabanellas de Torres, *Diccionario Jurídico Elemental*, 221 (Heliasta, 1997). Technically, the petitioning party is invoking a legitimate right before a judge that merely verifies its existence. *See* Artagnan Pérez Méndez, *Procedimiento Civil*, Vol. I, 51–52 (Taller, 1987); *See also*, *Escuela de la Judicatura de la República Dominicana*, available in Spanish at http://www.slideshare.net/enjportal/enj-mdulo-7-decisiones-graciosas. Last visited on June 30, 2014.

41 Art. 44 of Law No. 489 states in Spanish that "[s]i hubiere contestación sobre el auto que se dictare, la misma será conocida y fallada conforme establece la presente ley para el caso de anulación, por la Corte de Apelación competente, en única y última instancia y según establezca la convención internacional correspondiente." (Translation: "if any reply to the writ is made, the same shall be heard and decided as required under this Act in the case of the annulment, by the competent court, in sole and final instance and as provided for in the relevant international convention.")

VI Leading Cases

The Supreme Court of the Dominican Republic has stressed that Dominican courts must not review the merits of foreign decisions and must exercise a narrow role when reviewing foreign decisions for enforcement in the Dominican Republic. In a benchmark 2005 decision widely embraced by judges in the Civil and Commercial Chamber of the Court of First Instance of the National District, *I Chu Yin v. Hsu Chu-Ching*, the Dominican Supreme Court declared that "it is not pertinent, neither is it within [the Supreme Court's] jurisdictional attributions, to modify a decision for which exequatur is sought" and that "the judge [charged with deciding whether or not to issue an exequatur] is not authorized, nor enabled to perform an analysis of the case heard by the foreign tribunal, nor to verify if the decision was or not issued in conformity with the facts and the laws of the country issuing the decision."[42] The Supreme Court emphasized that judges who hear requests for exequaturs "are forbidden from examining and pondering considerations pertaining to the merits of the case, because their jurisdictional obligation is limited to granting or not enforceability within Dominican territory, of the foreign court's decision."[43]

In granting exequatur orders for the enforcement of foreign arbitral awards, Dominican courts often cite to a 2006 resolution by the Dominican Supreme Court recommending that courts promote and implement alternative dispute resolution mechanisms.[44] This resolution was of special importance because it acknowledged the "limitations of human and financial resources in the field of administration of justice [in the Dominican Republic, which] generated dissatisfaction on the part of its users, the substitution of dialogue with taking the law into one's hands, as well as the exalting of the culture of litigation to the detriment of the culture of peace."

A recent 2013 decision based on a strict reading of the Arbitration Law, however, merits some concern. Article 44 of the Arbitration Law requires judges to hear and decide challenges to exequaturs granting enforcement of the foreign

42 Supreme Court of the Dominican Republic, Dec. 7, 2005, *I Chu Yin v. Hsu Chu-Ching*, Decision No. 5, Cassation before the Supreme Court of Justice of Decision No. 158 of 12 May 2004 issued by the Civil Chamber of the Appellate Court of the National District.

43 Id.

44 Supreme Court of Justice Resolution No. 402-2006 of 9 Mar. 2006, recommending and declaring for all courts of the Dominican Republic the implementation and promotion of alternative dispute resolution mechanisms. *See, e.g.*, Decision No. 01702-11 of the Third Chamber of the Civil and Commercial Chamber of the Court of First Instance of the National District, *Ramón Rivera v. Sky Dominicana*, Case No. 036-2010-00876.

arbitral award.[45] In a recent case, a judge from the Civil and Commercial Chamber of the Court of Appeals of the National District (Fourth Chamber) heard an appeal to an exequatur order.[46] In *Virtus Partners, S.R.L. v. Camela Navigation, Inc.*, the judge analyzed the case under Article 44 of Law No. 489 and decided to hear the appeal. The judge reasoned that although international and national laws suggest that judges in the Dominican Republic have no jurisdiction to review the merits of foreign arbitral awards, Article 44 of the Dominican Arbitration Law allows appellate level judges to hear challenges to local rulings granting exequaturs for the enforcement of foreign arbitral awards. Whether a reversal of the exequatur order at the appellate level would in practice stay the enforcement of the award and whether that reversal could be then subjected to judicial review through cassation,[47] remains to be seen.

VII Conclusions

The majority of judges in the Dominican Republic who handle petitions for the recognition and enforcement of foreign arbitral awards are mindful of the limits of their role and are respectful of the arbitral tribunals that issued the awards. Most judges know that their role consists of verifying that the foreign arbitral award in question is enforceable pursuant to the requirements set forth in the applicable convention for the recognition and enforcement of arbitral awards, the Dominican Arbitration Law and any other applicable provisions, and consequently review the foreign arbitral awards without delving into the merits.

The Dominican Republic may have, however, inadvertently set up barriers or at least added steps to the enforcement of foreign arbitral awards. The open

45 Law No. 489, Art. 44.

46 Civil and Commercial Chamber of the Court of Appeals of the National District (Fourth Chamber), June 2013, *Virtus Partners, S.R.L. v. Camela Navigation, Inc.*, Decision No. 026-02-2012-00590. .

47 Cassation is a recourse through which the highest court or the court of cassation reviews the ultimate decision of a lower court. *See*, Solis, Stagg & Gasteazoro, *West's Spanish-English English-Spanish Legal Dictionary*, 55 (West Group, 1992). The court's review in cassation is generally limited to issues of law and not of the facts (Id.). In the Dominican Republic, the Supreme Court of Justice hears all cassation recourses (Art. 154 (2) of the Constitution of the Dominican Republic) and in that role, it decides whether the law has been rightfully or wrongfully applied by the lower court, without hearing the merits of the case (Art. 1, Law No. 3726 of 1953, on the Procedure of Cassation, amended by Law No. 845 of 1978 and by Law No. 491-08 of Dec. 19, 2008).

language of Law No. 489 requiring judges to hear and decide challenges to rulings pertaining to the enforcement of foreign arbitral awards, is a topic for discussion and interpretation and could in some cases delay enforcement of foreign arbitral awards in the Dominican Republic. The decision in the *Virtus Partners* case is one example. Because the granting of exequaturs is based on voluntary jurisdiction, while judges in the Dominican Republic are not hearing challenges to the foreign arbitral award itself, at least one judge has heard a challenge to an exequatur order based on Law No. 489. While this does not render a foreign arbitral award unenforceable, it does muddy a process that at least in theory was intended by legislators, and in general by the Dominican government to be completely streamlined.

Annex

Arbitration Law—Chapter VIII
Recognition and Enforcement of Awards

Article 41—Recogntion and Enforcement of the Arbitral Award

1) The courts indicated in Article 9 of this Law will hear cases regarding the recognition and enforcement of arbitral awards.
2) If seized of the recognition or enforcement of any measure adopted based on an award, the corresponding court determines that it is in one of the cases indicated in Paragraph 2 of Article 38 of this law [i.e. correction, interpretation, additional award) it shall submit such award to the competent Court for its analysis, duly suspending the enforcement process until a final decision is reached. In case it is necessary, it may order conservatory measures to preserve the assets or rights subject to enforcement for the duration of the Court's analysis.

Article 42—Recognition and Enforcement of Foreign Arbitral Made Abroad
Arbitral awards made abroad are enforced in the Dominican Republic in accordance with this law and the applicable treaties, pacts and conventions in force in the country.

Article 43—Enforcement Application Procedure
The party requesting the granting of the *exequatur* [recognition] for the enforcement of the award shall furnish with an application before the corresponding court, an original of the award and of the arbitral agreement or of the contracts that provides it.

Article 44—Award Review
The award presented in accordance with the previous article, is examined by the competent court in non-contentious jurisdiction, in accordance with the rules in this law and within the limits of the applicable international conventions. If there were a response to the order to be issued, it will be heard and decided in accordance with what this law provides for the annulment of awards, by the competent Appeals Court, in sole and non-appealable instance and as established by the corresponding international conventions.

Article 45—Grounds to Refuse Recognition or Enforcement of an Arbitral Award
Recognition or enforcement of the award may only be refused, regardless of the country in which it was made:

1) At the request of the party against whom it is invoked, when that party proves before the court:
   (a) That one of the parties to the agreement referred to in this law, 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.
   (b) That there has been a failure of due process, which has resulted in the violation of the right to present his/her case.
   (c) That the arbitral award deals with a difference not contemplated by arbitral agreement, or it contains decisions on matters beyond the scope of the arbitration agreement. However, if the decisions on matters submitted to arbitration can be separated from those not so submitted, the former may be recognized and enforced.
   (d) That the composition of the arbitral authority 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.
   (e) That the arbitral award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
   (f) That according to the law of the Dominican Republic, the subject matter is not capable of settlement by arbitration.
   (g) That the recognition or the enforcement of the award would be contrary to the public order of the Dominican Republic.
2) The grounds provided in paragraphs b), f) and g) of the previous numeral may be assessed *ex officio* by the court hearing the application for the granting of the *exequatur* [recognition] for the enforcement of the award.

CHAPTER 8

Ecuador

Álvaro Galindo and Francisco Endara

I Introduction

Arbitration in Ecuador is governed by the Arbitration and Mediation Law (AML) enacted on September 4, 1997.[1] The AML contains provisions regulating domestic and international arbitration. The AML generally follows the 1985 UNCITRAL Model Law with some notable differences regarding the grounds for the annulment of awards and the recognition and enforcement procedure of foreign arbitral awards.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

Ecuador has ratified several conventions related to international arbitration. These include:

- The 1928 Havana Convention on Private International Law;[2]
- The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention);[3]
- The 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention);[4] and
- The 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.[5]

1 Official Register 145, Sept. 4, 1997. A new codification was published in Official Register 417, Dec. 14, 2006.
2 Official Register Supplement 1201, Aug. 20, 1960.
3 Official Register 43, Dec. 29, 1961.
4 Official Register 875, Feb. 14, 1992.
5 Official Register 153, Nov. 25, 2005.

 | DOI 10.1163/9789004284364_010

Ecuador, at the time of ratification of the New York Convention, made two reservations.[6] One of the reservations indicated that Ecuador would apply the Convention on a reciprocity basis, only to *"recognize and enforce foreign arbitral awards that arise from legal relationships that are considered commercial under Ecuadorian Law"*.[7]

Ecuador signed the ICSID Convention on January 15, 1986 and deposited its instrument of ratification on the same date. The Convention entered into force for Ecuador on February 14, 1986. The ICSID Convention provides that "[*c*]*ontracting States shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State*."[8] On July 6, 2009, the World Bank, as the depository of the Convention, received a written notice of Ecuador's denunciation of the Convention.[9] In accordance

6 One of the reservations made by Ecuador was that it "will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State".

7 The original text in the Spanish versions reads as follows: "Ecuador ratifica la suscripción de la Convención sobre el Reconocimiento y la Ejecución de las Sentencias Arbitrales Extranjeras, tomando en cuenta que el Ecuador, a base de reciprocidad, aplicará la Convención al reconocimiento y ejecuciónón de sentencias arbitrales dictadas en el territorio de otro Estado contratante únicamente solo cuando tales sentencias se hayan pronunciado sobre litigios surgidos de relaciones jurídicas consideradas comerciales por el Derecho Ecuatoriano". Official Register 293 of Aug. 19, 1961.

The reservation made by Ecuador when it signed the New York Convention has, according to a local commentator, stopped being effective after Ecuador adopted the AML because international arbitral awards are treated as domestic arbitration awards under Article 42 of the AML, and "since as Ecuadorian law has not limited domestic arbitration to commercial legal relationships, the commercial legal relationships reservation would not apply to a party requesting the enforcement of an international arbitral award". *See* Neira, Edgar, *Arbitrabilidad, Convención sobre el Reconocimiento y Ejecución de Sentencias Arbitrales y Legislación Ecuatoriana. Convención de Nueva York de 1958 Reconocimiento y Ejecución de Sentencias Arbitrales Extranjeras*, 159 (Edited by Soto, Carlos. Ediciones Magna, Lima, 2009). (Translation: Arbitrability, Convention on the Recognition and Enforcement of Arbitral Awards and Ecuadorian Legislation, The NY Convention of 1958 Recognition and Enforcement of Arbitral Awards). This position seems plausible under Article VII (1) of the New York Convention that allows for the party seeking the recognition and enforcement to apply the more favorable legislation to obtain the enforcement, in this case the AML.

8 ICSID Convention, Art. 54. 3.

9 On December 4, 2007, the Republic of Ecuador notified the Centre pursuant to Art. 25.4 of the ICSID Convention that: "The Republic of Ecuador will not consent to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID), the disputes that arise in matters concerning the treatment of an investment in economic activities related to the exploitation of natural resources, such as oil, gas, minerals or others.

with Article 71 of the Convention, the denunciation took effect six months after the receipt of Ecuador's notice on January 7, 2010. However, the Convention remains in force and applicable to the arbitration proceedings that were initiated prior to the date of denunciation.

III Relevant Provisions in Free Trade Agreements and Bilateral Investment Treaties

Ecuador has signed 27 Bilateral Investment Treaties (BITs). In January 2008, Ecuador denounced nine of such treaties. In January 2011, Ecuador denounced the BIT with Finland. The BITs that Ecuador is a party to contain provisions referring the settlement of disputes between Ecuador and nationals of the other Treaty Party to arbitration.[10] For example, Article VI of the United States-Ecuador BIT provides that the investor, after complying with certain conditions, may bring a claim through international arbitration under one of the various options provided in such provisions (e.g., ICSID, UNCITRAL, and others).[11] A number of the provisions of this nature have been declared unconstitutional by the Constitutional Court.[12]

Any instrument containing the Republic of Ecuador's previously expressed will to submit that class of disputes to the jurisdiction of the Centre, which has not been perfected by the express and explicit consent of the other party given prior to the date of submission of the present notification, is hereby withdrawn by the Republic of Ecuador with immediate effect as of this date."

10 There are certain BITs that Ecuador has signed in which the scope of the dispute resolution clause is narrower or limited to arbitrate the amount of compensation to be paid to the investor in the case of an expropriation, like in the BIT signed with China. The BIT signed with Switzerland does not provide *ius standi* to the investor, requiring the State to file the claim on behalf of its national.

11 Bilateral Investment Treaty, U.S.-Ecuador Aug. 27, 1993, S. TREATY DOC. NO. 103-15. (Hereinafter, U.S-Ecuador BIT). Available at: http://www.state.gov/documents/organization/43558.pdf.

12 To date, the Constitutional Court has declared several provisions in the following BITs unconstitutional: Switzerland; Netherlands; Bolivarian Republic of Venezuela; Sweden; Germany; France; United States; United Kingdom; Chile; Spain; Argentina; Italy; China; Finland; Canada; Turkey; Plurinational State of Bolivia; and, Peru.

The Constitutional Court declared that the dispute resolution clause of the BITs contravenes Article 422 of Ecuador's Constitution. Article 422 of the Constitution in its relevant parts states: "It shall not be possible to enter into international treaties or instruments in which the Ecuadorean State waives sovereign jurisdiction to international arbitration venues in contractual or commercial disputes between the State and private individu-

Nevertheless, Ecuador still offers alternatives or guarantees for the protection of foreign investments, but the current trend seems to be towards actively seeking "*new ways to protect foreign investors without relying on international treaties*".[13] One of such alternatives is the Organic Code of Production (OCP) that has provisions[14] similar to the protections offered to foreign investors in BITs (i.e. against expropriation, full protection and security, discrimination and arbitrariness).[15] One important difference between the noted BITs and the OCP is the dispute settlement provision. Article 27 of the OCP establishes that disputes arising out of an investment may be solved by arbitration under Ecuadorian law provided that the investment contract contains an arbitration clause. The dispute would first be subject to a direct negotiation process, followed by a three-month compulsory mediation phase that must be exhausted before the arbitral proceedings can start.[16]

---

als or corporations." Translation taken from Jijón Rodrigo & and Marchán, Juan Manuel, *National and International Arbitration in Ecuador*, Arb. Rev. of the Americas, 60 (2014). According to the Constitutional Court's analysis, the investor state dispute settlement provision in those treaties is incompatible with Art. 422 of the Constitution because the State cannot submit commercial disputes with private individuals and corporations to arbitration. Some may argue that the Constitutional Court did not consider relevant the fact that BITs are designated to solve investment disputes and not commercial disputes.

13 Id.

14 OCP, Art. 17 establishes that: "Non-Discriminatory Conduct.—National and foreign investors; societies, companies or entities from the cooperative, popular, and supportive economy, in which these partake as well as their legally established investments in Ecuador, with the limitations provided by in the Constitution of the Republic, shall have equality of conditions with respect to administration operation, expansion, and transfer of their investments, and shall not be the subject of discriminatory or arbitrary measures. Foreign investors and investments shall have full protection and equal protection of the law, in such way that they shall have the same protection that Ecuadorean nationals receive within the national territory." Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=252399 (last visited on June 18, 2014).

15 Most notably, the OCP does not contain a provision guaranteeing investors fair and equitable treatment, and it links the protections granted in the code to the protections it grants Ecuadorian citizens, removing the phrase that appears on some BITs that specifies that the treatment or protection granted "shall in no case be accorded treatment less than that required by international law" (US-Ecuador BIT, Art. II. 3 (a)).

16 OCP, Art. 27 reads as follows: "In the investment contract with foreign investors, arbitration clauses may be agreed upon to solve controversies that might happen between the State and the investors.

The controversies between a foreign investor and the Ecuadorean State, which had been pursued and exhausted through administrative remedies, shall try to be resolved

IV National Law

The AML contains the applicable provisions for the recognition and enforcement of international arbitral awards. Yet the AML does not contemplate a specific mechanism for the recognition and enforcement of foreign awards. Under the AML, foreign or international arbitral awards have to be enforced pursuant to the same procedure that governs domestic awards. The relevant provision in Article 42 of the AML states that: "[*a*]*wards issued in an international arbitration proceeding shall have the same effects and shall be enforced in the same manner as awards issued in a domestic arbitration proceeding*."[17] The reasoning behind this provision is that the interested party should have already exhausted the remedies under the law of the seat of the arbitration before it initiates the enforcement proceedings.

V Application for Recognition and Enforcement before Local Courts[18]

The relevant provision of Article 42 of the AML states: "*International arbitration shall be regulated by treaties, conventions, protocols and other acts of*

---

in an amicable manner, with direct dialogue within a period of sixty (60) days. If a direct solution between the parties is not arrived at, there shall be a compulsory mediation instance within the three (3) following months from the inception of the formal beginning of direct negotiations.

If after this mediation instance the controversy still exists, the conflict may be submitted to national or international arbitration, in accordance to valid treaties, of which Ecuador is a party. The decisions of the Arbitration Tribunal shall be of law, the applicable law shall be the Ecuadorean one, and the final award shall be definitive and binding to all parties.

If after six (6) months the administrative remedies have been exhausted, the parties have not arrived to an amicable agreement, and neither have subjected to arbitrational jurisdiction for the solution of their conflicts, the controversy shall be brought to the attention of the Civil Courts. Tax issues shall not be subject of arbitration." Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=252399 (last visited on June 18, 2014).

17 AML, Art. 42.

18 For the purposes of this section, recognition would be defined as the process under which a court is asked to recognize the award "as valid and binding upon the parties in respect of the issues with which it dealt."; and enforcement would be defined, in contrast to recognition, as the process when a court is asked "(…) to ensure that [the award] is carried out, by using such legal sanctions as are available". Nigel Blackaby & Constantine Partasides, et al. Redfern and Hunter on International Arbitration,

international law signed and ratified by Ecuador."[19] Accordingly, if the enforcement and recognition of foreign arbitral awards is sought under the terms of a particular convention of which Ecuador is a party, the formalities and requirements of that Convention or Treaty should be observed. Nevertheless, as the AML expressly states the recognition and enforcement of international arbitral awards is the same as that for domestic arbitral awards, even if the enforcement and recognition is sought under the provisions of an international convention, the procedure for the recognition and enforcement would be the same as the procedure for the enforcement of local arbitral awards under Article 32 of the AML, provided that this is more favorable for the enforcement procedure.

The procedure contemplated in Article 32 of the AML is the same procedure that the Civil Code of Procedure uses for the enforcement of final judicial decisions, the "*vía de apremio*" or forced execution procedure. Regarding the application for recognition of an award, there is disagreement amongst local commentators on whether foreign arbitral awards need formal recognition (*exequatur*) when the enforcement application is sought under Article 42 of the AML. Favoring exequatur, Professor Santiago Andrade states the following:

> *Although, the foreign award has the same effect of a final judicial decision and it is res judicata, nevertheless it is dictated by a foreign tribunal and it cannot be better than a foreign judicial decision. The reasons that require the review of foreign judicial decisions are equally applicable to foreign arbitral awards, therefore, an international arbitral award produces the same effects of an international judicial decision*.[20]

In contrast, Edgar Neira finds that *"the exequatur of international arbitral awards has definitively been eliminated from the Ecuadorian legal system since September 4 of 1997 when the Arbitration and Mediation Law was promulgated"*.[21] In his view, because the AML grants international awards the same status as

---

Recognition And Enforcement Of Arbitral Awards 627 (Oxford University Press 2009).

19 AML, Art. 42(1).

20 Andrade, Santiago, *En torno al tema del reconocimiento y ejecución de sentencias extranjeras y laudos internacionales.* FORO. Revista de Derecho, No. 6, 80 (2006).

21 Neira, Edgar, *Habitabilidad, Convención sobre el Reconocimiento y Ejecución de Sentencias Arbitrales y Legislación Ecuatoriana. Convención de Nueva York de 1958 Reconocimiento y Ejecución de Sentencias Arbitrales Extranjeras*, 155 (Edited by Soto, Carlos. Ediciones Magna, Lima, 2009).

domestic awards, no recognition is required for the former. Similarly, Xavier Andrade says that:[22]

> (. . .) *foreign arbitral awards are not enforced in the same manner as foreign judgments. Alleging otherwise would, in our judgment, constitute disavowal and clear breach of the conventions signed and ratified by Ecuador, the constitutional principle of supremacy of international rules, and the clear provisions of the Arbitration and Mediation Law.*[23]

Based on the judicial authorities available to date,[24] it is our opinion that no recognition or *exequatur* is needed in Ecuador for international arbitral awards (other than attaching a certified copy of the award). Since the AML came into force, "*the exequatur procedure for enforcement of international arbitral awards is not necessary*."[25]

A *Applicable Awards*

The AML does not distinguish the type of awards eligible for enforcement in Ecuador. Article 42 of the AML merely states in general terms, "*awards issued in an international arbitration proceeding*".[26] To our knowledge there is no judicial decision clarifying whether provisional measures issued by arbitral tribunals are to be equated to awards for enforcement purposes.

---

22 For authors reaching a similar conclusion see Rodrigo Jijón and Juan Manuel Marchán, *National and International Arbitration in Ecuador*, Arb. Rev. of the Americas 61, (2014).

23 Andrade, Xavier, *Reconocimiento y Ejecución de Laudos Extranjeros en el Ecuador: Un Camino Inexplorado*, 19. Available at: http://www.andradeveloz.com/newSite/descargas/publicaciones/reconocimiento_y_ejecucion_de_laudos_extranjeros_en_el_ecuador.pdf (last visited on June 18, 2014).

24 *See* for instance the Judgment of the *Daewoo* case in which the Judge clearly said that: "[the] homologation process [exequatur] of Article 208 (6) of the Organic Code of Judicial Function is applicable only for foreign judgments and not for international arbitral awards."

25 In any case, it would be safe to say that the AML provides for an expedited and simplified process of recognition of international arbitral awards, under which once the formalities of Article 32 of the AML are satisfied (which for an international arbitral award are to provide a certified and translated copy of the award), the award will be "recognized" and the judge will order the execution or enforcement of the award. *See* Jijón, & Robalino, Javier, *National and International Arbitration in Ecuador*, Arb. Rev. of the Americas 50 (2010).

26 AML, Art. 42.

B *Competent Courts*

According to the AML, the competent judges for the enforcement of an international arbitration award are ordinary civil judges.[27] Once the petition seeking enforcement is filed, the judge is under an express obligation to enforce the international arbitral award by mandate of Article 32 of the AML.

C *Conditions*

One relevant aspect of the governing procedure under the AML, is that it does not leave room for the debtor or defendant to oppose the enforcement of the award. Article 32 of the AML clearly states that: *the judge will not allow* [*or accept any exception*] *except those that originate after the award was issued.*[28] Furthermore, the Civil Code of Procedure grants the defendant 24 hours to comply with the award once the judicial order has been issued. This approach is more favorable than the procedure provided under the New York Convention, which leaves room for the other party to oppose the enforcement of the award. The same applies to the ICSID Convention which allows a State to invoke sovereign immunity from execution. Xavier Andrade finds this aspect of the AML troublesome, noting that it "*contravenes modern tendencies of allowing the defendant the possibility of proving that an irregular award should not be executed.*"[29] The only exception available to the responding party is to claim that it has already complied with the obligations contained in the award.[30] As Andrade points out, the purpose of this provision is to allow "*the parties to agree on a form to extinguish the obligations contained in the award without the need to do all the execution process*".[31]

There seems to be consensus that in general, and unless otherwise provided, when enforcement is sought under the mechanisms of an international convention (i.e. The New York Convention), the AML procedure would also apply, but the formalities or the procedure for recognition and enforcement prescribed in the relevant international instruments should be observed or followed by

27 AML, Art. 32.

28 Id.

29 Andrade, Xavier, *Reconocimiento y Ejecución de Laudos Extranjeros en el Ecuador: Un Camino Inexplorado* 20. Available at: http://www.andradeveloz.com/newSite/descargas/publicaciones/reconocimiento_y_ejecucion_de_laudos_extranjeros_en_el_ecuador.pdf (last visited on June 19, 2014).

30 Civil Code of Procedure, Art. 489.

31 Andrade, Xavier, *Reconocimiento y Ejecución de Laudos Extranjeros en el Ecuador: Un Camino Inexplorado*, 20.

the party seeking the enforcement.[32] Under the New York Convention, when one party seeks the recognition and enforcement of an award, the judge may analyze if the award could be executed by analyzing whether:

> (*a*) *The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*
> (*b*) *The recognition or enforcement of the award would be contrary to the public policy of that country*.[33]

Although the procedure under the AML does not allow for a defendant to oppose enforcement, the Ecuadorian judge is required to verify similar conditions before ordering the enforcement of the award. Xavier Andrade has the view that if the *"award passes the test, it should be declared as recognized prima facie and its execution ordered"*[34] because the defendant would still have the opportunity to resist or oppose the enforcement of the award at the time of the award's enforcement on the grounds established in Article V(1) of the New York Convention.[35] These particularities or adaptations that the Judge would have to make to the procedures established in the AML to recognize and execute international arbitral awards under the New York Convention has led some commentators to propose changes to the AML procedure to "*allow the judge the opportunity to properly analyze the award and to give the defendant the opportunity to oppose the recognition and enforcement"*[36] as required by the New York Convention. Xavier Andrade proposes the adoption of the UNCITRAL Model Arbitration Law to secure such a procedure.

That said, if the more favorable mechanism provided for in the AML is applied, it could solve the apparent difficulty and the need to comply with the formalities of the New York Convention[37] because Article VII (1) of the New York Convention states that:

---

32 In similar terms see Robalino, Javier & Others, *Arbitration Guide IBA Arbitration Committee*. Ecuador Chapter 17. Available at: http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a646cf32-0ad8-4666-876b-c3d045028e64. (last visited on June 19, 2014).

33 NY Convention, Art. V(2).

34 Andrade, Xavier, *Reconocimiento y Ejecución de Laudos Extranjeros en el Ecuador: Un Camino Inexplorado*, 12.

35 Id. at 13.

36 Id. at 14.

37 Id. at 4.

> *The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of the arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.*[38]

In conclusion, the AML procedure for recognition and enforcement is more favorable for the enforcement of international arbitral awards in Ecuador than the procedure found in the New York Convention. Furthermore, it is possible to argue that the opposing party has limited grounds to oppose the enforcement, and that the competent judge has limited discretion to deny the enforcement of the award.

Finally, the enforcement of ICSID awards deserves some comments. ICSID proceedings initiated before Ecuador's denunciation of the ICSID Convention are enforceable under the provisions of the Convention. Pursuant to Article 54.2 of the ICSID Convention, there is no need to seek the *exequatur* for the award, but merely for the party seeking the enforcement of the award in Ecuador to submit or file a copy certified by the Secretary-General of the award.[39] This has caused some commentators to state that the enforcement of an ICSID award in Ecuador "*entails crucial benefits for the investor: local courts are not empowered to revise the award; consequently, enforcement of ICSID awards may be more expeditious than enforcement of other international awards*".[40] Yet, the ICSID Convention does not set forth a procedure for the enforcement of awards, rather stating the "*execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.*"[41] Accordingly, once the ICSID award clears the system provided in the Convention for the recognition of awards, the execution or enforcement mechanism provided for in the AML becomes applicable.[42]

---

38 NY Convention, Art. VII (1).

39 ICSID Convention, Art. 54.2.

40 Jijón, Rodrigo and Marchán, Juan Manuel, *National and International Arbitration in Ecuador*, ARB. REV. OF THE AMERICAS 61 (2013).

41 ICSID Convention, Art. 54.3.

42 This means that "the ICSID Convention does not establish a similar self-governing system for executing the final award against particular assets of the losing party" and it would be for local law to "determine whether particular assets may be seized to satisfy an ICSID award." Article 55 of the ICSID Convention buttresses that position by declaring that "[n]othing in Article 54 shall be construed as derogating from the law in force in any

D *Formalities*

As mentioned before, Article 42 of the AML states that: "*International arbitral awards will have the same effects and will be executed in the same manner as awards issued in a domestic arbitration procedure*." Domestic arbitral awards are executed under the procedure of Article 32 of the AML that provides as follows: *"Any of the parties can request ordinary judges to direct the execution of an award or a settlement agreement by filing certified copies of the award or the settlement agreement issued by the tribunal secretariat, the director of the center or the arbitrator or arbitrators with the certification that it is a non-appealable decision."*

Accordingly, under Ecuadorian law, the applicable formalities to petition the enforcement of an international arbitral award include the filing of an authenticated or certified copy of the award. For instance, the Judge in *Daewoo Electronics America Inc. v. Expocarga S.A.*,[43] found that the petitioning party had duly complied with the formalities because it filed:

i) A copy of the award certified by an Ecuadorian diplomatic or consular agent of the country in which the document was executed;
ii) A certified translation of the award; and
iii) The certification that the officer that notarized or the employee that authorized the document was in fact the said notary or officer and that in all acts he uses the signature used in the document.

In other words, according to the above mentioned judgment, the parties seeking to enforce an international arbitral award would need to comply with Article 190 of the Ecuadorian Civil Code of Procedure,[44] and Article 23 of the

---

Contracting State relating to immunity of that State or of any foreign state from execution." *See* Edward Baldwin, Mark Kantor, et al., *Limits to Enforcement of ICSID Awards*, 23 J. Int'l Arb. 1, 4 (2006).

43 *Daewoo Electronics America Inc. v. Expocarga S.A.*, Juzgado Octavo de lo Civil, Guayaquil, May 25, 2009. The translated excerpts of the decision were taken from: Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 2011—Volume XXXVI, Yearbook Commercial Arbitration, Volume XXXVI, 268–269 (Kluwer Law International, 2011). The judge in another leading case followed a similar approach. *See, Xavier Sisa v. Hampton Courtresources Ecuador S.A.* Juzgado Vigésimo Tercero de lo Civil, Quito, (2006, No. 2006-0812), (*Hampton* case). Available at: http://www.funcionjudicial-pichincha.gob.ec/index.php/consulta-de-procesos (last visited on June 19, 2014).

44 "Instruments which are executed abroad are legalized and authenticated by way of a certification of the Ecuadorian diplomatic agent or consul residing in the country in which the document was executed. In case of legalization, the certification of the diplomatic

Ecuadorian Law on Modernization.[45] For this reason, the AML provides for an expedited and simple process for the recognition of international arbitral awards, under which once the formalities of Article 32 of the AML are satisfied, the award is "recognized" and the judge will order the execution or enforcement of the award. A party seeking enforcement of an international arbitral award should keep in mind that Article 417 of the Civil Code of Procedure grants a five-year statute of limitations and that a regular enforcement process may run for at least a year under normal circumstances.[46]

E *Procedure*

The AML does not provide a specific procedure for the recognition and enforcement of foreign awards. The AML provides that foreign awards should be executed with the same procedure as that for domestic awards. This procedure is established in the Code of Civil Procedure, which provides that the enforcement of the final court's decision is carried out through a forced execution procedure called the "Vìa de Apremio".

---

agent or consul will only inform that the notary or the employee that authorized the document is in fact said notary or employee and that in all acts he uses the signature used in the document. If there is no Ecuadorian diplomatic agent or consul [in the country], the document will be certified by the diplomatic agent or consul of a friendly state and said certification will be legalized by the Minister of Foreign Relations of the country where the instrument was executed. In this case, the Foreign Relations Minister's certification will only inform that the diplomatic agent or consul has in fact the said position and that the signature used in the instrument is the same for all official documents. If the country where the document was executed has none of the authorities previously mentioned, the first political authority and one judicial authority [of that country] will certify the document expressing this circumstance. The authentication or legalization of instruments executed in a foreign country may also be accomplished in accordance with the laws and practices of the State where it is made. Judicial procedures executed outside the Republic in accordance with the law and practices of the foreign country will be valid in Ecuador." Civil Code of Procedure, Art. 190. The Judgment of the *Daewoo* case reiterated the nature of the enforcement process when it stated that "domestic and international awards do not admit the filing of an appeal, therefore, there could not be an appeal during the execution process of such an award".

45 "Documents Rendered in Foreign Nations. The State and all Public Entities that constitute the public administration will not request that documents executed in foreign territory, which are legalized by an Ecuadorian diplomatic agent or consul in that foreign territory, be legalized also by the Ministry of Foreign Relations. Documents executed before the Ecuadorian consuls in exercise of their notary authority will not require additional legalization. Nonetheless, the authority of an Ad-Honorem Consul has to be certified by the Minister of Foreign Relations." Modernization Law, Art. 23.

46 Civil Code of Procedure, Art. 417.

The competent judge for the enforcement process of an international arbitration award is an ordinary civil judge.[47] One important aspect noted under the AML is that once the judge has received the petition from the party seeking the enforcement, the judge is under an express obligation to recognize and enforce the arbitral award as mandated by Article 32 of the AML. As a result, some commentators have stated that the AML *"provides a mechanism that is more expeditious and direct than those provided in international conventions, which can be applied to international arbitration awards in Ecuador."*[48] All the case law available to date has been execution attempts applying the provisions or procedure contemplated in the AML.

The procedure in the AML is an expedited procedure, in which the party seeking the enforcement of an award would need to attach an authenticated copy of the award, as prescribed in Article 32 of the AML.[49] Once the judge recognizes the award as valid and authentic, a judicial order indicating the execution of the award will be issued within 24 hours. The content of the execution order issued by the judge will largely depend on the type of obligations the debtor must comply with. For instance, if the award has pecuniary obligations, the judge, under Article 438 of the Civil Code of Procedure, will give the debtor 24 hours to pay the amount it owes or surrender assets for a latter execution to honor the obligation. If necessary, the judge will appoint a forensic expert to determine the interest the debtor has to pay.[50]

If the award orders or condemns the debtor to do something or to comply with certain obligations, the judge, under Article 440 of the Civil Code of Procedure could order the execution at the expense of the debtor; and if it is not possible for the debtor to comply, the judge will determine the amount owed in compensation to the party enforcing the award.[51] If the award requires the debtor to abstain from certain actions and the debtor breaches, the judge will try to undo the action and if not possible, determine the amount of compensation for the breach.[52]

---

47 AML, Art. 32.

48 Rodrigo Jijón and Juan Manuel Marchán, *National and International Arbitration in Ecuador*, Arb. Rev. of the Americas 61. Similarly, Xavier Andrade states that "after analyzing the execution mechanisms under the New York Convention (…) and the Arbitration and Mediation Law, it would seem that the mechanism of the latter is the most favorable for the execution of international arbitral awards in Ecuador". Andrade, Xavier, *Reconocimiento y Ejecución de Laudos Extranjeros en el Ecuador: Un Camino Inexplorado*, 24.

49 For a detailed review of all the formalities that parties must comply with, see Section V(C)

50 Civil Code of Procedure, Art. 438.

51 Civil Code of Procedure, Art. 440.

52 Civil Code, Art. 1571.

Where the award requires the debtor to subscribe or issue a document, the judge could subscribe or issue such a document for the debtor;[53] and if the award condemns the party to surrender a specific asset, the judge could order the apprehension with public force, if needed. If that is not possible, it could determine the amount of compensation owed to the party executing the award.[54]

VI Leading Cases

The case *Daewoo Electronics America Inc. v. Expocarga S.A.*[55] is one of two leading cases in which an Ecuadorian court granted the enforcement of an international arbitral award.[56] In both cases, the enforcement of the arbitral award was analyzed under the provisions of the AML, without mentioning the New York Convention or any other international instrument.[57] Daewoo Electronics America Inc. (*Daewoo*) initiated an application to enforce an arbitral award against Expocarga before the 23rd Civil Judge of Guayaquil. The Judge granted the enforcement of the international arbitral and stated that under Article 42 of the AML, the award was an international arbitral award. The Court noted that an international arbitral award has *res judicata* effect similar to a final court decision.[58] This is clear from the following passage:

> [*S*]*ince this is an international arbitral award complying with the formal and material requirements for its enforcement, which must be carried out in the same manner as in the case of domestic awards initiated prior to the date of denunciation. Because the 2008 provision in Art. 438 of the Code of*

53 Civil Code of Procedure, Art. 440.

54 Id.

55 *Daewoo Electronics America Inc. v. Expocarga S.A.*, Juzgado Octavo de lo Civil, Guayaquil, May 25, 2009. The translated excerpts of the decision were taken from: Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 2011—Volume XXXVI, Yearbook Commercial Arbitration, Volume XXXVI, 268–269 (Kluwer Law International, 2011).

56 The other case which the authors of this paper have knowledge of is the *Hampton* case. We chose to comment on the *Daewoo* case because it contains a more detailed discussion and analysis of the execution procedure.

57 Arguably, the same result could had been achieved if the execution was sought under the New York Convention's more favorable provision of Article VII (1) that allows a party to seek enforcement under local law.

58 The *Daewoo* case appears in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 2011—Volume XXXVI, Yearbook Commercial Arbitration, Volume XXXVI, 268–269 (Kluwer Law International 2011).

> *Civil Procedure, directs Expocarga S.A. to pay the sum of US$ 3,341,004.27 to Daewoo Electronics America Inc. within ten days; this amount includes the capital sum of US$ 3,187,981.17 to be paid under the award, together with simple post-award interest at the rate of 6 percent from 31 July 2008 until 19 May 2009, the date on which the request* [*for enforcement*] *was filed, that is, the sum of US$ 153,023.10.*[59]

The Judge seemed to support the view that the procedure of the AML does not require the parties to obtain an *exequatur*[60] of the international arbitral award prior to execution by stating that: "[*the*] *homologation process* [*exequatur*] *of* [*A*]*rticle 208 num. 6 of the Organic Code of Judicial Function is applicable only for foreign judgments and not for international arbitral awards*."[61] As a result, the Judge confirmed that:

(a) It was not possible for the defendant to present exceptions to oppose the enforcement of the award;
(b) The only exception available to the responding party would be to evidence the award's obligations had been complied with in advance (e.g. the payment of a sum of money); and
(c) It was not possible to appeal or file any remedy against the execution or enforcement of the award once the procedure had been initiated.[62]

VII Conclusions

The enforcement of international arbitral awards in Ecuador is in its infancy because of the limited number of judicial decisions on the matter. Generally, there is a favorable disposition in Ecuador for enforcing international arbitral awards. The AML provides a favorable and simplified procedure designed to facilitate the enforcement of international arbitral awards by equating them to domestic awards and allowing their direct enforcement without the need to

59 Id.

60 In any event, it would be safe to say that the AML provides for an expedited and simplified process of recognition of international arbitral awards, and once the formalities of Article 32 of the AML are satisfied, the judge will order the enforcement of the award.

61 The *Daewoo* Case appears in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 2011—Volume XXXVI, Yearbook Commercial Arbitration, Volume XXXVI, 268–269 (Kluwer Law International 2011).

62 Id.

first seek their recognition or *exequatur*. Furthermore, the two court decisions handed down to date have applied the provisions of the AML in a consistent manner and have granted the enforcement of international arbitral awards in Ecuador by dismissing attempts to frustrate their enforcement.

Annex

Arbitration and Mediation Law of September 1997

Article 32.—Once an award becomes final, parties shall comply with it immediately.

Either party [to an arbitration procedure] may petition ordinary judges to order the enforcement of an award or of the settlement agreements by filing certified copies of the award or the settlement agreement issued by the tribunal secretariat, the director of the center or the arbitrator or arbitrators with the certification that it is a final decision.

Arbitration awards have the same effect as a final judgment and are *res iudicata* and shall be complied with in the same way as final instance judgments by forceful execution, and the enforcement judge shall not accept any opposition unless it arises following the award's issuance.

Art. 42.—International arbitration will be governed by treaties, conventions, protocols and other international law instruments signed and ratified by Ecuador.

All natural or juridical persons, public or private, without any restriction, are free to stipulate directly or refer to rules, all aspects of the arbitration procedure, including the constitution, proceedings, language, applicable law, jurisdiction and the seat of the arbitration, the place of which can be in Ecuador or in a foreign country.

For the State or public sector entities to submit to international arbitration, they shall observe the Constitution of the laws of the Republic.

For the different entities of the public sector to submit to international arbitration, the express authorization of the highest authority of the entity is necessary if the entity, prior to the favorable opinion of the Attorney General of the Republic, unless the arbitration is provided for in international instruments in force.

International arbitral awards will have the same effect and will be enforced in the same manner as awards issued in a domestic arbitration procedure.

CHAPTER 9

El Salvador

José Roberto Tercero

I Introduction

El Salvador's most significant and current experience with the recognition and enforcement of foreign arbitral awards dates back only three years. Though the country enacted a modern arbitration law in 2002, it was not until 2010 that Congress approved a new civil and mercantile procedure that assimilates a new pro-arbitration culture and procedurally assists courts in applying the relevant arbitration provisions. As a result, El Salvador now has a more streamlined and informed procedure for the recognition and enforcement of foreign arbitral awards. That procedure was on display in a recent Supreme Court decision, *Ricardo Humberto Artiga Posada v. Empresa Propietaria de la Red*.

A word of caution is due, however, given a recent development. In a very significant dispute for El Salvador, Italian power company Enel obtained an ICC award in July 2011 ordering a State entity to give up control over an important geothermal power joint venture.[1] El Salvador has refused to comply with the award. The State's refusal has bitterly divided the political, legal and business communities. Enel has not sought to have the award recognized and enforced in El Salvador, opting instead to file an ICSID claim against the State.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

El Salvador is a party to both the Inter-American Convention on Commercial Arbitration (1975 Panama Convention)[2] and Convention on the

1 Case No. 15888, ICC Int'l Ct. Arb., Enel Produzione S.p.A., Enel Green Power, S.p.A. v. Inversiones Energéticas, S.A., Comisión Ejecutiva Hidroeléctrica del Río Lempa. Affirmed by the *Paris Cour D'Appel* and currently pending before the *Cour de Cassation*.

2 Inter-American Convention on Commercial Arbitration, *entered into force* May 19, 1980. Ratified by *Decreto Ley* Nº 236, D.O. Nº 98, T. 267, May 27, 1980, as amended.

 | DOI 10.1163/9789004284364_011

Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention).[3]

III Relevant Provisions in Free Trade Agreements and Bilateral Investment Treaties

Most Free Trade Agreements and Bilateral Investment Treaties to which El Salvador is a party invoke international arbitration as a method to resolve investment disputes between foreign investors and the State. This is done pursuant to the rules of UNCITRAL or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID). Generally speaking, these treaties do not have specific provisions regarding the recognition and enforcement of awards. The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) however, is an important exception.[4] Specifically Article 10.26:7 provides that "[E]ach Party shall provide for the enforcement of an award in its territory." Article 10:26.8 goes on to state the following:

> *8. If the respondent fails to abide by or comply with a final award, on delivery of a request by the Party of the claimant, a panel shall be established under Article 20.6* (*Request for an Arbitral Panel*). *The requesting Party may seek in such proceedings:*
>
> (*a*) *A determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and*
>
> (*b*) *In accordance with Article 20.13* (*Initial Report*), *a recommendation that the respondent abide by or comply with the final award.*
>
> *9. A disputing party may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention, or the Inter-American Convention regardless of whether proceedings have been taken under paragraph 8.*

Furthermore, Article 20.22:1 of CAFTA-DR requires that El Salvador "encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area." Article 20:22.2 goes on to demand

3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *entered into force Oct. 22, 1997*. Ratified by *Decreto Ley* 114, D.O. Nº 218, T. 337, Nov. 21, 1997, as amended.

4 Dominican Republic-Central America-United States Free Trade Agreement, *entered into force Dec. 17. 2004 and ratified by Legislative Decree 555* (hereinafter "CAFTA-DR").

that El Salvador "provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes." Finally, Article 20:22.3 provides that El Salvador shall be deemed to be in compliance of the prescribed requirements to provide the necessary procedures to enforce and recognize arbitral awards "if it is a party to and is in compliance with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration." A similar approach has been followed in El Salvador's subsequent Free Trade Agreements with Mexico,[5] Taiwan[6] and Colombia.[7] However, in the two latter cases, mere accession to the Conventions is not taken as compliance of the commitment assumed. Parties could still argue that any procedural obstacle to recognition and enforcement of an award could constitute a treaty violation. Significantly, none of these provide for an arbitral panel review of a refusal to recognize or enforce an award, as CAFTA-DR does.

IV National Law

El Salvador has elevated the right to arbitrate civil and commercial disputes to a constitutional rank.[8] It is among the nation's most fundamental individual rights and therefore is subject to special protection and no unreasonable measures can be imposed to limit it. The recognition and enforcement of arbitral awards are also a part of that right.

The Law of Mediation, Conciliation and Arbitration (*Ley de Mediación, Conciliación y Arbitraje*) governing both national and international arbitration states that "[T]he recognition and enforcement of a foreign or international arbitral award will be carried out in accordance with the Treaties, Pacts or Conventions in force in the Republic."[9] Though this means that the New

5 Free Trade Agreement between the United Mexican States, and the Republics of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, ratified by Legislative Decree 1030 of Mar. 9, 2012, Art. 17.22.

6 Free Trade Agreement between the Republic of China (Taiwan), the Republic of El Salvador and the Republic of Honduras, ratified by Legislative Decree 376, Aug. 4, 2007, Art. 15.19.

7 Free Trade Agreement between Colombia, El Salvador, Guatemala and Honduras, ratified by Legislative Decree 699, Aug, 21, 2008, Art. 18.24.

8 Constitucion de la Republica De El Salvador (El Salvador Constitution. Hereinafter, "Contstitution.") Dec. 15, 1983, Art. 23.

9 Law of Mediation, Conciliation and Arbitration (*Ley de Mediación, Conciliación y Arbitraje* . Hereinafter "LCMA"), Nov. 7, 2002, as amended, Art. 82. *See also*, Art. 79 stating the same for enforcement only.

York and Panama Conventions prevail in case of conflict,[10] the provisions of the LCMA and those of the Civil and Mercantile Procedural Code (*Código Procesal Civil y Mercantil*) provide guidance to the courts, and are often applied by default.[11]

V Application for Recognition and Enforcement before Local Courts

In accordance with the LCMA, as a general rule, the State, its organs and state-owned enterprises can agree to international arbitration.[12] There is no exception in the LCMA for purposes of recognition and enforcement of an international or foreign arbitral award.

A *Applicable Awards*

The LCMA provides that recognition (or *exequatur*) is necessary for "arbitral awards made abroad as well as those considered International."[13] Unfortunately, Salvadorian law is silent as to whether partial or interim awards can be presented for recognition and enforcement. The CMPC does provide that Salvadorian courts will give effect to interim or execution measures ordered by "foreign courts."[14] The LCMA on the other hand, equates the binding character on an arbitral award to that of a court judgment.[15]

B *Competent Courts*

The Supreme Court of Justice, *en banc*, has the sole jurisdiction for the recognition of foreign arbitral awards (*exequatur*).[16] This includes awards rendered in disputes in which the State is a party.[17] *Exequatur* proceedings, however, are initially conducted by the Civil Chamber of the Court.[18] The Civil Chamber in turn is assisted by a specialized legal unit called *L'Unidad de Asesoría Técnica Internacional* (the International Technical Advisory Unit. Hereinafter

10 LCMA, Art. 76.

11 Civil and Mercantile Procedural Code (*Código Procesal Civil y Mercantil*. Hereinafter, "CMPC."), Apr. 15, 2010, Art. 20.

12 LCMA, Arts. 25, 77. *See also*, Constitution, Art. 146.

13 LCMA, Art. 79. For a definition of "international arbitration" *see*, Art. 2 (h).

14 CMPC, Art. 154.

15 LCMA, Art. 63.

16 LCMA, Art. 80.

17 LCMA, Art. 77.

18 CMPC, Art. 28(1).

"UATI"). It is the UATI that studies the applications and drafts the recognition resolutions (*pareatis*). The UATI is therefore the place for practitioners to inquire about the status of recognition applications.[19] Once the Civil Chamber has approved the draft resolution, it will be heard and decided upon by the full court.[20] Following its recognition, the award may be presented for enforcement before the first instance civil and commercial court with jurisdiction in the domicile of the party against whom enforcement is sought.[21]

C *Conditions*

Pursuant to Article 82 of the LCMA, recognition and enforcement of international and foreign arbitral awards will be conducted in accordance with the Treaties, Pacts or Conventions in force.[22] As has been noted, El Salvador is a party to both the New York and Panama Conventions. The LCMA provides default grounds for the refusal of recognition that mirror those in the New York Convention.[23] Once the foreign arbitral award has been recognized, it may be presented for enforcement.[24] There is a two-year time limit to present an award for enforcement.[25]

The CMPC governs the enforcement procedures.[26] Respondents often attempt to oppose the enforcement of an award based on procedural or substantive grounds not allowed during the recognition phase. Article 82 of the LCMA unfortunately provides some support to this approach by lumping together the grounds for resisting both recognition and enforcement.[27] Fortunately, the Supreme Court has stated in the past that grounds to oppose recognition of the award should be properly raised during the recognition phase, that is to say, not during its enforcement.[28]

---

19 Supreme Court, *Unidad de Asesoría Técnica Internacional*, http://www.csj.gob.sv/UATI/UATI_02.html (last visited 11 Nov. 2013).

20 LCMA, Art. 83.

21 LCMA, Art. 83. *See also* CMPC, Arts. 30(3), 555, 562.

22 LCMA, Art. 82.

23 LCMA, Art. 82. Pursuant to LCMA, Art. 76, the provisions of the New York Convention (or other relevant international conventions) will prevail in case of a conflict with the LCMA default rules.

24 LCMA, Art. 83.

25 CMPC, Art. 553.

26 CMPC, Art. 555. *See also* LCMA, Art. 83.

27 LCMA, Art. 82.

28 Corte Suprema de Justicia Republica de El Salvador [Supreme Court] Sept. 22, 2011, *Panamco de Nicaragua, S.A. v. Sociedad Specialty Products, S.A. de CV*.

D *Formalities*

The LMCA requires a party seeking recognition of an award to file a duly legalized and translated copy of both the arbitration agreement and the award.[29] El Salvador has acceded to the 1961 Convention Abolishing the Requirement of Legalization for Foreign Public Documents.[30] For awards made in member countries, an Apostille Certificate will suffice. For non-member states, the document must be fully legalized through the local chain of authorities and up to the Salvadoran consul general for the geographic area. Once in El Salvador, legalization is finalized by the Ministry of Foreign Relations. In addition, both the agreement and the award should be translated into Spanish and endorsed before a notary public, a civil-commercial court, or by an expert appointed within the *exequatur* proceedings.

E *Procedure*

The CMPC governs the procedure for an application for recognition.[31] In practice, the application for recognition is filed in writing either with the Secretary General of the Supreme Court, or with the Clerk of the Civil Division of the Court. In either case, the application must be addressed to the full Court, and be filed together with two copies. The applicant also provides a third copy of which he or she keeps and upon which the clerk seals acknowledging receipt and providing the file number.

Upon the verification of the formal conditions of the filing, the Court will order the application to be served upon the opposing party. Within a ten-day period, the respondent must invoke a ground to oppose recognition and provide evidence to support it. If the respondent does not respond, the Court will decide the application within a ten-day period. If the respondent does respond and provides "useful and pertinent evidence," the Court will hold an evidentiary hearing within 20 days. Thereafter, the Court will issue a judgment within a ten-day period. That judgment cannot be appealed.[32]

The CMPC also governs the procedure for enforcement.[33] A written petition for enforcement should be filed together with the award (and its translation), the recognition resolution (*pareatis*), and an indication of the respondent's

29 LCMA, Art. 81.

30 Convention Abolishing the Requirement of Legalization for Foreign Public Documents *entered into force* Sept. 15, 1995 (hereinafter the "Hague Convention").

31 CMPC, Art. 20.

32 CMPC, Art. 558.

33 CMPC, Art. 555. *See also* LCMA, Art. 83.

assets if possible.[34] Once the court considers that the formal requirements of the petition have been met, it will issue an order of enforcement (*despacho de ejecución*).[35] Unfortunately, the CMPC does not impose a time limit and courts may take up to a year to do so. In the major judicial districts (namely those of the capital city and the larger cities) however, an order of enforcement may take three or four weeks. The order of enforcement will attach the respondent's known assets, or orders measures to identify them.[36] The order will be served on the respondent and it will require him to provide a full statement of assets. The respondent may oppose enforcement at any time. Grounds to oppose enforcement under the CMPC can be formal (lack of standing, noncompliance of enforced award with legal requirements), or material (statute of limitations, partial or full payment, compensation or set off).[37]

VI Leading Cases

El Salvador's leading case is the September 2011 Supreme Court decision in *Ricardo Humberto Artiga Posada v. Empresa Propietaria de la Red.*[38] The decision was issued shortly after the enactment of the CMPC and therefore provided crucial guidance regarding its application. For this reason, the case constitutes an important precedent for future practice as it established a presumption in favor of arbitration (*in dubio pro arbitris*) and also addressed a number of issues relevant to the recognition and enforcement of foreign arbitral awards.

The parties to the case were an individual Salvadoran contractor (*Artiga*) and a multinational public-private partnership (*Empresa Propietaria de la Red or EPR*) of the Central American region's principal state-owned electric utilities together with the Spanish giant ENDESA.[39] According to the relevant court decisions, the arbitral proceedings were conducted under the UNCITRAL

34 CMPC, Arts. 570–572.

35 CMPC, Art. 574.

36 CMPC, Art. 576.

37 CMPC, Art. 579.

38 Corte Suprema de Justicia Republica de El Salvador [Supreme Court] Sept. 22, 2011, *Ricardo Humberto Artiga Posada v. Empresa Propietaria de la Red, Pareatis 8-P-2010*.

39 *Empresa Propietaria de la Red* was established pursuant to the Central American Electrical Interconnection System treaty (*Sistema de Interconexión Eléctrica de los Países de América Central*) and is responsible for the development of the infrastructure to interconnect the region's power grids.

rules. The claimant *Artiga* prevailed and presented the award for recognition.[40] During the recognition proceedings before the Supreme Court, the respondent, in accordance with the New York Convention, opposed the recognition of the award arguing: (i) the absence of a written agreement to arbitrate; (ii) tribunal decisions on matters beyond the scope of the agreement to arbitrate; and (iii) the violation of national and international public policy.

The Supreme Court rejected the respondent's arguments and agreed with the tribunal's findings. Finding support in the UNCITRAL's July 6, 2006 Recommendation for the Interpretation of Art. II(2) of the New York Convention,[41] the Court stated "*this Court, representing the State of El Salvador, abiding by its commitments* [*in the New York Convention*]*, declares the existence of the principle in favor of the recognition and enforcement of arbitral awards*."[42] The Court also stated that as a general rule, arbitral awards are presumed valid and enforceable and it is the respondent that bears the burden of proof in opposing the recognition and enforcement of the award:

> *. . . awards are presumed to be valid and enforceable. That is why the grounds for nullity are regulated and interpreted as an exception, as it can only be properly granted as a result of legally provided grounds. This same reason leads us to determine that an opposition* [*ground*] *must be interpreted to be exceptional and serious to be admitted. Accordingly, the party opposing the recognition of the award has the burden of proof.*[43]

Finally, the Court also discussed the violation of the country's public policy as a ground to refuse enforcement:

> *Public order is the set of rules and principles essential to coexistence in our politically organized social conglomerate at a given historical point in time.*

---

40 The parties had entered into a written contract in 2004 containing an arbitration clause and a performance term set to expire in January 2007. Performance on the contract extended into December 2007. The respondent argued that the arbitration clause in the written agreement could not be understood to apply beyond the expiration of the contract. The arbitral tribunal decided that the commercial relationship constituted an identifiable contractual performance under the contract and therefore subject to its provisions.

41 "Recommendation regarding the interpretation of Art. II(2), and Art. VII(1)" of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006)". *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html

42 *Posada v. Empresa* at Section VII.

43 Id. at Section III.

> *As an example, public order norms are police* [power] *norms which seek to regulate and resolve health and public safety problems, etc.; those which protect the existence of the State and its citizens* (*or that correspond to conditions which guarantee the ordinary and harmonious functioning of institutions considering legally plausible values and principles in accordance with Inter-American Court of Human Rights Consultative Opinion OC-5/85, of November 13, 1985*), *that correspond to* [attending to] *natural disasters; those intrinsically related to social morals and good customs . . . Public order norms involve a fundamental importance of each society and do not* [refer to] *futile questions; for that reason, public order* (*national or international*) *cannot be invoked as merely one more argument to prevail in litigation so that it implies an excessive use of the term to achieve a merely private objective*.[44]

VII Conclusions

El Salvador's long-standing adoption of the relevant international conventions together with its civil procedural rules (modeled after Spain's current *Ley de Enjuiciamiento Civil*), provide to both its courts and practitioners a modern and appropriate framework for the recognition and enforcement of arbitral awards. Although the Supreme Court has limited experience with the recognition of foreign arbitral awards, it has consistently exhibited a pro-arbitration approach. It should be noted, that the differing courts' enforcement methodologies are likely to have divergent approaches depending on their familiarity with the CMPC. To date however, the country has not had a case in which a foreign arbitral award has been enforced.

Annex

El Salvador Constitution
Article 23

The freedom to enter into contracts in conformity with the laws is guaranteed. No person who has the free administration of his property may be deprived of the right to resolve civil or commercial matters by settlement or arbitration. . . .

44 Id. at Section II.

Law of Mediation, Conciliation and Arbitration

Art. 75—Supplementary Application
The provisions of this Chapter shall apply to foreign and International Arbitration, without prejudice to what has been provided by any multilateral or bilateral treaty, convention or agreement, for which the entirety of the requirements for their entry into force has been fulfilled.

Art. 76—Primacy of International Law in Force
In case of conflict between International Treaties, Conventions and Pacts and this law, the former shall prevail.

Art. 79—Enforcement of Foreign and International Awards
The arbitral awards made abroad, as well as those considered International in accordance with this law, will be enforced in El Salvador in accordance with the Treaties, Pacts or Conventions in force in the Republic or, in their absence by the common laws.

Art. 80—Recognition and Authorization
The recognition and enforcement of a foreign or international arbitral award will be petitioned before the Supreme Court of Justice in accordance with the rules established in the treaties, agreements or conventions in force in the Republic or, in their absence, by the Code of Civil Procedures.

Art. 81—Legalization and Translation
The party applying for recognition and enforcement, shall present the duly legalized and if necessary, translated award and the arbitral agreement.

Art. 82—Rules for Recognition and Enforcement
The recognition and enforcement of a foreign or international arbitral award will be carried out in accordance with the Treaties, Pacts or Conventions in force in the Republic; absent any in force, the following rules shall apply:

1. The recognition and enforcement of a foreign arbitral award may only be refused, at the request of the interested partied, in any of the following cases:
    a) That one the party to the arbitral agreement is under some incapacity;

b) That the agreement is not valid pursuant to the law to which the parties submitted it or, if nothing is provided in this respect, pursuant to the law of the country where the award is made;
c) That the party against whom the award is invoked was not given proper notice of the appointment of an Arbitrator or of the arbitration proceedings or has been otherwise unable to exercise its rights;
d) That the award deals with a difference not contemplated by the arbitral agreement, or it contains decisions on matters beyond the scope of the arbitral agreement. Nevertheless, if the decisions of the award on matters submitted to arbitration can be separated from those that haven't, the former may be recognized and enforced;
e) That the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties or, in its absence, that they are not in accordance with the law of the law of the country where the arbitration took place;
f) That the award has not yet become binding on the parties, or has been set aside or suspended by a tribunal under the law of which the award was made; and
g) That the subject matter of the difference is not capable of being subject to arbitration in accordance with this law or the recognition and enforcement of the award are contrary to public policy.

2. The Supreme Court of Justice, ex officio, may refuse the recognition or enforcement when it finds that in accordance with the laws of the Republic that the subject matter of the difference is not capable of being subject to arbitration, or the award is contrary to international public policy.

Art. 83—Judicial Enforcement
The enforcement of the award, once recognized in the manner provided for in the Treaties, Agreements or Conventions or, in their absence in this statute failing in this law, will be carried out before the Judge that in accordance with the provisions of Code of Civil Procedures and the Organic law of the Judiciary, responsible for the enforcement of domestic judgments.

CHAPTER 10

Guatemala

Álvaro Castellanos Howell

I Introduction

Since the mid 1980´s, Guatemala has included in its legal system both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and the Inter—American Convention on International Commercial Arbitration (Panama Convention). Then in the next decade, and more precisely in 1995, a new arbitration law was enacted[1] which closely follows the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration.

It can therefore be stated that prior to the end of the twentieth century, the legal rules applicable to the recognition and enforcement of foreign arbitral awards in Guatemala, met the expected international standards in this important subject matter. In addition, some relatively recent cases decided by the Court of Constitutionality of Guatemala have brought important interpretations about the rules applicable to the main topic of this Chapter. As described in more detail in Section V of this chapter, the Court´s decisions are about the validity and constitutionality of the rules of the national arbitration statute as they relate to the recognition and enforcement of awards.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

Guatemala is a party to a number of international agreements applicable to this subject-matter. They include:

- *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (*New York Convention of 1958*): this Convention entered

1 Decree 67–95 of Congress of the Republic of Guatemala, "Ley de Arbitraje," 1985. Hereinafter "Arbitration Law."

 | DOI 10.1163/9789004284364_012

into force in Guatemala on June 19, 1984.[2] Guatemala only applies the New York Convention to awards made in the territory of another contracting State and to differences arising out of legal relationships, whether contractual or not, that are considered commercial under Guatemalan applicable law.[3]

- *The Inter-American Convention on International Commercial Arbitration* (*Panama Convention of 1975*): This Convention was entered into force in Guatemala on September 20, 1986. Guatemala has not made a declaration or reservation since its ratification on August 20, 1986.
- *Convention on Private International Law* (*Código de Bustamante*): This is an international Convention signed on February 20, 1928 during the Sixth International American Conference (Sexta Conferencia Internacional Americana). The Code contains a single article, Article 432, relating to the recognition and enforcement of arbitral awards. In effect, Article 432 reinforces the applicability of the foreign arbitral recognition and enforcement rules, including the Arbitration Law (*See* Annex 1). The Code entered into force in Guatemala on September 9, 1929. Since then, the Code has not been denounced according to its own rules, and remains in effect, if applicable, based on the fact that Guatemala has adopted the New York and Panama Conventions.

III Relevant Provisions in Free Trade or Bilateral Investment Agreements

Guatemala is a State party to free trade agreements (FTAs) that touch on the recognition and enforcement of foreign arbitral awards. Such treaties impose international standards and obligations that provide effective means of recognizing and enforcing foreign arbitral awards. These free trade agreements are:

- *US-CAFTA-DR* (*Dominican Republic-Central America Free Trade Agreement*): Article 20.22 (Alternative Dispute Resolution) provides that:
  1. Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative

2 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 1958. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last visited Jan. 20, 2014).

3 Such two reservations were made under Governmental Accord 60–84 of Jan. 30, 1984.

dispute resolution for the settlement of international commercial disputes between private parties in the free trade area;

2. To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes;
3. A Party shall be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration;
4. The Commission may establish an Advisory Committee on Private Commercial Disputes comprising persons with expertise or experience in the resolution of private international commercial disputes.

- *Free Trade Agreement between the United Mexican States and the Republics of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua*, Article 17.22 mirrors in almost identical terms the provisions of the US-CAFTA-DR FTA on the means to recognize and enforce foreign arbitral awards.
- *Free Trade Agreement between the Governments of Central America and the Republic of Chile*. Article 19.21 provides for similar rules, though there is no provision stating that a party shall be deemed to be in compliance with the international obligation to provide appropriate procedures to ensure the observance of agreements to arbitrate disputes and for the recognition and enforcement of arbitral awards, if such party is complying with the New York Convention and the Panama Convention. The same description is applicable to Article 18.24 of the Free Trade Agreement between the Republic of Colombia and the Republics of El Salvador, Guatemala and Honduras.

According to international principles of law duly recognized in the Political Constitution of the Republic of Guatemala, a State party to an international agreement shall not invoke any rules of its internal law as a justification for its failure to perform a treaty. Guatemala has been a State party to the Vienna Convention on the Law of Treaties since July 21, 1997, and according to Article 27 of said Convention, such fundamental rule of international law is also expressly recognized. As described in the section on National Laws, *infra*, the applicable Guatemalan arbitration law provides that in the case of the recognition and enforcement of foreign arbitral awards, it must first be determined which international treaty shall be applied, if any, and only if there is no

such treaty, then, the rules of the national law shall be applied for due recognition and enforcement of such awards.

Pursuant to Articles 46 through 48 of the Arbitration Law of Guatemala (Arbitration Law), there shall be no distinction between the enforcement of awards issued in Guatemala or elsewhere. This is because for any procedural aspects not provided for in detail in the New York Convention or the Panama Convention, the rules of procedures for recognition and enforcement of any award, irrespective of its place of issuance, are the same.

IV National Law

Decree 67–95 of the Congress of the Republic came into legal effect on November 25, 1995. It embodies the Arbitration Law of Guatemala (Arbitration Law). As briefly indicated, the Arbitration Law is essentially based on the 1985 UNCITRAL Model Law. It was implemented for international and domestic arbitration proceedings; and is not limited to the subject matter of commercial disputes, but applicable to any dispute that is "arbitrable" according to the rules or Article 3 of the Arbitration Law.[4]

It should be noted that there are advantages to having a domestic law based on the UNCITRAL Model Law. These include the establishment of the well-known *kompetenz-kompetenz* principle, as well as the implementation of the standard on the independence/autonomy of an arbitral agreement. The Arbitration Law mandates that local judicial authorities shall not intervene in any arbitral proceeding, except in those cases and for the purposes provided for in the law.[5]

4 Article 3, Decree 67–95 of Congress: **ARTICLE 3.-** Subject-matters of arbitration: 1) This law will be applicable in all those cases in which a controversy deals with matters where the parties have free disposition pursuant to the law. 2) This law will also apply to all those other cases where, by disposition of other laws, the arbitral procedure is allowed, as long as the arbitral agreement is valid pursuant to the law. 3) The following may not be subjective to arbitration: a) The matters on which there is a firm judicial resolution, except the aspects derived from its execution. b) The matters inseparably joined to others over which the parties do not have free disposition. c) When the law expressly prohibits or appoints a special procedure for determinate cases. 4) The labor arbitrations are excluded from the scope of application of this law.

5 Arbitration Law, Arts. 8, 10, 11, 21.

V Application for Recognition and Enforcement before Local Courts

Chapter VIII of the Arbitration Law governs the recognition and enforcement of arbitral awards. Article 45 provides that foreign arbitral awards will be recognized and enforced in Guatemala pursuant to the New York Convention, the Panama Convention, or any other applicable treaty to which Guatemala is a party. In the absence of any applicable treaty, the award is to be recognized and enforced in accordance with the Arbitration Law. Article 46 of the Arbitration Law provides that foreign arbitral awards shall be binding in Guatemala, regardless of the country in which they have been issued. Article 47 provides narrow exceptions for the refusal of an enforcement, all of them very similar, if not, identical, to those in the New York Convention.

A *Applicable Awards*

As discussed earlier, foreign arbitral awards are recognized and enforced in Guatemala under the Arbitration Law according to the rules of the New York Convention, the Panama Convention, or any other international treaty to which Guatemala is a party. In the event of multiple applicable international treaties, and provided the parties are not in agreement, the treaty more favorable to the party seeking enforcement of the award is applied.[6]

In the absence of an applicable international treaty, the foreign award shall be recognized and enforced in Guatemala in accordance with the specific rules contained for that purpose in the Arbitration Law.[7] Further, an arbitral award, irrespective of the location of the issuing tribunal, shall be recognized as binding in Guatemala, and its enforcement shall occur under the procedural rules contained in Articles 46 and 47 of the Arbitration Law.[8]

There are no provisions within the Arbitration Law that delineates when an arbitral award is considered foreign or domestic. Consequently, where it is indeterminable whether an arbitral award is foreign or domestic, it is unclear whether the New York Convention, for example, shall also be applied to arbitral awards not considered as domestic awards in the State where recognition and enforcement is sought.

Pursuant to the rules of the Arbitration Law, the award, shall contain the date of issuance and the place of the arbitration. The award shall be deemed

6 Id. at Arts. 42(1)(2). In particular, paragraph (2) not only refers to awards, but also to arbitration agreements, following the obligations under Article II of the New York Convention.

7 Id. at Art. 45(3).

8 Id. at Art. 46(1).

issued in the place of arbitration. If, for example, the place of arbitration is the Republic of Guatemala, the arbitral award is not considered a foreign arbitral award.[9] Arguably, that effect does not amount to a lesser degree of enforceability of such an award, because, as described before, all arbitral awards shall be deemed as binding, and all shall be recognized and enforced according to the specific national procedural rules of the Arbitration Law. These rules are to be harmonized with the respective provisions of the New York Convention, including the limited causes to refuse a requested recognition and enforcement of the award.

B *Competent Courts*

A commercial or civil court of first instance, either at the place of domicile of the party against whom the enforcement is sought, or at the place where the assets of the respondent party are located is the competent court.[10] The party seeking recognition and enforcement has the right to elect whether to seek enforcement in one or the other, although in many occasions both venues may concur in just one place.

Awards resulting from arbitral proceedings under any of the international treaties referred to in Section III above, would also be recognized and enforced through the same courts of first instance. For example, Guatemala did not refer to any other particular Tribunal when it complied with the designation of courts or other competent authorities pursuant to the ICSID Convention. It just designated the "Judicial Branch," and consequently, the applicable rules of the Arbitration Law are also applicable to ICSID cases.[11]

C *Conditions*

The legal character of the binding effects of any award, is the general rule or principle under the Arbitration Law. The only "conditions" or exceptions to the legal presumption of validity and enforceability, would be those expressly provided for in the Arbitration Law.[12] Article 47 of the Arbitration Law contains

9 Arbitration Law, Art. 40(3).

10 Id. at Art. 46(1).

11 International Center for Settlement of Investment Disputes. *Contracting States and Measures Taken by Them for Purposes of the Convention*, ICSID/8, May 2013. Available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingMeasures&reqFrom=Main (last visited Jan. 20, 2014).

12 Arbitration Law, Art. 47. This rule begins with the following text: "The recognition and enforcement of an arbitral award, whichever the country in which it has been rendered, can be refused, only upon the following causes . . ."

those limited grounds upon which, recognition and enforcement of an award may be refused. Such grounds mirror those provided for in the New York Convention.[13] The list of grounds "in line" with the New York Convention, is clearly regarded as a *numerus clausus* list.

It is important to keep in mind that if the New York Convention, the Panama Convention, or any other relevant international treaty is applicable to a particular case, any such convention (the most favorable towards the effective execution) shall be applied. Further, if any convention or treaty is applicable then the national rules adopt the very essence of the New York Convention.

D *Formalities*

When petitioning for an enforcement proceeding, the originals or certified copies of the arbitral award and the arbitration agreement must be supplied.[14] While the entire arbitral award must be furnished, the arbitration agreement can be given without the remainder of the contractual provisions to which it is a part. If the documents are in any language other than Spanish, then translations must be provided. Such translations must be certified by an authorized translator in Guatemala. If no authorized translator is available for the original language of the award (and the arbitration agreement, if different from the award), then the translation can be made by two persons who speak and write such language, under oath and with their signatures duly certified by a notary.[15]

E *Procedure*

Once the application for the recognition and enforcement of a foreign or domestic award is filed at the competent court, such court must grant a period of 3 days to the respondent to answer. These are calendar days, unless the last day is a non-working day, in which case, it is understood to expire on the next following working day.[16] In order to stay the enforcement proceedings, the respondent must demonstrate, within the 3-day period that there is an application to set aside the award before a competent court.[17] This would be

13 For the full text of Art. 47 of the Arbitration Law, please refer to Annex I of this Chapter.

14 Arbitration Law, Art. 46(2).

15 Id.

16 Id. at Art. 6(3).

17 Stay of enforcement can only be based on the pendency of an action to set aside an award. Of course, such action to set aside depends on the place where the award has been rendered. In the case of Guatemala, the only legal remedy against a final award, in order to set it aside, is the *Recurso de Revisión*. This recourse or remedy is regulated under Articles 43 and 44 of the Arbitration Law. Essentially, these Articles mirror the rules of the UNCITRAL Model Law related to the annulment or setting aside of an award (article 34 of the Model Law). There is, though, a considerable difference in the sense that under

the only legal reason allowed as a defense or exception, to stay such enforcement proceedings.

Other than this 3-day period granted to the respondent, there are no other hearings during the proceedings for the recognition and enforcement of an award. In other words, if the respondent is not able to demonstrate that it has filed, in due course, a motion to set aside the award, there are no other legal remedies, or any other defense that can be raised against the enforcement. The competent court is not required to review the application for admissibility.

After the expiration of the 3-day period, if the respondent fails to demonstrate that there is a pending motion to set aside the award, and is unable to plead any of the causes to request the denial of enforcement under Article 47 of the Arbitration Law (which again, mirrors those causes under the New York Convention), then the competent court must issue a final and definite resolution ordering the enforcement of the award and, if applicable, order the seizure of assets identified by the applicant. Any decision in this regard is final and not subject to any appeal or recourse.[18]

Finally, the General Rules of Civil Procedure for Enforcement of Domestic Judgments are applicable in any matter not expressly provided for in the Arbitration Law, but in a manner consistent with the celerity and effectiveness under which an award must be enforced.[19] It can be said that the New York Convention becomes very relevant in this regard as to the obligations imposed on a contracting state to ensure the effective means of enforcement.

VI Leading Cases

It must be clarified from the outset, that, as of today, the relevant judicial precedents with regards to the recognition and enforcement of arbitral awards does not come from the first instance courts, the appellate courts, or the Supreme

---

the provisions related to the *Recurso de Revisión*, there is the possibility for the competent court (an appellate court in that case), not only to confirm or annul the award, but also, to modify it. This particular and evident deviation from the Model Law is in the process of being corrected through an initiative already in the National Congress of Guatemala. In contrast to the Model Law, the time period to file a motion to set aside an award, is one month from the date on which the party making the application received the award, or, if a request for interpretation or correction of the award has been made, one month from the date on which that request had been disposed of by the arbitral tribunal.

18 Arbitration Law, Arts. 48(4)(5).

19 Id. at Art. 48(6). Rules of the Code of Civil and Mercantile Procedures ('Código Procesal Civil y Mercantil'), provides that a national judgment must be enforced through the highest ranking enforcement proceeding (*'ejecución en la vía de apremio'*).

Court of Justice. ("Ordinary Jurisdiction"). Rather, the judicial precedents briefly reported in this chapter, comes from the Court of Constitutionality, which is an independent or autonomous Court with the highest powers regarding the "constitutional jurisdiction", which is considered an "extraordinary jurisdiction".

Recurso de Casación is not available for any case in which a respondent moves to set aside an award. As described before, the only legal recourse against an award is the *Recurso de Revisión*. In addition, Guatemala lacked until now, reports of judicial resolutions, especially for final judgments of first and second instances. Though, such resolutions are public, it is almost impossible to obtain daily decisions of the Guatemalan competent courts on the Arbitration Law due to the fact that there is no organized, structured and systematic mechanism for case reports.

Although resolutions and the award in any arbitral proceeding are regarded as not subject to any recourse (except for the motion to set aside the award—*Revisión*) in many instances, parties file unmeritorious constitutional remedies during arbitration proceedings. These are mainly the constitutional relief or protection known as *Amparo*, and a type of judicial review known as *Inconstitucionalidad*. These remedies are almost always finally determined by the Court of Constitutionality as the highest court in the nation for constitutional protection. The rulings or judgments of this Court are reported and more accessible. Thus, this Court of extraordinary jurisdiction sets the precedents that are followed not only as the *ratio decidendi*, but also as the *obiter dicta* in many legal matters, including arbitration. For this reason, in this Chapter, all the cases referred to as 'leading' or relevant, are from judgments made by the Court of Constitutionality.

A) Court of Constitutionality: "Unconstitutionality in a Particular Case"—Case No. 2802–2007.[20]

In Case No. 2802–2007, several aspects of Article 48 of the Arbitration Law were reviewed under constitutional scrutiny. The constitutionality of said Article was sustained, and the precedent is relevant for the following reasons:

i) it confirms that the competent court in enforcement proceedings must reject *in limine*, any remedies or recourses used during an enforcement proceeding, and that such determination confirms that

20 Corte Constitucional (inconstitucionalidad), Mar. 2008, *Corporación de Fianzas, Confianza, Sociedad Anónima and Texaco Guatemala Inc.*

there is no violation of due process of the respondent in an enforcement proceeding;

ii) the effects of *res judicata* of the awards was examined, and sustained;

iiii) the principles such as those of legality and veracity of the awards (presumption of legal and binding effects) was recognized;

iv) confirms that the defenses or causes for not allowing the enforcement of an award are only those provided for in the Arbitration Law, and that any other defense must be rejected *in limine*;

v) fully recognizes the binding and mandatory effects of the international treaties and conventions regarding enforcement of foreign arbitral awards to which Guatemala is a State party; and

vi) it validates that *Recurso de Revisión* is the sole remedy to set aside an award that, under the Arbitration Law, must be presented and substantiated. Further, the precedent affirms that the use of any other method to set aside an award would contradict and violate principles of due process under the Constitution and other laws of Guatemala.

The judgment in this case reads as follows:

> *The nature of arbitration requires that in the event of enforcing an award, the intervention of the State's courts is necessary to reach such end; this is because the arbitration tribunal lacks enforceability for that purpose. Two principles govern this issue: completeness and consistency. The first means that the content of the award must refer to what was submitted to the arbitration court and consistency means that what was resolved must be the same as what was raised and discussed during the process. When these principles are met, the award has certain characters regarding its effectiveness: res judicata, enforceability and binding between the parties, making it comparable in rank to a court ruling. When res judicata is achieved, two effects are produced: one formal and one material—formal when against a decision, no appeal is granted; material refers to the procedural effect produced by invariance and permanence of the judgment—i.e. they have the characteristic of immutability, i.e. you cannot question their legal effect.*
>
> *The enforceability is acquired with the recognition of the competent court, and the binding nature stems from the fact that the parties must comply with what the arbitration award states, as this obligation has been perfected since the arbitration agreement was celebrated between the parties.*
>
> *In the enforcement of the award, and in accordance with Article 47 of the Arbitration Law, the court must limit the feasibility of the application to the study of the authenticity of the executive title and whether or not it's*

> *enforcement is feasible without analyzing the merits of the award, this is because the substantive issues were known by the arbitration court, and if necessary, by a state court through a petition for review. The requirements for granting recognition and enforcement of arbitral awards in addition to the Arbitration Act are set forth in "*(. . .) *the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (*New York*) *of June 10, 1958, the Inter-American Convention on International Commercial Arbitration* (*Panama*) *of 1975, or any other treaty on recognition and enforcement of arbitral awards to which Guatemala is a party, if applicable . . ." in accordance with what is regulated in Article 45 of the Arbitration Law. These rules of international order together with the law in question, contemplate, mainly in Article 5 of the aforementioned conventions and from Article 46 onwards of the Arbitration Law, the principles of legality and veracity of the arbitral award, limiting the causes to repeal the recognition and enforcement of arbitral awards.*

There are other interesting parts of this judgment that, in general, sustains the compatibility of the rules of the Arbitration Law with the Constitution of the Republic of Guatemala regarding the enforcement of awards. This is demonstrated in the following excerpt of the judgment:

> *This court finds that there is no violation of the right of self-defense in the provision under consideration, as the law that contains it—Article 43 of the Arbitration Law—establishes the impeachment mechanism, so that, previous to the arrival of the enforcement phase, the substantive issue resolved by the arbitration court can be judicially examined through a petition for review*, (motion to set aside the award) *and thus protecting that right, regardless of whether there is an implicit acceptance of the outcome of the award from the moment of submission to the arbitration agreement. Furthermore, the parties have access to different variants of the defenses set out in Article 47 of the Arbitration Law, in order to request the refusal of enforcement and recognition of arbitral award on the grounds and reasons set forth therein. Of this account, this court shares the opinion of the court a quo as to the lack of merits of the unconstitutionality motion in a particular case of section 3 of the challenged Article, because although the opportunity to object to the claim originated in the arbitration is limited to the extent imposed by such process, they are provided in the procedural design, alternatives that make possible the exercise of the right of self-defense of the parties, both in the awareness and the enforcement stages.*

> *On the other hand, the unconstitutionality of paragraph 5 of Article 48 of the Arbitration Law is also argued; paragraph 5 states: "(. . .) Any resolution on relative or absolute grounds that falls in the procedure for the recognition and enforcement of an award, is not subject to appeal or any judicial remedy (. . .)" because—according to the applicant—it doesn't allow, in any way, the right of appeal guaranteed by Article 12 of the Constitution of the Republic of Guatemala, as expressly prohibiting the use of any means of appeal or procedural remedy in the recognition and enforcement of arbitral awards. In this regard, it pertains, mutatis mutandis, the considerations made in the previous provision, based on the validity of the principles of presumption of legality and veracity of the arbitration award, which prevails in the conduct of this type of process.*

The attack of unconstitutionality of both sections of Article 48 were rejected with a clear and abundant reasoning, so as to foresee that any future challenges in similar or identical terms, should be fully disregarded.

B) Court of Constitutionality: Appellate Decision—Case of *Amparo*, No. 441-2008.[21]

The underlying case was effectively related to the enforcement proceeding of a foreign arbitral award. In the resolution made by the Court of Constitutionality, two main determinations are very positive:

i) In the recognition and enforcement of foreign arbitral awards, no judicial remedies or recourses are available against the decision of the competent court of enforcement. This clearly allows the judge in any other enforcement case to reject, *in porta*, any remedy or recourse that is not a defense or cause established in the Arbitration Law as a valid cause to refuse enforcement.
ii) The opposition presented by the respondent in an enforcement proceeding of a foreign arbitral award must be limited to the ability of said respondent to demonstrate, with written evidence, that the motion to stay or set aside the award is still pending. Otherwise, the competent court is fully authorized to reject *in limine* any other defenses filed by the respondent. It must be clarified that the

21 Corte Constitucional, (amparo), Sep. 2008, *Apatlán* v. *Halliburton Energy Services Inc. Sociedad Anónima*.

judgment from the Court of Constitutionality did not address the causes for the rejection of enforcement under Article 47 of the Arbitration Law.

The judgment in this case reads as follows:

> *In this regard, this Court deems it appropriate to quote Article 1 of the Arbitration Law which states:*
>
> 1. *This law will apply to domestic and international arbitration, when the place of arbitration is in the country, without prejudice to any applicable bilateral or multilateral treaty to which Guatemala is a party.*
> 2. *The rules contained in Articles 11, 12, 45, 46, 47 and 48 of this Law, shall apply even if the place of arbitration is outside the country." In accordance with the abovementioned, Article 48 of the Arbitration Law provides that: "The proceedings for recognition or enforcement of awards is subject to the following rule.* [. . .]
> 3. *Any resolution on relative or absolute grounds that falls in the procedure for recognition and enforcement of an award, is not subject to appeal or any judicial remedy . . ." The transcribed rules state that this law applies even if the arbitration has been outside the country, as in the case under consideration, in that the arbitration award whose execution is sought, was issued by the International Court of Arbitration of Paris, France* (sic).
>
> *Therefore, if the governing rule is clear in stating that in the process of recognition and enforcement of awards, it is not lawful to appeal or file any procedural remedy, the challenged authority, when deciding in the claimed resolution that the appeal brought is notoriously unfounded, it did it within the powers granted by the abovementioned Law, acting according to it, so what was decided did not provoke any offense or limitation to the right of self-defense, being that, as noted, the decision of that authority is the result of the application of the legal provision applicable to the case. Therefore, the filed defense is unfounded and, being that the court a quo ruled similarly, the original ruling is upheld.*

It can be noted then that in the constitutional reviews of both actions, (that is, the "unconstitutionality attacks" and *amparo*), the Court of Constitutionality, so far, has sustained the compatibility of the rules of the Arbitration Law. It should also be noted that there are a few more cases from the Court of Constitutionality, which were not mentioned here, because they follow similar criteria as the ones depicted in this section.

VII Conclusions

Under a strictly normative perspective, Guatemala not only has a legal system respectful of the highest standards with regards to the recognition and enforcement of foreign arbitral awards, but also, as of the date of preparation of this Chapter, the judicial scrutiny exercised to said legal system, has confirmed its validity, as well as its compatibility with the Constitution of the Republic, and thus, its effective application.

Having said that, however, there is certainly work to do in the consolidation of effective and real enforcement of arbitral awards in Guatemala, especially due to the fact of an undeniable abuse of the constitutional means to attack such procedures. The most pervasive obstacles to the celerity of these proceedings continue to be, the lack of knowledge of arbitration in the Guatemalan media, as well as the excessive formalism that broadly affects our procedural legislation as opposed to the arbitration proceedings, specially the vast and unlimited application of the *amparo*.

Annex

Arbitration Law—Decree 67–95
Chapter VIII
Recognition and Enforcement of Awards

Article 45—Applicable Rules to Recognition and Enforcement of Foreign Awards.

1) The foreign arbitration awards will be recognized and enforced in Guatemala pursuant to the Convention on Recognition and Enforcement of Foreign Arbitration Awards (New York Convention) executed on June 10, 1958, the Inter American Convention on International Commercial Arbitration (Panama Convention) executed in 1975, or any other treaty regarding the recognition and execution of arbitral awards to which Guatemala is a party, as long as they are applicable.
2) In the event that more than one international treaty is applicable, unless otherwise agreed between the parties, the one most favorable to the party seeking the recognition and execution of an arbitration award or agreement must be applied.
3) In the absence of the applicability of any international treaty or convention, the foreign awards will be recognized and enforced in Guatemala in

accordance to the rules of this law and the specific provisions of this chapter.

Article 46—Recognition and Enforcement.

1) An arbitration award, irrespective of the country in which it has been rendered, will be recognized as binding and, after the presentation of a request in writing to the competent court, it will be enforced pursuant to the provision of this article and Article 47. It shall be competent, at the election of the party requesting the recognition and enforcement of the award, either the Civil or Commercial Court with jurisdiction at the place of the domicile of the person against whom it is being enforced, or at the place where his or her property is located.
2) The party that invokes an award or requests its execution must present either the original of the document where the award is evidenced, duly certified, or a duly certified copy of said document, and the original of the arbitration agreement to which Article 10 refers to, or a duly certified copy thereto. If the award or agreement is not written in Spanish, then it must be translated to said language, under oath and by a legal translator authorized in the Republic, and if no sworn translator is available for the language of the award, it shall be translated under oath by two persons who speak and write both languages, with Notarial certification of their signatures.

Article 47—Grounds for Refusing the Recognition and Enforcement.
The recognition or enforcement of an arbitral award will only be denied, notwithstanding the country in which it has been rendered, in the following cases:

a) By request of the party against whom it is being invoked, when this party proves before the competent court of the country where the recognition and enforcement being requested:
    i) That one of the parties in the arbitration agreement to which Article 10 refers to, was affected by some incapacity, or that said agreement is not valid regarding the law to which the parties have submitted to, or if nothing is indicated on this behalf, by virtue of the law of the country where the award has been rendered; or
    ii) That the party against whom the award is being invoked, was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings; or

iii) That the award deals with a difference not contemplated by 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) That 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 competent court of the country in which, or under the law of which, that award was made; or

b) When the court verifies:

i) That, pursuant to the Guatemalan legal system, the purpose of the controversy is not susceptible to be submitted to arbitration; or

ii) That the recognition and enforcement of the award would be contrary to public policy of the State of Guatemala.

Article 48—Procedure for the Recognition and Enforcement of the Award.

The procedure for the recognition and enforcement of awards, will be subject to the following rules:

1) Once the term of one month, referred to in Article 43(3) has elapsed, without the award being complied, its forced execution might be obtained before a competent court, pursuant to Article 46(1), through the request of enforcement, and where the documents indicated in Article 46(2) shall be attached.

2) Likewise, if applicable, a certified copy of the judicial decision rendered in the determination of the motion to set aside the award shall also be attached.

3) Of the enforcement being pursued, the court will give a three day hearing to the respondent, who will only be able to oppose the requested enforcement based upon the pendency of the motion to set aside the award, as long as such pendency is evidenced in writing with the opposition brief of the respondent. In this case, the court shall pronounce, without any other procedure, the suspension of the enforcement until the resolution regarding the motion to set aside the award is issued, and if there is a favorable finding for said remedy, then the court, when

presented with a certified copy of the resolution, will pronounce a judicial decree denying the execution.

4) If the "foreseen" mentioned in paragraph 6 below, and any of the causes established in Article 47 do not occur, the court will pronounce a judicial decree ordering the enforcement of the award to the obliged party and the embargo of his or her property, if applicable.
5) Any procedural or substantive order during the procedure for the recognition and enforcement of an award is not subject to any recourse or remedy whatsoever.
6) Anything not expressly foreseen in this chapter for the recognition and enforcement of awards, the legal provisions applicable to the execution of national judgments shall be supplementarily applicable, as long as said application is compatible with the celerity sand efficiency with which an arbitration award must be enforced.

CHAPTER 11

Honduras

Fanny Rodríguez del Cid and Mario Agüero

I Introduction

Prior to the approval of a special *Law of Conciliation and Arbitration* in 2001, arbitration in Honduras was regulated, in a general manner, through the Civil Code, Civil Procedures Code, and by the Labor Code in labor related matters. These regulations on arbitration were considered obsolete before the necessities and demands of a growing commercial sector that required fast, efficient, and alternative mechanisms for the resolution of conflicts arising from those commercial relationships.

The *Law of Conciliation and Arbitration*[1] was approved in Honduras on October 17, 2000 through Legislative Decree 161–2000, and made effective on March 7, 2001. With the approval of this Arbitration Law, Honduras was gaining proximity to the standards of international arbitration, through a legal text inspired mainly by the UNCITRAL Model Law on International Commercial Arbitration.

Along with the need to modernize the arbitration legislation in Honduras, this new Arbitration Law complied with the requirements demanded by the international treaties and conventions signed and ratified by Honduras. The new Law has respected the universal spirit of arbitration as an alternative mechanism for the solution of conflicts, through an expedite process carried out by special arbitrators in different subjects.

The following are noteworthy advantages that the Arbitration Law offers:

(i) the regulation of national and international arbitration;
(ii) regulation of institutional and ad-hoc arbitration;
(iii) arbitration is considered a viable solution to rectify conflicts arising from contractual relationships between Honduras, its governmental entities and national and foreign parties;
(iv) assistance and relief from judicial authorities in the arbitration process is regulated;

1 The Law of Conciliation and Arbitration (*Ley de Conciliación y Arbitraje*), Legislative Decree 161–2000, Mar. 7, 2001 (Honduras). Hereinafter the 'Arbitration Law'.

 | DOI 10.1163/9789004284364_013

(v) the norms regarding the integration of an arbitration tribunal and arbitration procedure are secondary to the will of the contracting parties;
(vi) international treaties are recognized as primary sources of law in international arbitration when in conflict with the Arbitration Law;
(vii) the possibility of carrying out international arbitration in national and foreign courts is contemplated for conflicts arising from contracts between the State of Honduras, its governmental entities and national and foreign parties;
(viii) arbitration awards are granted the same force as judicial rulings;
(ix) the following principles are respected:
    a. jurisdiction;
    b. nature of the arbitration process;
    c. temporality;
    d. voluntarily;
    e. legality;
    f. equality amongst the parties;
    g. due process;
    h. disposition.

The following sections present an overview of the Honduran legislation along with the international treaties Honduras has ratified that concern arbitration and the recognition and enforcement of foreign arbitration awards. Unfortunately, specific cases will not be cited because the Honduran Supreme Court of Justice has not addressed many arbitration cases, and the court does not have an accessible archive on reported cases.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

In Honduras, the recognition and execution of foreign arbitral awards is mainly regulated by the foreign treaties it has signed and ratified. The Arbitration Law has established that arbitration awards issued abroad, as well as those considered as international by the Law, will be enforced according to the treaties, pacts and conventions in force in Honduras. With this in hand, we will now consider the two main applicable treaties for the recognition and enforcement of foreign arbitral awards in Honduras which are: (i) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York

Convention, 1958);[2] and (ii) the Inter-American Convention on International Commercial Arbitration (the Panama Convention, 1975).[3]

The New York Convention, which is often considered the most important source for the recognition of foreign arbitration awards in Honduras, binds the state as a signatory to recognize the authority of the arbitration awards and enforce them in accordance with the procedures currently in force in the country. The New York Convention also provides exceptions for the refusal of enforcing arbitral awards. The Inter-American Convention on International Commercial Arbitration, adopted by the State members of the Organization of the American States also contains the fundamentals and grounds for refusing to recognize and enforce foreign arbitral awards.

In general terms, both Conventions provide that (i) Honduras shall recognize the validity of bilateral agreements, unless the exceptions within the Conventions are triggered; and (ii) recognize and enforce foreign arbitration awards, save the exceptions within the Conventions apply. Additionally, both Conventions impose the burden of proof on the party requesting the recognition and enforcement of the foreign arbitral award to show that the requirements for the enforcement have not been duly complied with.

III National Law

Commercial arbitration is principally regulated by the *Law of Conciliation and Arbitration*. Its main foundation originates in the Constitution, which maintains that no person having the administration of his/her own goods and properties may be deprived of the right to resolve a civil matter through settlement or arbitration.[4] The Arbitration Law does not have a unique and autonomic system since the general sources of law are applied to arbitration in Honduras. However, where there is a conflict between the Arbitration Law and international treaties, the Arbitration Law expressly recognizes that.

Chapter IX of the *Law of Conciliation and Arbitration* deals with the recognition and enforcement of foreign arbitral awards. International arbitration is determined by the parties involved in an agreement or dispute and is subject

2 Honduras acceded to the New York Convention on Nov. 3, 2010, and it became effective on Jan. 1, 2001.

3 Honduras acceded to the Panama Convention on Jan. 8, 1979, and it became effective on Mar. 22, 1979.

4 Honduras Constitution, Art. 110.

to the element of territoriality. In relation to the parties, arbitration is considered international when an agreement containing an arbitration clause is signed, and the parties have their domicile in different states. Where a party has multiple domiciles, the Arbitration Law underscores that the domicile will be where the party has a more immediate relationship with the arbitration agreement/clause. If a party does not have a specific domicile, then the domicile will be the party's habitual residence.

With regards to the element of territoriality, arbitration is considered international when either of the following is located outside the State to which the parties have their domicile:

(i) The place of arbitration, if it has been determined in the arbitration agreement; and
(ii) The place of compliance of a substantial part of the contract or the place to which the object of a controversy has a close relationship.

In consideration of these two elements and in line with the Arbitration Law, international arbitration can therefore be defined as *an extra judicial and alternative mechanism to resolve contractual conflicts, agreed upon by the parties, in which at least one element exceeds the borders of a country, and the controversy is presided over by one or more arbitrators that issues a ruling called an award*.[5]

The Arbitration Law grants parties to an international arbitration the freedom to choose suitable norms. These include substantial and procedural norms that the arbitrators must follow in order to issue an effective award. The Arbitration Law also clearly specifies the rules applicable to the recognition and enforcement of foreign arbitral awards. It classifies international arbitration of the State and defines it as the resolution, through arbitration, of any controversy that may arise from contracts celebrated between the State of Honduras and governmental entities with non-domiciled nationals or foreigners. The freedom of choice of norms also prevails in this type of arbitration and so the resolution of these controversies may be subjected to arbitration tribunals and the laws of different jurisdictions.

5 Ana María Botero Sanclemente and Néstor Raül Correa Henao, *Arbitraje Internacional*, 19 (Cámara de Comercio, de Bogotá, 2nd Edition, 2004).

IV Application for Recognition and Enforcement Before Local Courts

Foreign arbitration awards, judgments, as well as other judicial foreign resolutions that firmly conclude a matter with definite character will be entitled to enforcement in Honduras. These will have the legal force that stems from either the international agreements, the procedures of juridical international cooperation, or from the agreements celebrated with the country from which they come.

Pursuant to the Honduran Civil Procedure Code, once an award or judgment is recognized, it should be enforced according to the terms provided therein, unless it conflicts with an international treaty to which Honduras is a party.[6] In fact, under the *Law of Conciliation and Arbitration*, foreign arbitral awards must be enforced in Honduras in accordance with the treaties to which the Republic is a party.[7]

It must be stated therefore, that the New York Convention is the applicable instrument for the recognition and enforcement of foreign commercial arbitral awards. Accordingly, in keeping with the treaty's Article III clause, Honduras must recognize arbitral award as binding and enforce them in accordance with its Civil Procedure Code.

In Honduras, foreign decisions can be recognized through two distinct routes: (i) via direct application of a treaty; or by (ii) recognition through exequatur. The former derives from judicial transnational cooperation and the latter from an application of the ordinary rules for recognition of foreign judgments under which a series of requirements need to be met.

A *Competent Courts*

As far as the enforcement of decisions from foreign courts in Honduras is concerned, one must distinguish between the concepts of judicial competence for its recognition; and enforcement once the decision is recognized. Competence falls under the purview of the Supreme Court of Justice.[8] This is also codified in Article 90 of the *Law of Conciliation and Arbitration* which expressly states that the recognition and enforcement of arbitral awards shall be requested before the Supreme Court of Justice. Enforcement, on the other hand, falls under the authority of the Civil Court that has jurisdiction over the assets that are to be seized; or with the Civil Court "upon which the enforcement would fall."[9]

6 Civil Procedure Code (hereinafter, CPC), Arts. 754, 755 and 756 (Honduras).

7 Arbitration Law, Art. 89.

8 CPC, Art. 755.

9 Id. at Art. 756.

B *Conditions and Formalities*

In seeking recognition and enforcement of foreign decisions in Honduras, the following requirements must be met:

(i) The judgment needs to be final., That is, it has to have the authority of res judicata by having been issued by a competent court or tribunal;
(ii) The respondent, the party against whom the judgment is being enforced, must be personally notified of the resolution being enforced. The notice must be in conformity with the procedures of the country of origin. Notification gives the respondent the opportunity to exercise the right of defense.
(iii) The judgment must have the necessary requirements to be considered as such in the place of issuance. It must also satisfy the conditions of genuineness required by the national law.
(iv) The judgment should not affect the principles of public order under Honduran law. Additionally, the obligations contained in the judgment should be sustainable to lawful fulfillment in Honduras; and
(v) The judgment should not be incompatible with any previously pronounced or simultaneous rulings handed down by a Honduran court.

Article 754 of the Procedural Civil Code offers a few guidelines on the conditions of admissibility for the recognition of a foreign decision in the face of inapplicable treaties. There is the policy of reciprocity that makes recognition possible upon certain conditions and "*. . . the same force will be given . . . as those declared in Honduras*," providing certain requisites are met.

These requirements are relative to the competence of the Court that issued the resolution, with respect to the principles of due process of law in the procedure of the judgment being enforced; along with the genuineness and validity of the judgment, which must not be in conflict with the Honduran public order or any other Honduran law.

C *Procedure*

As indicated, the recognition of the foreign decisions of enforcement in conformity with the previous procedures is a competence of the Supreme Court of Justice. The recognition and enforcement will be requested by means of a writ presented by the petitioner (the party to whom it interests), along with the appropriate evidence. This will also serve as notification to the opposing party who will have five (5) days to proffer a response.

It is the responsibility of the party requesting recognition and enforcement to have the award and arbitration agreement duly authenticated and translated into Spanish. If evidence is admitted, a hearing will be scheduled within ten (10) days at the conclusion of which an order will be pronounced. If the opposing party does not have allegations, or if evidence was not necessary, it will pass directly to the issuance of a judgment. The Supreme Court of Justice will issue a judgment within ten (10) days either recognizing and granting full effect to the foreign decision or refusing recognition. These judgments are non-appealable.

V Leading Cases

As a result of the country's limited experience with international arbitration, to date, we are not aware of a leading case on the recognition or enforcement of a foreign arbitral award in our jurisdiction.

Annex

Law of Conciliation and Arbitration—Legislative Decree 161–2000

Article 89—Recognition and Enforcement of the Award
The arbitral awards pronounced abroad, as well as those considered international in accordance with this Act, are enforced in Honduras under treaties, agreements or conventions in force in the Republic.

Article 90—Competent Courts to Petition Recognition and Enforcement
Petitions to recognize and enforce arbitral awards shall be brought before the Supreme Court. The recognition and enforcement of the award shall be requested before the Supreme Court.

Article 91—Legalization and Translation of the Award
The party invoking recognition and enforcement shall have the award and the arbitration agreement duly authenticated and translated into Spanish.

Article 92—Supplemental Procedure for Recognition and Enforcement of the Award
The recognition and enforcement of a foreign arbitral award will be conducted in accordance with the provisions of the treaties, agreements or conventions in force in the Republic. If none exists, the following rules apply:

1) The recognition and enforcement of a foreign arbitral award at the request of a party, may only be refused the following cases:
   a) one of the parties to the arbitration agreement was under some incapacity;
   b) The agreement is not valid under the law to which the parties subjected it or, if no law is indicated thereon, under the law of the country that has issued the award;
   c) The party against whom the award is invoked was not adequately notified of the appointment of an arbitrator or the arbitral proceedings or was unable, for any other reason, to assert their rights;
   d) The award refers to a dispute not contemplated in the arbitration agreement or contains decisions exceeding the terms of the arbitration agreement. However, if the provisions of the award relating to matters submitted to arbitration can be separated from those that are not, the former can be recognized and enforced;
   e) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place, and;
   f) The award is not yet binding on the parties or has been set aside or suspended by a court whose law was applied to make the award.
2) The Supreme Court, on its own motion, may refuse recognition or enforcement when it is verified that under the laws of the Honduran Republic, the subject of the dispute is not arbitrable or the award is contrary to international public policy.

Article 93—Competent Court to Enforce the Award
Enforcement of the award, once recognized in the manner provided by treaties, agreements or conventions or, in the absence of those by this Act, shall be held before the judge who under the provisions of the Code of Civil Procedure and the Law of Organization and Powers of the Courts, is in charge of the enforcement of a national judgment.

CHAPTER 12

Mexico

*Claudia Frutos-Peterson and Antonio Riva Palacio**

I Introduction

Arbitration in Mexico has come a long way since the reform of the Commercial Code adopting the UNCITRAL Model Law on International Commercial Arbitration in 1993.[1] In 2011, Mexico amended its arbitration law with the intent of strengthening arbitration as a method for dispute settlement.[2] Although there are various areas in which arbitration in Mexico can be bolstered further, arbitration is emerging as a true alternative for the settlement of commercial disputes in Mexico. Indeed, arbitration has been increasingly recognized by the Mexican business community as an effective and efficient method for settling disputes: arbitral institutions in Mexico have seen a consistent case load,[3] and additional

---

* The views expressed in this paper are exclusively the authors' views and opinions and do not necessarily reflect those of Curtis, Mallet-Prevost, Colt & Mosle LLP, or those of its clients.

1 In 1993, Mexico adopted the UNCITRAL Model Law on International Commercial Arbitration of 1985 ("the UNCITRAL Model Law") with some modifications. Although the reform represented an important step for Mexico as it incorporated modern principles of arbitration, some issues were not completely addressed by the 1993 reform resulting in certain practices that raised some criticisms, in particular in connection with the enforceability of arbitration agreements and the recognition and enforcement of arbitral awards by the Mexican courts. *See* Leonel Pereznieto Castro and James A. Graham, *Mexican Supreme Court Rejects the Principle of* Kompetenz-Kompetenz, 72 Arbitration 388, 388 (2006); James Graham, *Awards Are No Longer Mandatory without prior Judicial Recognition*, 18(1) IBA Arbitration Newsletter 109, 111 (2013); James A. Graham, *Las decisiones arbitrales en derecho y en amigable composición en búsqueda de su carácter obligatorio y final ante la Suprema Corte mexicana*, 6(2) Arbitraje: Revista de Arbitraje Comercial y de Inversiones 545, 546 (2013).

2 The reform adopted on Jan. 27, 2011, incorporates the provisions of the UNCITRAL Model Law (as amended in 2006), with some minor changes. This reform addressed some of the problems that existed under the previous law, in particular in connection with the role of the judges when referring a matter to the arbitral tribunal in light of the existence of an arbitration clause, and the role played by national courts when providing judicial assistance during the arbitral proceeding. The new text also incorporates Art. 17 of the UNCITRAL Model Law (as amended in 2006) on provisional measures.

3 *See* Centro de Arbitraje de México, *Estadísticas*, http://www.camex.com.mx/index.php/arbitraje-cam/estadisticas (last visited on June 21, 2014). According to the 2012 statistics

 | DOI 10.1163/9789004284364_014

arbitral institutions have appeared in recent years.[4] Perhaps more importantly, the Mexican legislature and judiciary have supported the use of arbitration and, barring extraordinary cases,[5] Mexican courts have enforced arbitration agreements and arbitral awards. Notwithstanding the foregoing, the debate on the ease for enforcing arbitral awards in Mexico continues in light of recent interpretations made by the courts.

Arbitration has also become an accepted method for dispute settlement in public works or other large contracts entered into by foreign or transnational companies with Mexican governmental entities,[6] including State companies, such as *Petróleos Mexicanos* (the Mexican national oil company, or "Pemex"), its subsidiaries, and the *Comisión Federal de Electricidad* (the Mexican national electricity company, or "CFE").[7] However, in recent years, this type of arbitration has been affected by reforms to public procurement laws, which limit the

published by the ICC International Court of Arbitration, 44 parties came from Mexico, making Mexico the second most frequent nationality amongst Latin American parties using the system (after Brazil). Mexico City was also one of the top ten cities selected as the place of arbitration (and the only Latin American city). ICC International Court of Arbitration, *2012 Statistical Report*, 24(1) ICC Bulletin 8, 14.

4 The Arbitration Centre for the Construction Industry (*Centro de Arbitraje de la Industria de la Construcción*) founded in March 2011 is the most recent venture of this type. Centro de Arbitraje de la Industria de la Construcción, *¿Quiénes Somos?*, http://www.caic.com.mx (last visited on June 21, 2014).

5 Recently, Mexican courts have been strongly criticized by the arbitration community in light of the annulment of an arbitral award rendered by an ICC tribunal seated in Mexico in the *Commisa v. PEP* case. In this respect, *see* section VI.B below.

6 For example, in January 2012, Mexico adopted a new law on Public-Private Partnerships, which regulates long-term contracts between public and private parties in order to render public services using infrastructure provided totally or partially by the private sector. Law on Public-Private Partnerships, *Diario Oficial de la Federación*, Jan. 16, 2012 ("*Ley de Asociaciones Público Privadas*"). Art. 139 of this law provides for arbitration as a dispute settlement mechanism under these agreements, with some exceptions.

7 For instance, the Law of *Petróleos Mexicanos* provides: "Concerning international legal acts, *Petróleos Mexicanos* or its Affiliates may agree on the application of foreign law, the jurisdiction of foreign courts in trade matters, and execute arbitration agreements whenever deemed appropriate in furtherance of their purposes." *Ley de Petróleos Mexicanos*, Art. 72, *Diario Oficial de la Federación*, Nov. 28, 2008. *See also* Art. 45 of *Ley de Servicio Público de Energía Eléctrica*. This was aided by the fact that Mexican State-owned companies do not, in principle, enjoy jurisdictional immunity under Mexican law. *See* Art. 4 of the Federal Code of Civil Procedures (according to which the institutions, services and entities of the Federal Public Administration and the federal entities have the same status as any other party in judicial proceedings, but prohibiting enforcement or attachment orders issued against them, and exempting them from any obligation to post guarantees of performance).

possibility of settling certain disputes through arbitration, including disputes arising from the rescission of public contracts by the contracting entity for non-performance.[8] This has caused Mexican practitioners to raise a series of critiques against this regime; specifically, that this might deter foreign companies from participating in public procurement proceedings or otherwise contracting with these entities. In our experience, however, this has not been the case.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

Mexico is a party to the major international and regional conventions concerning the enforceability of foreign and international arbitral awards[9] and such conventions have been routinely applied by Mexican courts.[10] Mexico acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"). The New York Convention entered into force in Mexico on July 13, 1971.[11] Mexico did not file any reservation, declaration or notification concerning the applicability of the New York Convention.

Mexico is also a party to the Inter-American Convention on International Commercial Arbitration of 1975 (the "Panama Convention"). The Panama Convention entered into force in Mexico on April 26, 1978.[12] As with the New York Convention, Mexico did not file any reservation, declaration or notification

8 *See* Acquisition Law ("*Ley de Adquisiones, Arrendamientos y Servicios del Sector Público*") (as amended on Jan. 16, 2012), Art. 80; Public Works Law ("*Ley de Obras Públicas y Servicios Relacionados con las mismas*") (as amended on Apr. 9, 2012), Art. 98. *See also* Law on Public-Private Partnerships, Art. 139.

9 In Mexico, international treaties enter into force as regards national law once they have been published in the *Diario Oficial de la Federación*, the official publication of the Mexican Federal Government. Law of the Official Gazette of the Federation and Governmental Gazettes (*Ley del Diario Oficial de la Federación y Gacetas Gubernamentales*), Art. 3(IV). The treaties are enacted through decrees (*promulgados*) which typically publicize the celebration of the treaty and are accompanied by the text of the treaty.

10 One of the earliest examples concerning the application of the New York Convention by Mexican courts dates from 1977, where the Eighteenth Civil Court of First Instance for the Federal District relied on the New York Convention as the applicable law for enforcing the award issued in *Presse Office S.A. v. Centro Editorial Hoy S.A.*, ICC Case No. 1840 of 1972, ICC Int'l Ct. Arb.

11 Enactment decree published in the *Diario Oficial de la Federación* dated June 22, 1971.

12 Enactment decree published in the *Diario Oficial de la Federación* dated Apr. 27, 1978.

concerning the applicability of the Panama Convention. Finally, Mexico is also a party to the Inter-American Convention of Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979 (the "Montevideo Convention"). The Montevideo Convention entered into force in Mexico on July 11, 1987.[13] Mexico filed a reservation pursuant to Article 1 of the Montevideo Convention limiting its applicability to compensatory judgments involving property in any of the States party, and three interpretative declarations.[14]

III Relevant Provisions in Free Trade Agreements or Bilateral Investment Agreements

As a matter of policy, Mexico includes provisions for the settlement of disputes in its free trade agreements ("FTAs") as well as in its bilateral investment treaties ("BITs").[15] Generally, these agreements provide for arbitration under (i) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"),[16] (ii) the ICSID Additional Facility Mechanism, and (iii) the UNCITRAL Arbitration Rules.

13 Enactment decree published in the *Diario Oficial de la Federación* dated Aug. 20, 1987.

14 Mexico's declarations are intended to clarify certain provisions of the Montevideo Convention. The first declaration states that Mexico recognizes the competence of a foreign court pursuant to the principles recognized in the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments of 1984. The second declaration refers to the enforcement of foreign judgments and clarifies that, for such enforcement, a letter rogatory must be obtained from the competent authorities in the state where the judgment is obtained. The third declaration indicates that the Mexican judge who receives the letter rogatory—required pursuant to the second declaration—shall be competent as regards all procedures to guarantee execution of judgments, including attachments, depositaries, third-party interventions, and adjudication in auction.

15 The negotiation, celebration, and approval of international treaties regarding international trade or commercial matters is regulated by the Law Concerning the Approval of International Treaties on Economic Matters (*Ley Sobre la Aprobación de Tratados Internacionales en Materia Económica*). This law serves to facilitate the negotiation and eventual approval of international commercial treaties by the Mexican Government and requires that dispute settlement provisions guarantee basic procedural rights. Law Concerning the Approval of International Treaties on Economic Matters, Art. 4(I), published in the *Diario Oficial de la Federación* dated Sept. 2, 2004.

16 Note, however, that Mexico is not a party to the ICSID Convention, so recourse to ICSID by foreign investors has so far only been available through the Additional Facility Mechanism.

Very few Mexican agreements provide for ICC arbitration or other venues as agreed by the parties to the dispute.[17]

Several BITs and FTAs concluded by Mexico contain detailed enforcement provisions in order to guarantee the enforceability of arbitral awards rendered under the agreement in an investor-State arbitration. For example, the Mexico-Korea BIT indicates that:

> [...]
> (*5*) *Each Contracting Party shall, in its territory, make provision for the effective enforcement of awards made pursuant to this Article and shall carry out without delay any such award issued in a proceeding to which it is party.*
> (*6*) *An investor may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention, if both Contracting Parties are parties to such instruments.*
> (*7*) *A disputing party may not seek enforcement of a final award until:*
> (*a*) *in the case of a final award made under the ICSID Convention:* (*i*) *one hundred and twenty days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or* (*ii*) *revision or annulment proceedings have been completed; and*
> (*b*) *in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules:* (*i*) *three months have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or* (*ii*) *a court has dismissed an application to revise, set aside or annul the award and there is no further appeal, or* (*iii*) *a court has allowed an application to revise, set aside or annul the award and the proceedings have been completed and there is no further appeal.*
> (*8*) *If a disputing Contracting Party fails to abide by or comply with a final award, on delivery of a request by a Contracting Party whose investor was a party to the arbitration, an arbitral tribunal under Article 16* [*State-State arbitration*] *may be established. The requesting Contracting Party may seek in such proceedings:*
> (*a*) *a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement, and*

17 A list of the different FTAs and BITs concluded by Mexico which are in effect is contained in Annex II.

(*b*) *a recommendation that the Contracting Party abide by or comply with the final award.*[18]

Other agreements concluded by Mexico also promote the use of arbitration and other alternative dispute mechanisms. To this effect, the contracting parties are required to provide adequate procedures to enforce arbitration agreements and arbitral awards in their territories.[19] As a general rule, the foreign investor has standing to bring an arbitration, however, some Mexican FTAs allow the investor to bring a claim on behalf of his investment as well.[20] As of October 2013, twenty-five cases have been initiated against Mexico under this framework of bilateral and multilateral agreements. Fifteen of these cases have been concluded.[21]

---

18 Agreement between the Government of the United Mexican States and the Government of the Republic of Korea for the Promotion and Reciprocal Protection of Investments entered into force on June 27, 2002. For other examples, *see* Annex II.

19 *See* Annex II. Art. 2022 of NAFTA on alternative dispute resolution provides:

> 1. Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.
>
> 2. To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.
>
> 3. A Party shall be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration.
>
> 4. The Commission shall establish an Advisory Committee on Private Commercial Disputes comprising persons with expertise or experience in the resolution of private international commercial disputes. The Committee shall report and provide recommendations to the Commission on general issues referred to it by the Commission respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area.

20 For example, Art. 1117 of NAFTA provides:

> Claim by an Investor of a Party on Behalf of an Enterprise:
>
> 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

21 *Secretaría de Economía de México*, available at http://www.economia.gob.mx/comunidad-negocios/comercio-exterior/solucion-controversias/inversionista-estado (last visited on

IV National Law

Arbitration proceedings in Mexico are governed by federal law and are specifically regulated by Title Four of the Federal Commercial Code, "Commercial Arbitration."[22] Since 1993, Title Four of the Commercial Code has incorporated the UNCITRAL Model Law with minor modifications.[23] This law governs domestic and international arbitration in Mexico.[24] In January 2011, Title Four of the Commercial Code was modified.[25] This reform involved changes in four important areas in which interpretation problems and doubts existed

June 22, 2014). Five of these cases are notice of intent that are not active. Most of these cases have been filed under NAFTA.

22 Although the arbitration regime in the Commercial Code is intended to be a self-contained system for regulating arbitration proceedings and the recognition and enforcement of national and international arbitral awards, some other provisions and rules apply, such as international treaties, certain supplementary rules of procedure from the federal and local civil codes, and certain jurisprudence.

23 The Supreme Court of Mexico has expressly recognized this and referred to the explanatory note prepared by UNCITRAL on the Model Law when interpreting the arbitration provisions in the Commercial Code. Suprema Corte de Justicia de la Nación [Federal Supreme Court of Justice], First Chamber, Amparo en Revisión 755/2011, June 13, 2012 ("*City Watch v. ADT*"), ¶¶ 64–65, in reference to two related arbitrations: *ADT Security Services, S.A. de C.V. v. City Watch, S.A. de C.V.*, Canaco Case No. 137, and *City Watch, S.A. de C.V. v. ADT Security Services, S.A. de C.V.,* Canaco Case No. 237, Suprema Corte de Justicia de la Nación [Federal Supreme Court of Justice], First Chamber, Recurso de Revisión 3836/2004, Jan. 11, 2006, in connection with the Canaco arbitration *LDC, S.A. de C.V. v. ADT Security Services S.A. de C.V., and the National Chamber of Commerce of Mexico City* (*Canaco*) ("*LDC v. ADT*").

24 Art. 1415 of the Commercial Code indicates: "The provisions of this Title [Four] shall apply to domestic commercial arbitration and to international commercial arbitration when the place of arbitration is situated in the national territory, except as otherwise provided in the international agreements to which Mexico is a party or in any other law that establishes a different procedure or states that certain disputes are not capable of settlement by arbitration."

25 Commercial Code, *Diario Oficial de la Federación* dated Jan. 27, 2011, Arts. 1415–1480. On June 6, 2011, Mexico made a minor change to its arbitration law by adding a third paragraph to Art. 1424. The current version of Art. 1424 reads as follows:

> The judge before whom an action is brought in a matter which is the subject of an arbitration agreement shall, when requested by a party, refer the parties to arbitration unless he finds that the agreement is null and void, inoperative or incapable of being performed.
>
> Where an action is referred to in the preceding paragraph has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the judge.

under the previous law. For instance, despite the fact that the arbitration law incorporated the negative effect principle contained in Article 8 of the UNCITRAL Model Law, Mexican courts issued contradictory decisions when a party sought to enforce an arbitration agreement under the previous law.[26] The new law makes clear that all challenges against an arbitration agreement are within the jurisdiction of the arbitral tribunal except for those cases where the arbitration agreement is manifestly null and void, inoperative or incapable of being performed.[27] The new arbitration law also clarifies the procedure to follow when seeking to enforce an arbitration agreement. According to Article 1464 of the Commercial Code, the judge must immediately refer the matter to arbitration and suspend the judicial proceeding until the matter has been resolved by the arbitrators, at which time the judge shall terminate the proceedings at the request of any of the parties. If the arbitration agreement is declared null, or the arbitral tribunal does not have jurisdiction, the judge shall lift the suspension at the request of any party.

The second change concerns a major overhaul of the role played by national courts when providing judicial assistance during the arbitral process. The new law clarifies the process to be followed by the court when assisting with the constitution of the arbitral tribunal and the challenges of arbitrators, the

---

Notwithstanding the provisions of the first paragraph of this article, when a foreign resident expressly submitted to arbitration and initiates an individual or collective lawsuit, the judge shall refer the parties to arbitration. If the judge refuses the recognition of the arbitral award pursuant to Article 1462 of this Code, the rights of the plaintiff party will be reserved to file the applicable action.

26 Art. 1424 of the 1993 Commercial Code provided that: "The judge before whom an action is brought in a matter which is the subject of an arbitration agreement shall, upon request made by a party at any time, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed." Mexican courts interpreted Art. 1424 in different ways. Some of the courts ordered to refer the matter immediately to arbitration while others denied it, obligating the party trying to enforce the arbitration agreement to appeal the decision before federal courts. In 2006, the Supreme Court of Mexico settled the contradiction among the circuits. The decision was strongly criticized by the arbitration community in Mexico, arguing that it compromised the applicability of the *compétence-compétence* principle. In its decision, the Supreme Court distinguished between challenges to the arbitration agreement and challenges to the contract as a whole. According to the Court, the latter type fell to the jurisdiction of the arbitral tribunal while the former type fell to the jurisdiction of the court. *LDC v. ADT*. *See also* James A. Graham and Carlos Leal-Isla, *Observations—Cour Suprême du Mexique*, Revue de l'Arbitrage, 1040 (2006).

27 Commercial Code, Art. 1465.

taking of evidence and issues concerning arbitrators' fees.[28] In practice, this modification resulted in a more comprehensive framework regarding the relationship between arbitrators and the courts, and clarified the authority of the *juge d'appui*.

The new law also incorporates Articles 17 H and 17 I of the UNCITRAL Model Law in their entirety, providing that provisional measures issued by the arbitral tribunal shall be recognized as binding by the courts irrespective of their origin.[29] Finally, the new law also clarifies important procedural issues that existed under the previous text with respect to set-aside and enforcement proceedings. The new law adopts a clearer and faster procedure.[30]

Despite these important modifications, the 2011 reform failed to address a number of problems which continue to be unresolved as of this date. One important criticism refers to the liability of arbitrators when issuing interim measures. Under the current framework, arbitrators are liable, along with the requesting party, for any damages and lost profits caused by interim measures issued by the arbitrators.[31] Regardless of whether such liability may actually be triggered in practice, it has given Mexican practitioners cause for concern and has opened the debate on whether this could prevent Mexico from being a favorable seat for international commercial arbitration. There is also a potential conflict between Article 1424, which appears to indicate that a party can request the judge to refer the matter to arbitration without indicating the exact time when such request should be made, and Article 1464 which refers to Article 1424 but also indicates that the request to refer the matter to arbitration shall be made in the first brief on the merits submitted by the requesting party. Therefore, the procedural stage at which a party may request a judge to refer the matter to arbitration seems unclear under the new law.

V Application for Recognition and Enforcement before Local Courts

According to the Mexican arbitration law, awards, irrespective of the country in which they are made, shall be recognized as binding and shall be enforced

28 *See*, in general, Chapter X, "Court Assistance in Commercial Settlement and Arbitration," Arts. 1464–1480 of the Commercial Code.

29 Commercial Code, Arts. 1479–1480.

30 *See* section V below.

31 Art. 1480 of the Commercial Code provides: "The party requesting any interim measures, as well as the arbitral tribunal which issues such measures, shall be responsible for such measures; therefore, the damages and lost profits caused are their responsibility."

in accordance with Articles 1461–1463 of the Commercial Code.[32] Article 1462 sets forth the exclusive grounds to refuse the recognition and enforceability of an award, which are similar to those indicated by Article 36 of the UNCITRAL Model Law and Article V of the New York Convention.[33]

In addition, the 2011 reform incorporated a special executive procedure for the recognition and enforcement of arbitral awards in Mexico.[34] This special procedure is intended to be fast, efficient and with minimal burden on the parties; however, in practice this might not always be the case due to the constitutional remedy allowed under Mexican law known as *amparo*.[35] *Amparo* proceedings can take one year; however, the proceedings can be longer barring any special service of process or other procedural requirements which, by their extraordinary nature, might require additional time.

In this respect, it is interesting to note that, in light of this constitutional remedy, a number of court decisions and authors have expounded on the

---

32 *See* Annex I. The Commercial Code does not make a distinction as to the type of awards (interim, interlocutory, partial or final awards) or prohibit the enforcement of a partial or interim award. Thus, all types of awards need to comply with the requirements under Art. 1448. Grounds for annulment and enforcement are the same for all types of awards.

33 *See* Annex I. From the court decisions that have been reviewed, it seems that "arbitrability" and "public order" are the most invoked grounds to oppose the enforceability of an arbitral award. There are no reported court decisions on the enforcement of arbitral awards that have been annulled at the seat of the arbitration.

34 Commercial Code, Arts 1471–1476. Annulment of arbitral awards is also governed by this executive procedure. Under Mexican law, executive proceedings, or "*procedimiento ejecutivo*," are those judicial proceedings where the instrument on which the action is based is enforceable under Mexican law through a summary proceeding. These instruments are called "executive documents." Broadly speaking, in executive proceedings, the claimant files the original document (or a certified copy) which forms the basis of the action along with its first filing and the courts will require payment from the respondent upon serving process. If the respondent fails to pay any amounts owed under the executive document, the court officer serving respondent will attach whatever assets are sufficient to guarantee payment of the debt, including costs and expenses. Commercial Code, Arts. 1391–1392.

35 The *amparo* is a complex proceeding regulated by the *Amparo* Law. In general, the *amparo* may be conceived as an appeal filed by a private party against a law considered unconstitutional or against "an act of authority," as defined for purposes of the *Amparo* Law, when such act of authority does not conform to the applicable legal framework. There are two types of *amparos*: indirect *amparo*, which is a two-instance proceeding against an act of authority that it is not a final judgment, and a direct *amparo*, which is a one-instance proceeding to review a final judgment that has allegedly violated certain rights under the Constitution, namely the right of defense.

fact that arbitral awards are private actions, carried out by individuals acting in their private capacity and not as "authorities" within the meaning of the *Amparo* Law and as such cannot be subject to review by Mexican Federal courts via an *amparo* proceeding.[36] As indicated below, however, a party could file an *amparo* request to challenge a decision rendered by a court in an annulment or enforcement proceeding.[37]

A *Competent Courts*

Federal and local courts in Mexico have concurrent jurisdiction over commercial matters, including for the recognition and enforcement of arbitral awards. This has been a feature of Mexican law since the 19th century, when the Federal Government decided to have a uniform commercial law for all of Mexico and, in order to enforce such law, it granted jurisdiction to federal tribunals.[38] However, to prevent all commercial disputes being submitted only to federal tribunals, the Mexican Constitution provides that local courts shall also have jurisdiction when "only private interests are involved,"[39] creating the

36 Francisco González de Cossío, *National Report for Mexico*, in: Jan Paulsson (ed), INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, 39–40 (Kluwer Law International 1984, Last updated: Sept. 2011 Supplement No. 66).

37 While the prior arbitration law was in force, there were contradictory decisions rendered by the different Circuits regarding whether a direct or an indirect *amparo* should be filed against a decision annulling or enforcing an arbitral award. At the time, the Supreme Court of Mexico decided the contradiction, holding that only an indirect *amparo* would proceed against a decision vacating or enforcing an award. *See* James A. Graham and Leonel Pereznieto, *Improvement of Constitutional Remedies in regard to Arbitration*, 17(1) IBA Arbitration Newsletter 74, 74–75 (April 2012). However, under the new arbitration law, since the annulment and enforcement proceedings are characterized as "trials," it has been suggested that only the direct *amparo* would proceed against these types of court decisions. Id.

38 María del Refugio González, *Comercio y Comerciantes en México en el Siglo XIX*, in *Centenario del Código de Comercio*, UNAM Instituto de Investigaciones Jurídicas, 223, 228–233, 293 (1991).

39 Mexican Constitution, Art. 104(II).

> Article 104. Federal Tribunals shall entertain jurisdiction:
>
> [. . .]
>
> II. Over any controversy, either civil or commercial, regarding performance or application of federal laws or international treaties executed by the Mexican State. Upon claimant's request, and only when individual interests are affected, local judges and tribunals may entertain jurisdiction over such claims.
>
> First instance judgments may be appealed before the hierarchically immediate superior of the judge who entertained jurisdiction at first instance.

current system, where federal and local courts enjoy concurrent jurisdiction and competence over commercial matters. In reality, however, even when federal and local courts are competent, the larger number of commercial cases are typically filed before local courts—and only during the appeals stage will commercial cases reach federal courts.

The recognition and enforcement of arbitral awards are commercial matters and thus, insofar as the awards only involve private interests, federal and local courts have concurrent jurisdiction over these proceedings.[40] However, one could question whether arbitral awards concerning both State and "private interests" should be submitted exclusively before the federal courts when seeking to enforce such awards. This could be the case, for instance, of arbitral awards involving the interests of the State. The same argument could be raised *vis-à-vis* awards involving Mexico's public interest given foreign policy considerations. Article 104(II) of the Mexican Constitution seems to entail the federal courts as the competent authority to adjudicate over the recognition and enforcement of these types of awards.

Competence of Courts to Adjudicate over the Recognition and Enforcement

In Mexico, the competence of federal courts is circumscribed to the federal judicial circuits. There are 32 federal judicial circuits in Mexico. In turn, the competence of the local state courts is circumscribed to judicial districts within each state. Thus, aside from the determination of whether a federal or a local court has jurisdiction over the recognition and enforcement of an arbitral award, it is also necessary to determine which court is competent in order to file a claim for recognition and enforcement.

Under Article 1422 of the Commercial Code, when the seat of the arbitration is located abroad, a party may request the recognition and enforcement of an arbitral award before either of two courts: (i) the court with competence over the domicile of the debtor; or (ii) the court with competence over the place where the goods are located.[41] It is of course possible that the domicile of

40 *See* Art. 1422 of the Commercial Code.

41 Id. There are a number of additional rules to determine the competence of a court in certain scenarios. For example: if the debtor has several domiciles, then the general rule is that the claimant has the right to select in which court it will file its action (Commercial Code, Art. 1106); if the debtor has no fixed domicile, then the competent court shall be the court of the place where the contract was signed—for personal actions—or where the goods are located—for real actions, or actions *in rem* (Commercial Code, Art. 1107); and if the goods are located in different judicial districts, then any court with jurisdiction over any of those districts will be competent to recognize and enforce the award (Commercial Code, Art. 1108).

the debtor and the goods are located within the same judicial district, in which case both tests will point to the same court as the competent court.

B *Applicable Awards*

Mexican arbitration law distinguishes between three types of arbitral proceedings: (i) national arbitrations conducted in Mexico; (ii) international arbitrations where the seat of arbitration is in Mexico; and (iii) international arbitrations where the seat of arbitration is outside of Mexico.[42] This distinction will determine the requirements that need to be satisfied in order to enforce an arbitral award in Mexico. The first two categories are governed by Title Four of the Commercial Code in its entirety, while the third category is only subject to certain provisions of Title Four of the Commercial Code.[43]

According to Article 1448 of the Commercial Code, awards issued in Mexico (domestic or international) must be issued in writing, be signed by the arbitrators, and reasoned, unless the parties agree otherwise. The award should also indicate the date and the place of the arbitration.[44] International awards issued abroad are not expressly subject to these requirements, but are not expressly exempt from them either. In practice, it is recommended to have a written, signed and reasoned award if enforcement is to be sought in Mexico.

C *Formalities*

The party seeking to enforce the award should present to the competent court, an original copy of the award together with the arbitration agreement or a certified copy of both documents. If the award has not been drafted in Spanish, the party should also provide a Spanish translation of the award. Such translation needs to be prepared by an official interpreter,[45] although in practice, parties prepare their own translation and then have it reviewed and certified by an official interpreter. The Mexican arbitration law does not indicate time limits for seeking the enforcement of an award. Therefore, the general statute of

42 Commercial Code, Art. 1415.

43 Commercial Code, Arts. 1424, 1425, 1461, 1462 and 1463.

44 Commercial Code, Art. 1448.

45 Commercial Code, Art. 1461. Official interpreters are translators who register before a *consejo de la judicatura*, a division of the Mexican judiciaries at the federal and local levels who, among other things, regulate the judiciary and maintain registries of individuals authorized to act as experts in specific fields of knowledge, including translators.

limitations applies (*i.e.*, 10 years from the date when the award is notified to the parties).[46]

D *Procedure*

The procedure for the recognition and enforcement of awards in Mexico is a special summary proceeding, which is intended to be simple, fast, efficient, and low cost.[47] In general terms, a typical procedure for recognition and enforcement of an arbitral award has five steps: (i) request for enforcement; (ii) answer to the request; (iii) evidentiary period; (iv) hearing; and (v) decision. The request for enforcement is filed before the courts by the party seeking recognition and enforcement, along with an original or a certified copy of the award and the arbitral agreement, accompanied by their certified translation in Spanish, if necessary.[48] Once the court has admitted the request, it will notify the other parties and will grant them 15 business days (from the date when notice is served) to file their answer to the request.[49] The other parties may or may not file an answer to the request for recognition and enforcement, but failure to file an answer does not affect the 15-day deadline.[50] If the parties wish to submit any evidence, they must offer the evidence along with their original filings. However, if the parties fail to submit any evidence and the judge does not consider that any evidence is necessary, then the judge will fix a date for a hearing, which should be held within 3 business days.[51] Nevertheless, if the parties submit evidence or the judge considers that it is necessary to discuss evidence, then the judge will fix a term of 10 business days for examining evidence and fix a date for the hearing, which should be held within three business days after the expiration of such term.[52] The parties are not required to attend the hearing, which is held regardless of their attendance.[53] Once the

46 Commercial Code, Art. 1047. Regarding the annulment of arbitral awards, this statute of limitations is three months from the date when the award is notified to the parties. Commercial Code, Art. 1458.

47 Commercial Code, Arts. 1471, 1472–1476. This is substantially the same procedure for annulment of arbitral awards. Commercial Code, Art. 1470, paragraph V.

48 Commercial Code, Art. 1461.

49 Commercial Code, Art. 1473. For purposes of Mexican law, business days are Monday through Friday, excluding official holidays, other days as indicated on the official calendar of each court, or exceptionally, those days designated as a non-working day by judicial authorities for reasons of force majeure or otherwise. Commercial Code, Art. 1064.

50 Commercial Code, Art. 1474.

51 Id.

52 Commercial Code, Art. 1475.

53 Commercial Code, Art. 1474.

hearing is held, the judge summons the parties to hear the court's decision. The decisions rendered by the court during this special trial and its final judgment are not subject to appeal,[54] but may be subjected to scrutiny through *amparo* proceedings.[55] Annex 3 summarizes the different stages of the proceeding.

Despite the above, in practice, it is common for the party against which enforcement is sought to initiate a set-aside proceeding against the award based on any of the grounds recognized by the UNCITRAL Model Law, which are incorporated into Mexican law.[56] Finally, it is worth noting that there are no court fees in Mexico; however, there are a number of administrative costs, for example, the preparation of certified copies of the docket or additional copies of any ruling or judgment, which are covered by the parties.

VI Leading Cases

Recently there have been two decisions rendered by the Supreme Court of Mexico that have been widely discussed by the arbitration community because of their implications to arbitration practice in Mexico. The first case relates to the annulment of an arbitral award issued by an arbitral tribunal in the case of *City Watch v. ADT*. In this case, the dispute arose from a distribution agreement between two Mexican parties under the mediation and arbitration rules of the National Chamber of Commerce of Mexico City ("Canaco").[57] The second case relates to the enforcement of an arbitral award rendered in the case of *Commisa v. PEP*, an ICC arbitration between a Mexican subsidiary of Halliburton and *Pemex-Exploración y Producción* ("PEP"), a subsidiary of Pemex.[58]

---

54 Commercial Code, Art. 1476.

55 *See supra* fn. 34.

56 Commercial Code, Art. 1457. From the analyzed decisions, it seems that two of the most common grounds raised by the party seeking to annul the award are the invalidity of the arbitration agreement and considerations of public policy. It should be noted that the Mexican judge may suspend the enforcement of the award pursuant to Art. 1463 of the Commercial Code. Art. 1463 provides: "If an application for setting-aside or suspension of an award has been made to a judge of the country in which, or under the law of which, that award was made, the judge to whom recognition or enforcement is requested may, if he considers it proper, adjourn his decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide sufficient security."

57 *City Watch v. ADT*.

58 *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex Exploración y Producción*, ICC Case No. 13613/CCO ("*Commisa v. PEP*") ICC Int'l Ct. Arb.

A City Watch v. ADT

In *City Watch v. ADT*, the Supreme Court of Mexico opined on the distinction between the "recognition" and "enforcement" of an award for purposes of Mexican arbitration law and confirmed the concurrent jurisdiction that federal and local courts have for the recognition process.[59] According to the Supreme Court,

> The recognition of the arbitral award is the formal act carried out by judicial authorities and which declares it as final and binding regarding the issues disputed by the parties; the effect of this jurisdictional proceeding is to give legal effect to the operative part of the award even though this does not involve its active enforcement, a concept derived from the notion that there are differences between recognition of the award and its enforcement; that is, an award may be recognized without it being enforced since it can be presented at trial as evidence that a dispute submitted to trial has been finally settled (*res iudicata*) and therefore, it would not be necessary to re-litigate the matter; it can also be recognized to be offered as evidence and the basis for setoffs.
>
> The enforcement of the award is the means to execute the effects of the operative section of such award, including through coercive means and even against the will of the parties under obligation to comply; it is the mechanism pursuant to which, through judicial intervention and with the possible use of public force, [the parties are] enjoined to perform and consummate the arbitral award to its final consequences; these proceedings shall be brought before the local or federal judge with territorial jurisdiction over the domicile of the respondent or, failing that, of the location of the goods subject to execution.[60]

---

59 The decision also dealt with two other important issues in arbitration: (i) grounds for annulment, and (ii) the concept of public order as one of the grounds to vacate an arbitral award. With respect to the grounds for annulment, the Supreme Court held that the grounds set forth in Art. 1457 of the Commercial Code are the exclusive grounds to vacate an award. Regarding "public order," the Court relied on the UNCITRAL preparatory work of the Model Law to determine its meaning, and concluded that "an award violates public policy and consequently constitutes a ground for annulment, when the issue analyzed by the arbitral tribunal goes beyond the limits of the legal institutions of the state, principles, rules and institutions that form the state and therefore, transcend the community for the seriousness of the irregularities of the award." *City Watch* at ¶ 81.

60 Id. at ¶¶ 49.30–49.31 (emphasis in the original).

Although the distinction between recognition and enforceability made by the Supreme Court follows international arbitration law, the court is misguided in saying that an award must be recognized ("approved") to produce legal effects. First, an award produces effects independently of the recognition process. Second, Article 1471 of the new arbitration law indicates that no homologation (*exequatur*) is required for the recognition and enforcement of arbitral awards.[61] However, in light of this holding, the Supreme Court seems to suggest otherwise.

B Commisa v. PEP

The *Commisa v. PEP* arbitration arose out of an engineering, procurement and construction contract entered into by the parties in 1997 for the design and construction of two offshore gas compression platforms in the bay of Campeche, Mexico. The contract was amended a number of times throughout its life and was subject to significant changes.[62] Towards the end of the project, PEP notified Commisa that it intended to administratively rescind the contract.[63] Due to the parties' failure to resolve the dispute amicably, Commisa brought an ICC arbitration claim pursuant to the contract. Two weeks after, PEP administratively rescinded the contract.

The *Commisa v. PEP* arbitration showcases a number of issues regarding enforcement of awards in Mexico. The first is that acts of State entities acting in exercise of their governmental authority are usually not arbitrable in Mexico. A second issue is the perils of engaging in parallel litigation, particularly in

61 There is debate in Mexico regarding the concepts of "homologation" and recognition. In fact, several court decisions refer to both terms as equivalent. However, in light of Art. 1471 of the Commercial Code, the 2011 reform seeks to make a distinction between the two terms, which apparently was not recognized by the Supreme Court in the *City Watch v. ADT* case. Art. 1471 indicates: "For the recognition and enforcement of the arbitral awards referred to in Arts. 1461 to 1463 of this Code, no homologation is required. Unless the recognition and enforcement are required as defense in a trial or other proceeding, the recognition and enforcement shall be brought under the special proceeding referred to in Arts. 1472 to 1476."

62 Given that PEP is a governmental entity and subject to public procurement laws, the contract was considered an administrative contract under Mexican law and therefore governed by a series of laws and regulations of public and administrative nature.

63 In accordance with the Contract, "In the event that the Contractor finds itself in one or more of the grounds described in Clause 10.3.2 and Clause 10.3.3, or in general fails to comply with . . . the Law of Acquisitions and Public Works . . . PEP may rescind the present contract administratively . . .".

amparo proceedings, where a decision by a court might have an adverse impact on the arbitration.

In this case, Commisa filed for arbitration seeking, among other things, payment of significant sums owed by PEP for works performed, and damages for wrongful termination of the contract. Prior to the constitution of the arbitral tribunal, PEP tried to draw down on certain guarantees posted by Commisa. Commisa filed for *amparo* before Mexican federal courts seeking an injunction against PEP's attempt to collect on the bonds.[64] In the meantime, the arbitral tribunal was constituted and ordered PEP to abstain from collecting on the bond. Yet, the tribunal's order was issued after the decisions in the *amparo* proceedings found that (i) PEP acted as a public authority when rescinding the contract; (ii) the authority of governmental entities to administratively rescind a contract was constitutional; and (iii) PEP had duly complied with the procedure for administrative rescission. In its award, however, the arbitral tribunal found that PEP had breached its obligations under the contract and had wrongfully terminated the contract, awarding Commisa approximately USD 350 million (including interest), and PEP approximately USD 6 million.

PEP sought to annul the arbitral award before the Mexican courts arguing that (i) the dispute was not arbitrable, and (ii) the award conflicted with public policy. The Mexican Fifth District Court dismissed PEP's claims because it found, among other things, that the award did not conflict with public policy. PEP challenged this decision through an *amparo*, but the Tenth District Court dismissed PEP's *amparo*, finding that the broad arbitration agreement covered damages for breach of contract and administrative rescission. PEP appealed to the Eleventh Collegiate Court for the Federal District and the court granted PEP's *amparo* on the grounds that administrative rescissions were a matter of public policy for safeguarding public resources, among other things.[65]

Commisa sought to confirm the arbitral award in the United States. The District Court of the Southern District of New York confirmed the award, finding that the annulment by the Mexican court "violated basic notions of

64 In its *amparo*, Commisa argued that the legality of PEP's administrative rescission of the contract was the subject-matter of the arbitration and that allowing PEP to exercise its authority and draw down on the bonds would irreparably harm Commisa and its parent companies.

65 In its decision, the Eleventh Collegiate Court relied on Art. 98 of the Law on Public Works and Related Services, although the Court indicated that it was not applying Art. 98 "retroactively" but rather as a "guiding principle." According to Art. 98 of the Law on Public Works and Related Services: "[t]he administrative rescission, early termination of the contracts and such cases as the Regulation of this Law may determine may not be subject to arbitration proceedings." *See supra* fn. 8.

justice."[66] According to the U.S. District Court, the Mexican court applied retroactively the Law on Public Works and Related Services, which was adopted after the contract concluded between the parties, to vacate the award in favor of Commisa.[67] For the U.S. District Court:

> *applying a law that came into effect well after the parties entered into their contract was troubling. But this unfairness was exacerbated by the fact that the* [*Mexican*] *Eleventh Collegiate Court's decision left COMMISA without* [*an administrative*] *remedy to litigate the merits of the dispute that the arbitrators had resolved in COMMISA's favour.*[68]

VII Conclusions

The 2011 reform to the Mexican arbitration law eliminates some of the problems and uncertainties that existed under the previous text. However, it is too soon to assess how Mexican courts are going to interpret some of the new provisions of the law in practice, in particular with respect to Article 1464 concerning the enforceability of arbitral agreements and Article 1480 regarding provisional measures.

With respect to the enforcement of arbitral awards, the cases cited above highlight the prevalent trends in Mexican courts. On the one hand, Mexican courts support arbitration and, as a general matter, favor enforcement of arbitral awards. On the other hand, Mexican courts continue to overzealously guard the limits for arbitration—sometimes perhaps overstepping their boundary. As courts and practitioners become more familiar with principles of international commercial arbitration, it is expected that some of the interpretations

66 *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, Opinion and Order Granting Petitioner's Motion to Confirm Arbitration Award and Denying Respondent's Motion to Dismiss Petition, 10 Civ. 206, U.S. District Court, Southern District of New York, Aug. 27, 2013, p. 31.

67 Id. at 28–30.

68 Id. at 29. Apparently by the time the Eleventh Collegiate Court issued its decision vacating the arbitral award, the administrative remedy that Commisa could have sought under Mexican law was no longer available in light of the statute of limitations applicable to this type of remedy (*i.e.*, 45 days). It is interesting to note that the implications of this case are not over. Recently, Kellogg, Brown & Root (KBR), Commisa's parent company, a U.S. company, filed a notice of arbitration before the Mexican Government under NAFTA, arguing, among other things, that Mexico has breached its obligations under NAFTA regarding discriminatory treatment.

made by the courts in connection with the recognition and enforceability of arbitral awards shall closely follow such principles.

Annex I

Federal Commercial Code

Title Four: Commercial Arbitration

. . . .

Chapter IX
Recognition and Enforcement of Awards

Article 1461—An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, after application in writing to the judge, shall be enforced subject to the provisions of this chapter.

The party relying on an award or applying for its enforcement shall supply a duly authenticated original copy of the award or a certified copy thereof, as well as the original arbitration agreement referred to in Section I of Article 1416, and Article 1423, or a certified copy thereof. If the award is not made in Spanish, the party relying on the award shall supply a Spanish translation of such documents, prepared by an official translator.

Article 1462—Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only when:

I. The party against whom the award is invoked, furnishes to the competent judge of the country where recognition or enforcement is sought, proof that:
   a) A party to the arbitration agreement 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;
   b) It was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
   c) 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. Nevertheless, 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;

d) 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;

e) The award has not yet become binding on the parties or has been set aside or suspended by the judge of the country in which, or under the law of which, that award was made; or

II. The judge finds that the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Mexico; or the recognition or enforcement of the award would be contrary to public policy.

Article 1463—If an application for setting aside or suspension of an award has been made to the judge of the country in which, or under the law of which, that award was made, the judge 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 sufficient security.

Annex II[69]

Bilateral Treaties

a) The following treaties provide for investor-state arbitration under ICSID, ICSID Additional Facility, or UNCITRAL:

BIT	Entry into Force	Investor-State Dispute Resolution Provision	Award and Enforceability Provision
Argentina	22 July 1998	Article 10	Article 10
Australia	18 July 2007	Article 13	Article 19
Czech Republic	14 March 2004	Article 10	Article 17
Denmark	23 September 2000	Article 9	Article 16
Finland	21 August 2000	Article 10	Article 17
Greece	17 September 2002	Article 10	Article 17

69 Source: *Secretaría de Economía de México*, available at http://www.economia.gob.mx/comunidad-negocios/comercio-exterior (last visited on June 21, 2014).

TABLE (*cont.*)

BIT	Entry into Force	Investor-State Dispute Resolution Provision	Award and Enforceability Provision
Iceland	28 April 2006	Article 10	Article 17
Korea	28 June 2002	Article 8	Article 15
Netherlands	1 October 1999	Article 4	Articles 9 and 10
Panama	14 December 2006	Article 13	Article 20
Portugal	4 September 2000	Article 9	Article 16
Switzerland	11 March 1996	Schedule, Article 3	Articles 8 and 9

b) The following treaties provide for investor-state arbitration under ICSID, ICSID Additional Facility, UNCITRAL, or the ICC:

BIT	Entry into Force	Investor-State Dispute Resolution Provision	Award and Enforceability Provision
Austria	26 March 2001	Article 11	Article 18
Benelux	20 March 2003	Article 11	Article 18
France	11 October 2000	Article 9	Article 9
Germany	23 February 2001	Article 12	Article 19
Italy	4 December 2002	Annex, Section 2, Article 2	Annex, Section 2, Article 9
Sweden	1 July 2001	Article 9	Article 17
Uruguay	1 July 2002	Article 8	Article 8

c) The following treaties provide for investor-state arbitration under the ICSID, ICSID Additional Facility, UNCITRAL, or any other rules, as agreed by the parties:

BIT	Entry into Force	Investor-State Dispute Resolution Provision	Award and Enforceability Provision
Belarus	27 August 2009	Article 13	Article 20
China	6 June 2009	Article 13	Article 20

BIT	Entry into Force	Investor-State Dispute Resolution Provision	Award and Enforceability Provision
Singapore	4 April 2011	Article 11	Article 18
Slovakia	8 April 2009	Article 13	Article 20
Spain	4 April 2008[70]	Article XI	Articles XVI and XVII
Trinidad and Tobago	16 September 2007	Article 13	Article 20

d) The following treaties provide for specific arbitration rules:

Country	Entry into Force	Investor-State Dispute Resolution Provision	International Arbitration	Award and Enforceability Provision
Cuba	29 March 2002	Appendix, Article 4	1. ICSID 2. UNCITRAL 3. ICC 4. Any other rules, as agreed by the parties	Articles 8 and 9
India	23 Feb. 2008	Article 12	1. ICSID 2. UNCITRAL 3. Any other rules, as agreed by the parties	Article 19
United Kingdom	25 July 2007	Article 11	1. ICSID 2. ICSID Additional Facility 3. PCA 4. Any other rules, as agreed by the parties	Article 18

70 The BIT replaced a previous BIT concluded between Mexico-Spain (Dec. 18, 1996).

Free Trade Agreements[71]

The following FTAs contain an investment chapter and provide for ICSID, ICSID Additional Facility, or UNCITRAL arbitration as the method for settling disputes between foreign investors and the host States:

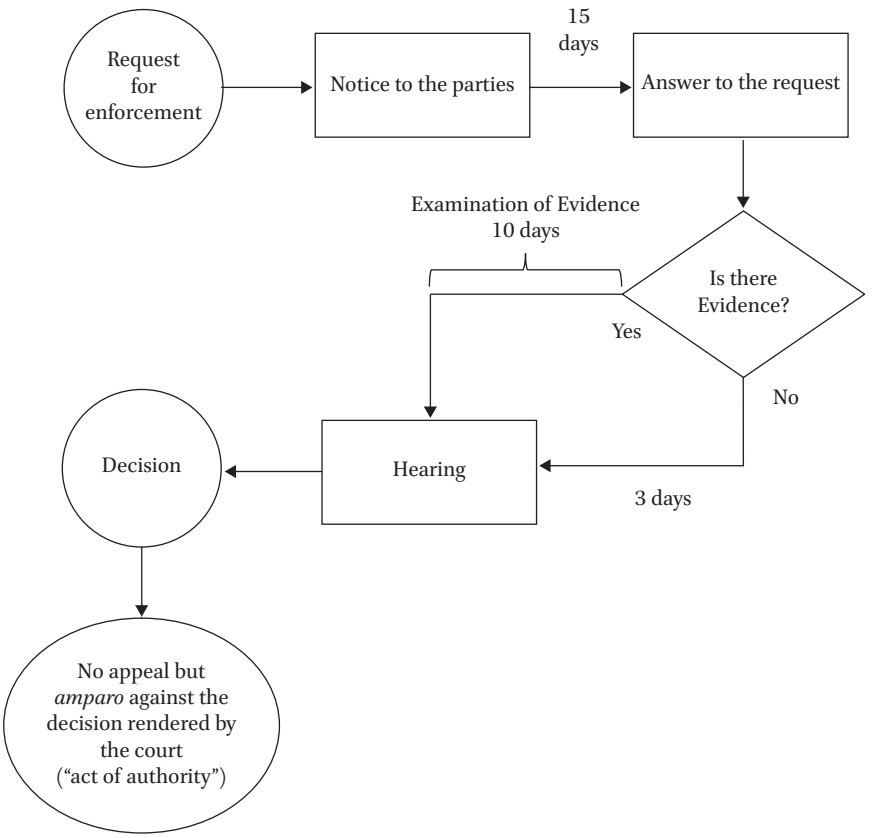
Country	Entry into Force	Investor-State Dispute Resolution Provision	Award and Enforceability Provision / Promotion of ADR
NAFTA (Mexico, U.S., Canada)	1 January 1994	Article 1120	Articles 1135 and 1136 / Article 2020
Central America FTA (Mexico, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua)	1 September 2012 (regarding Mexico, El Salvador and Nicaragua) 1 January 2013 (regarding Honduras) 1 July 2013 (regarding Costa Rica) 1 September 2013 (regarding Guatemala)	Article 11.20	Article 11.30
Chile	1 August 1999	Articles 9–21	Articles 9–36 and 9–37 / Articles 18–19
Colombia	2 August 2011	Articles 17–18	Articles 17–23 / Articles 19–19
PERU[72]	1 February 2012	Articles 11.20	Articles 11–31

71 Most of the FTAs concluded by Mexico followed the provisions of NAFTA, although the most recent agreements present some modifications. Mexico has also concluded FTAs with Bolivia (1995); Israel (2000); the European Union (2000); and the States of the European Free Trade Association (2001). However, these agreements do not contain an investor-state dispute resolution provision.

72 The Mexico-Japan FTA also provides for recourse to arbitration under any other rules as agreed to by the parties.

Country	Entry into Force	Investor-State Dispute Resolution Provision	Award and Enforceability Provision / Promotion of ADR
Uruguay	15 July 2004	Articles 13–20	Articles 13–35 and 13–36 / Articles 18–16
Japan[73]	1 April 2005	Articles 79	Articles 92 and 93

Annex III



73 The Mexico-Japan FTA also provides for recourse to arbitration under any other rules as agreed to by the parties.

CHAPTER 13

Nicaragua

Fernando Medina Montiel and José René Cruz Orué

I Introduction

The purpose of this chapter is to analyze and develop Nicaragua's existing regulatory system in relation to the enforcement of judgments handed down by foreign courts, limiting the content of the chapter to judgments issued by competent jurisdictional authorities. That is, we did not focus the analysis of this work solely on the enforcement of foreign arbitral awards because there are no precedents of the Supreme Court of Nicaragua in that respect. It is important to note that Nicaragua ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Inter-American Convention on International Commercial Arbitration in 2003. Nicaragua's Mediation and Arbitration Law was approved in 2005.

Subsequently, this chapter aims to identify the practical applications and trends of the Supreme Court of Justice over the decades in the implementation of the provisions contained in the Nicaragua Code of Civil Procedure and the Bustamante Code. The decisions of the Supreme Court have been positive and consistent thus far in relation to judgments handed down by foreign courts.

As regards to existing obstacles related to alternative dispute resolution methods and, in particular, the enforcement of foreign arbitral awards and the reason for refusing them, notice is given to the reader on the contents of the preliminary draft of the new Code of Civil Procedure, which is currently under a consultation process at the National Assembly.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

The Convention adopting the Code of Private International Law,[1] signed on February 13, 1928, was approved by the legislative chambers of the Republic of Nicaragua on January 17, 1929, and sanctioned by the Executive Branch

1 Convention on Private International Law (Havana, Cuba Feb. 20, 1928) *entered into force* Mar. 30, 1930, (hereinafter, Bustamante Code).

 | DOI 10.1163/9789004284364_015

on January 18, 1929. The letter of deposit was signed by the President of Nicaragua and endorsed by the Secretary of State for Foreign Affairs on December 17, 1929. Nicaragua expressed the following reservations germane to the Bustamante Code:

> *The Republic of Nicaragua will be unable to apply the provisions of the Code of Private International Law which may be in conflict with the Canon Law in matters that now or in the future Nicaragua may consider to be subject to such Canon Law. The Nicaraguan Delegation declares, as it has previously done several times verbally throughout the discussions, that some of the provisions of the approved Code are in disagreement with express provisions of the legislation of Nicaragua or with principles which form the basis of such legislation; but, as deserved homage to the notable work of the illustrious author of this Code, it chooses, instead of formulating the corresponding reservations, to make these declarations and to leave to the public authorities of Nicaragua the formulation of such reservations or the modification, as far as possible, of the national legislation, in cases of conflict.*

There is extensive jurisprudence of the Supreme Court in relation to enforcement of foreign judgments, applying Article 423 et seq. of the Bustamante Code[2] and Article 542 et seq. of the Code of Civil Procedure.

For example, the Supreme Court of Justice has granted exequatur recognizing a decision issued by a Costa Rican judge, authorizing two individuals to withdraw the funds from the Nicaraguan bank account of a deceased person. The court's decision in this case was given because the requirements of the Bustamante Code concerning civil judgments were met.[3] Similarly, an exequatur was granted to a divorce decree issued in the United States. Although

---

2 By way of examples:
Supreme Court of Justice of Nicaragua, Judgment of May 17, 1935, Judicial Bulletin 8967.
Supreme Court of Justice of Nicaragua Judgment of June 20, 1946, Judicial Bulletin 13507.
Supreme Court of Justice of Nicaragua Judgment of September 29, 1950, Judicial Bulletin 15267.
Supreme Court of Justice of Nicaragua Judgment of March 25, 1953, Judicial Bulletin 16449.
Supreme Court of Justice of Nicaragua Judgment of September 6, 1960, Judicial Bulletin 20116.
Supreme Court of Justice of Nicaragua Judgment of March 11, 1963, Judicial Bulletin 91/1963.
Supreme Court of Justice of Nicaragua Judgment of August 24, 1971, Judicial Bulletin 154/1971.
Supreme Court of Justice of Nicaragua Judgment Number 2 of January 25, 1993.

3 Supreme Court of Justice of Nicaragua, Judgment of June 8, 1970, Judicial Bulletin 110/1970. Also mentioned by Alejandro Montiel Argüello, *Nicaraguan Civil Jurisprudence Supplement*, 70, (1970–1974).

the United States did not ratify the Bustamante Code, the test for reciprocity was not required in this case because there was jurisprudence relating to the granting of an exequatur.[4]

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[5] was enacted by the Nicaraguan National Assembly through Decree No. 3579 of June 25, 2003, published in Official Gazette No. 133 of July 16, 2003, and entered into force on December 23, 2003.[6] The Inter-American Convention on International Commercial Arbitration[7] was enacted by the National Assembly through Decree No. 3362 of February 4, 2003, published in Official Gazette No. 38 on 24 February 2003, and ratified by the President of the Republic of Nicaragua through Decree No. 54–2003 dated July 2, 2003, which was published in Official Gazette No. 126 on July 7, 2003. The instrument of ratification was deposited on October 2, 2003. The Government of Nicaragua did not express any reservation in relation to these two instruments.

It is important to clarify that the ratifications of the aforementioned conventions were the result of the promotional and management efforts led by business associations, academia and international experts, as preparatory actions for the process of approval of the Mediation and Arbitration Act (Law No. 540).

III Relevant Provisions in Free Trade or Bilateral Investment Agreements

Nicaragua's major trading partner is the United States of America, which, in conjunction with Central American trade, represents 37.10% of the nation's export.[8] Consequently, the CAFTA-DR Free Trade Agreement was approved by Presidential Decree No. 4371, published in Official Gazette No. 199 of

4 Supreme Court of Justice of Nicaragua, Judgment of August. 24, 1971, Judicial Bulletin 154/1971. Also mentioned by Alejandro Montiel Argüello, *Nicaraguan Civil Jurisprudence Supplement*, 70–71, Imprenta Nacional, Managua (1970–1974).

5 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), *entered into force* Dec. 23, 2003 (hereinafter, New York Convention).

6 UNCITRAL, Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). Available at, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited on Feb. 6, 2014).

7 Inter-American Convention on International Commercial Arbitration (Panama, 1975), *entered into force* Nov. 1, 2003 (hereinafter, Inter-American Convention).

8 Export Processing Center (CETREX), Exports by Economic Region, January-August 2013: United States of America, 25.38%; Central America, 11.72%; Venezuela, 15.21%; Canada, 11.72%. Available at http://www.cetrex.gon.ni (last visited on June 13, 2014).

October 14, 2005, and entered into force for Nicaragua on April 1, 2006.[9] It contains the following relevant provisions:[10]

> Article 20.22, (Alternative Dispute Resolution), provides that: *Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area*. It stipulates that "*each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes*." Paragraph 3 of the same article states that: "*A Party shall be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration.*"

IV National Law

The starting point for analyzing alternative dispute settlement methods and, in particular, the recognition and enforcement of foreign arbitral awards, is the Political Constitution of Nicaragua, which states in Article 5 that it "*. . . recognizes the principle of pacific settlement of international disputes through the means provided by international law . . .*" This article goes on to provide that "*Nicaragua adheres to the principles of International Law, which are hereby recognized and ratified*." To supplement the foregoing provisions, Article 32 touching on the principle of legality, maintains that "[*n*]*o one is obligated to do what is not required by law, or barred from doing what is not prohibited by law*."

The Mediation and Arbitration Law (No. 540) highlights the significant progress made by Nicaragua relevant to the modernization of its national regulatory framework.[11] The United Nations Commission for International Trade Law

9 The Dominican Republic-Central America-United States Free Trade Agreement, *entered into force* Apr. 1, 2006 (hereinafter, CAFTA-DR).

10 Mr. Salvador Stadthagen, the Ambassador of Nicaragua to the United States of America remitted a letter to Mr. Jose Miguel Insulza, Secretary General of the Organization of American States, based on Article 22.5.2 of CAFTA-DR, indicating that it shall enter into force in Nicaragua on Apr. 1, 2006.

11 Mediation and Arbitration Law (hereinafter, LMA). Published in Official Gazette No. 122 of June 24, 2005, and entered into force 60 days after its publication.

has recognized that the LMA is based on the UNCITRAL Model Law of 1985.[12] This in fact is an affirmation that allows arbitrators and legal advisers, national and foreign, to have confidence in the content and guarantees of the LMA.

As to its scope of application, Article 21 of the LMA provides that it shall apply to national and international arbitration, without prejudice to any multilateral or bilateral treaty in force to which Nicaragua is a party. Much like Article 1.3 of the Model Law on International Commercial Arbitration, Article 22 of the LMA provides as follows:

> *An arbitration is international if the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States, or one of the following places is situated outside the State in which the parties have their places of business:*
> 1. *The place of arbitration if determined in, or pursuant to, the arbitration agreement.*
> 2. *The place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely related.*

Code of Civil Procedure

The national regulations concerning enforcement of foreign judgments are established in the Code of Civil Procedure of Nicaragua.[13] Article 542 of the CCP provides that final decisions rendered in foreign countries shall have the legal force and effect laid out in the respective treaties, and the proceedings established under Nicaraguan law shall be followed for their execution, provided that such proceedings are not modified by the treaties. The article goes on to state that if there are no special treaties with the State in which the final decision was made, it shall have the same legal force as any final decision issued in Nicaragua. In accordance with the provisions of Article 542, one must consider Article 3 of the New York Convention, which provides that each

12 UNCITRAL, *Status UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*. Nations of the Americas that have a law based on the Model Law of 1985 are Canada, Costa Rica*, United States of America in 7 States, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru*, Dominican Republic, Venezuela (* based on the Model Law of 2006). *See*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited on Feb. 6, 2014).

13 Code of Civil Procedure of Nicaragua, (hereinafter, CCP), Arts. 542–552. The CCP has been in force since 1906.

contracting State must recognize the authority of the arbitral decision and shall enforce it in accordance with the rules of procedure in force in the territory in which the decision was made.

Interestingly, Article 543 of the CCP, provides that if the final decision originates from a State in which Nicaraguan court decisions are not enforced pursuant to its laws, then that State's final decision would not have any legal force in Nicaragua. The following cases are postulated to illustrate the relation thereto:

- In 1948, the Supreme Court of Justice granted an exequatur to a Mexican divorce decree because it was determined that Mexico is a State which enforced Nicaraguan judgments on the basis of jurisprudence.[14]
- An exequatur was refused to a judgment issued in France because it was not proven that Nicaraguan judgments were enforced in that State.[15]

There are different systems for determining the enforcement of foreign judgments. The Nicaraguan legislation has a limited control system.[16] This means that the court must determine: (i) whether the judgment fulfills the requirements of the law;[17] (ii) whether the obligations for which enforcement is sought is lawful in Nicaragua, (iii) whether the judgment fulfills the necessary requirements of the State in which it was made in order to be considered authentic; and (iv) whether the judgment fulfills Nicaraguan legal requirements to receive full faith and credit.

Article 431 of the Bustamante Code provides that final judgments issued by a contracting State that are not enforceable, shall have the effect of res judicata in the other States if the respective conditions determined by the Bustamante Code are fulfilled, except those relating to enforcement. Article 433 of the Bustamante Code stipulates that the aforementioned procedure applies to civil judgments handed down by an international court in any of the contracting States in relation to individuals or private interests. It has been stated that Article 433 regulates writs of execution issued by an international court, such

14 Supreme Court of Justice of Nicaragua, *Sentence of the Supreme Court of Justice*, Judicial Bulletin 14156, Feb. 6, 1948. Also mentioned by Alejandro Montiel Argüello, *Nicaraguan Civil Jurisprudence*, 178 (Tome II, Managua, 1972).

15 Supreme Court of Justice of Nicaragua, *Sentence of the Supreme Court of Justice*, Judicial Bulletin 425/1963, Oct. 1, 1963. Also mentioned by Alejandro Montiel Argüello, *Nicaraguan Civil Jurisprudence*, 182 (Tome II, Managua, 1972).

16 Alfonso Valle Pastora, *Cómo Tramitar El Exequátur, ejecución de sentencias extranjeras*, 14 (Impresiones La Universal, Managua, 2002). (Title Translation: *How to Arrange the Exequatur Enforcement of Foreign Judgments*).

17 CCP, Art. 544(2)(3).

as joint commissions, arbitral tribunals, etc., as long as they are civil and refer to individuals or private interests, for enforcement in a foreign country.[18]

Writs of execution shall have legal force in Nicaragua, except as provided in Articles 542 and 543 of the CCP, as long as the following circumstances are met:[19]

a. The writ of enforcement has been issued as a result of a personal action;
b. The obligation for which enforcement is sought is lawful in Nicaragua;
c. The writ of enforcement fulfilled the requirements of the State in which it has been issued in order to be considered authentic, and fulfilled Nicaraguan legal requirements for giving faith;
d. The litigation has been carried out with the intervention of the defendant, except if the defendant is found in contempt of court for failure to appear after being summoned;
e. The writ of enforcement is not contrary to public policy;
f. The writ of enforcement is enforceable in the country of origin.

In its final part, the aforesaid article provides that: "These rules and the foregoing articles shall apply to decisions made by *judge arbitrators*." In this case, their authenticity and efficacy is confirmed by the signature or other sign of approval emanating from an ordinary superior court of the State in which the decision was made. Concerning the foregoing provision, the Bustamante Code[20] determines that the procedure and effects regulated in the previous Articles (424, 425, 426, 427, 428, 429) shall apply to decisions handed down in any of the contracting States by *arbitrators* or *amicable compositors*, providing that the matter that motivates them can be subject to settlement by arbitration in accordance with the laws of the State in which enforcement is sought.

With respect to the expression "judges arbitrators," one scholar in particular has noted that *"[a]lthough some speakers do not give the character of judgments to the decisions rendered by arbitrators and therefore do not include them in the decisions that can be enforced in foreign countries, such as the legislation of certain countries, including, inter alia, our legislation, they estimate them with the judicial authority and even regulate their fulfillment when foreign decisions are*

18 Pastora, *Cómo Tramitar El Exequátur* at 16.

19 CCP, Art. 544.

20 Bustamante Code, Art. 432.

involved".[21] Indeed, the ratification of the New York Convention and the adoption of the Mediation and Arbitration Law have changed the juridical landscape inasmuch as arbitral decisions are deemed binding and enforceable, dispelling any doubts that a judicial authority may be lacking in this respect.

The Supreme Court of Justice has expressed the following in relation to Article 544 of the Code of Civil Procedure and final decisions that have legal force in Nicaragua:

- It is inadmissible to grant an exequatur to a decree of adoption because it cannot be technically considered a judicial decision since it does not resolve any dispute and it is rather a document from a foreign country that can be registered and have legal effect in Nicaragua.[22]
- An exequatur is granted to a decree of divorce issued in the United States of America because it fulfills the requirements of Article 544 of the CCP.[23]

Concerning Article 544(4) of the CCP dealing with whether the litigation has been carried out with the intervention of the defendant, unless the defendant is found in contempt for failing to appear after being summoned, the Supreme Court has expressed that:

- It is inadmissible to grant an exequatur to a decree of divorce issued in Costa Rica because the required documents as indicated in Article 17 of the CCP are not attached and because the second requirement of Article 423 of the Bustamante Code was not fulfilled inasmuch as the defendant was appointed an ad litem counsel even though her whereabouts were known. It was ascertained that the plaintiff knew she was in Nicaragua.[24]

---

21 Aníbal Solórzano Reñazco, *Código de Procedimiento Civil de Nicaragua, Comentado y Concordado*, 489, (Tomo Segundo, Managua, 1975), (Title Translation: *Code of Civil Procedure of Nicaragua, Reviewed and Concordant*).

22 Supreme Court of Justice of Nicaragua, *Sentence of September 12, 1974*, Judicial Bulletin 195/1974. Also mentioned by Alejandro Montiel Argüello, *Nicaraguan Civil Jurisprudence, Supplement*, 72 (Tome II, 1970–1974).

23 Supreme Court of Justice of Nicaragua, *Sentence of September 16, 1966*, Judicial Bulletin 236/1966. Also mentioned by Alejandro Montiel Argüello, *Nicaraguan Civil Jurisprudence*, 182 (Tome II), 1972.

24 Supreme Court of Justice of Nicaragua, *Sentence of June 20, 1946*, Judicial Bulletin 13507. Also mentioned by Alejandro Montiel Argüello, *Nicaraguan Civil Jurisprudence*, 178 (Tome II), 1972.

- The granting of an exequatur to a decree of divorce issued in the United States is inadmissible for the time being because it has not been confirmed that the defendant has been summoned.[25]
- An exequatur is granted to a decree of divorce issued in the United States of America because it fulfills the requirements of Article 544 of the CCP wherein the defendant was summoned and a validation process was requested by the defendant.[26]

Insofar as Article 544(3) of the CPP provides *that the writ of* enforcement *must fulfill the requirements of the State in which it has been issued to be considered authentic*, the Supreme Court of Justice has ruled that:

> . . . Article 544 of the CCP defines the requirements that must be fulfilled in order for a foreign judgment to have legal force in Nicaragua. Among these requirements, some are of a formal nature, such as being authenticated and duly signed and sealed, in addition to its submission before this Court after being duly authenticated by the respective Nicaraguan authorities. The document that has been attached to the request under process does not fulfill the aforesaid requirements . . . The requested exequatur is refused . . .[27]

Article 16 of the CCP provides that *arbitral decisions, court orders or judgments* issued by any of the States of Central America shall have the same legal force in Nicaragua as they have in their place of origin, so long as the following requirements are fulfilled:

a. the arbitral decisions, court orders or judgments have been issued by a competent court;
b. they have the character of a final judgment in the country of origin;
c. the opposing party has been summoned and represented, or has been found in contempt of court pursuant to the laws of the State in which the trial took place;

---

25 Supreme Court of Justice of Nicaragua, *Sentence of April 15, 1959*, Judicial Bulletin 19449. Also mentioned by Alejandro Montiel Argüello, *Nicaraguan Civil Jurisprudence*, 181 (Tome II), 1972.

26 Supreme Court of Justice of Nicaragua, *Sentence of January 26, 1969*, Judicial Bulletin 4/1968. Also mentioned by Alejandro Montiel Argüello, *Nicaraguan Civil Jurisprudence*, 183 (Tome II), 1972.

27 Supreme Court of Justice of Nicaragua, *Sentence No. 128, July 10, 1985*.

d. they are not contrary to public policy or to the laws of Nicaragua;
e. a plea has been lodged before the Nicaraguan Supreme Court of Justice with reference to the previous points;
f. their authenticity and efficacy is confirmed by the signature or from another sign of approval emanating from an ordinary superior court of the State in which the final judgment was made.

Article 17 of the CCP details the documents to be attached pursuant to the provisions of Article 16 of the CCP. These are a complete copy of the judgment; proof that the essential party has been heard or found in contempt; a copy of the court order containing the final judgment; and a copy of the laws to which the decision is based. The privilege for the Central American countries, establishing facilities for the enforcement of decisions and compliance of certain measures was repealed by the adoption of the Bustamante Code, which prevails in the Latin American countries that have ratified it.[28] On the other hand, it can be argued that the relevant provisions in the Nicaraguan legislation concerning the enforcement of foreign judgments are found in Article 542 of the Code of Civil Procedure already mentioned in the previous paragraphs and in Article 16.[29]

V Application for Recognition and Enforcement before Local Courts

A *Competent Courts*

The Code of Civil Procedure[30] warrants that the Supreme Court of Justice (Civil Chamber of the Supreme Court)[31] shall hear the request for enforcement of a foreign judgment, except where it is to be heard by other courts according to the treaties.[32] This is supported by a Supreme Court response to consultation, expressing that petitions for exequatur of foreign judgments must be made to the Supreme Court.[33] Pertaining to the final paragraph in

28 Pastora, *Cómo Tramitar El Exequátur* at 15.
29 Alejandro Montiel Arguello, *Apuntes de Derecho Internacional Privado*, 71 (Managua, 1970). (Title Translation: *Notes on Private International Law*).
30 Code of Civil Procedure of Nicaragua, (hereinafter, CCP) (1906).
31 Organic Law of the Judiciary Power of the Republic of Nicaragua of July 15, 1998, Law No. 260, Art. 32(4),
32 CCP, Art. 545.
33 Supreme Court of Justice of Nicaragua, *Consultation dated April 3, 1964*, Judicial Bulletin 501/1964. Also mentioned by Alejandro Montiel Arguello, *Nicaraguan Civil Jurisprudence*, 182 (Tome II), 1972.

relation to the treaties and the exception, the Bustamante Code provides that the enforcement of judgments should be requested to the competent judge or court in order to take effect, upon prior compliance of the formalities required by domestic legislation.[34]

B ***Conditions***

It is important to take into account that Article 63 of the LMA determines the grounds for denying the recognition or enforcement of an arbitral award. These provisions are similar to those laid down in Article 5 of the New York Convention. It has been stated that it is necessary to take into account the two distinct concepts of recognition and enforcement. Recognition allows the arbitral award or foreign judgment to unfold its effects in the forum (*res judicata*). While enforcement activates the coercive resources of the State when the parties do not voluntarily comply and presupposes the recognition of the judgment being enforced.[35]

Under Article 63 of the LMA, the recognition and enforcement of a decision may be refused, at the request of the party against whom it is made, irrespective of the country where the award was issued. The grounds for refusal are as follows:

1. The party against whom it is made is able to prove to the competent authority of the State in which recognition and execution are requested:
    a) that the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the laws to which the parties have submitted to, or, if such law is not specified, under the laws of the State in which the decision was made;
    b) that the party against whom the arbitral decision has been made was not duly notified of the appointment of the arbitrator, or of the arbitral procedure to be followed, or was unable, for any other reason, to present their defense;
    c) that the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration, or the decision exceeds the terms of the agreement to submit to arbitration. Nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from

34 Bustamante Code, Art. 424.

35 Id. at Art. 647.

those not submitted to arbitration, the former may be recognized and enforced;

d) that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the laws of the State where the arbitration took place; or

e) that the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the laws of which, the decision has been made.

2. The recognition and enforcement of an arbitral decision may also be refused if the competent authority of the State in which the recognition and enforcement is requested finds:

a) that the subject of the dispute cannot be settled by arbitration under the laws of that State;

b) that the recognition or enforcement of the decision would be contrary to the public policies of that State.

In its final part, Article 63 provides that if the annulment or suspension of the arbitral award is requested to a competent authority, the court where the recognition or enforcement is sought may, if it considers it appropriate, defer its decision. The court may also order that the opposing party provide the appropriate guarantees, all at the request of the party that petitions for the recognition or enforcement of the decision. In contrast to a foreign award, which requires an exequatur, an arbitral award rendered under the provisions of the LMA is binding.[36]

C *Formalities*

Article 62 of the LMA applies to the recognition and enforcement of arbitral awards. This article provides that "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 law and other relevant laws," i.e., the Code of Civil Procedure. It is the responsibility of the party requesting the enforcement of the award to

36 LMA, Arts. 21 and 62.

supply the duly authenticated original award or certified copy along with the original arbitration agreement or a duly certified copy.

If the arbitral award rendered is in a foreign language, a duly certified translation of the arbitral award must be attached. Authentication is a formality whereby a competent authority certifies that a signature is genuine, while a certified copy is a formality in which a copy is certified as a true copy of the original.[37] With regards to managed or institutional arbitration, it is a standard practice of courts in other States to have admitted certifications made by the secretary general of those institutions.[38] It is uncertain whether Nicaragua will follow this trend.

Article 546 of the CCP stipulates that prior to the translation made pursuant to law, and after hearing the party against whom it is invoked, as well as the representative from the Public Ministry(Attorney General's Office) within a three day period, the court shall rule on whether or not to comply with the writ of enforcement. This ruling is not subject to appeal. Article 188 of the CCP stipulates that when an interpreter is required, an official interpreter must be used. It turns out, however, that this official does not exist in practice, and therefore it is necessary to use an interpreter appointed by the court, who may be an expert translator.

Law No. 139 which confers greater utility to the notary institution, stipulates in Article 5 that notaries are empowered to translate documents referred to in Article 1132 of the Code of Civil Procedure by means of a public deed, through an interpreter appointed by the authorized notary.[39] We should keep in mind that, pursuant to Article 11 of the Constitution, the official language is Spanish,[40] In accordance with the above, the Code of Civil Procedure provides that any written document in any language other than English must be accompanied by a translation.[41] The Bustamante Code provides in paragraph 5 that any civil or contentious administrative decision handed down in any of the contracting States shall have legal force and may be enforced in the other

37 Miguel Virgos Soriano, *Título IX, Del exequátur de laudos extranjeros, Comentario a la Ley de Arbitraje*, 655, (Edit. Marcial Pons, 2006). (Title Translation: *Title IX, The Recognition of Foreign Awards, Commentary on the Arbitration Act*).

38 Id.

39 Law No. 139 published in Official Gazette No. 36 of Feb. 24, 1992.

40 Nicaragua Constitution, Art. 11 (1987). Spanish is the official language of the State. The languages of the communities of the Atlantic Coast of Nicaragua will also have official use in the cases established by law.

41 CCP, Art. 1132.

States if the following conditions are fulfilled: The decision is translated by an officer or official interpreter of the State in which it will be enforced.[42]

Consequently, the Secretary of the Supreme Court has reported to *"... have seen in some cases that it* [*Supreme Court*] *has refused to process the exequatur because the translation was already made in a language other than Spanish."*[43] Furthermore, *"... the Bustamante Code is clear and precise in pointing out that the translation must be done in the State in which the exequatur will be enforced."*[44]

D *Procedure*

In order to be effective, an exequatur should be in line with the following process:

1. A written request for exequatur must be filed with the Civil Chamber of the Supreme Court of Justice. (CCP, Article 545). Article 546 of the CCP mandates that the time period to hear the parties is three days. The Bustamante Code, however provides for a period of 20 days.[45] Commentators have expressed that the Bustamante Code should be given precedent and therefore, the 20-day period would prevail.[46] On the subject of the term, the Supreme Court has held that: "*... Based on Article 542 et seq. of the CCP, where relevant, with the intervention of the General Attorney of the Republic* ... [and] ... *in accordance with Article 868 of the CCP, a counsel ad litem was appointed ... and the Attorney General was ordered to be heard, granting a period of twenty days*."[47] [...] "*... In relation to the request filed, an order was issued to hear the Attorney General of the Republic for a period of twenty days ...*"[48]
2. A procedural ruling will thereafter be given from the Civil Chamber stating that the interested party has filed an appearance, intervention has been granted, and a hearing has been set for the Attorney General and the other party.
3. Service of process of the decision should be delivered to the interested party, the opposing party, and the Attorney General's Office.

---

42 Bustamante Code, Art. 423(5).

43 Pastora, *Cómo Tramitar El Exequátur* at 29.

44 Id.

45 Bustamante Code, Art. 426.

46 Pastora, *Cómo Tramitar El Exequátur* at 29. *See also*, Arguello, *Apuntes de Derecho Internacional Privado* at 492.

47 Supreme Court of Nicaragua, *Sentence No. 19, May 15, 1995*.

48 Supreme Court of Nicaragua, *Sentence No. 69, August 16, 1994*.

(CCP, Article 546). In examining the procedure for due process, Article 547 of the CCP provides that an order shall be issued to the judge in whose territory the party is domiciled, summoning the respondent to appear within three days, which term is increased by one day for every thirty miles of distance. Upon lapse of this term, the court shall continue to hear the case even if the summoned party fails to appear.[49]

4. Documentations to be attached to the written request are:[50] a) a duly authenticated or certified copy of the original decision; b) a certified translation, if necessary; and c) the original arbitration agreement or a duly certified copy thereof.[51]
5. A court order to hear the Attorney General and the other party will be issued.
6. Thereafter, a court order summoning the parties for final judgment will be served.
7. Votes will then be casted in favor of or against the judgment.
8. Reasoned votes will be considered.
9. Ruling as to the granting or refusal of the exequatur will be handed out. Article 549 of the CCP provides that where there is an exequatur for a writ of enforcement, the hearing referred to in Article 546 shall not be necessary and the exequatur shall be granted, provided the defendant is notified of the order in which a letter rotatory was ordered and the defendant has had sufficient time to assert his rights. Commentators have argued that this article demonstrates that the legislature has diverted from the path of the Spanish and Chilean Code and have inserted a new provision from another system. It can be noted that the law no longer refers to the enforcement of judgments, but to the granting of an exequatur for a writ of enforcement which is a far cry from being a judicial sentence.[52]

---

49 The CCP stipulates that if the notices, writs of summons, and service of process are made in a foreign country, a letter rogatory, duly authenticated and signed by the authorizing person must be sent through the Secretary of Foreign Affairs to the Embassy or Consulate of Nicaragua; and if there is no Embassy or Consulate of Nicaragua, the letter rogatory shall be sent to the Embassy or Consulate of a friendly nation of Nicaragua. *See* CCP, Art. 138.

50 LMA, Art. 62.

51 CCP, Art. 546.

52 Pastora, *Cómo Tramitar El Exequátur* at 31. *See also*, Solórzano Reñazco, *Código de Procedimiento Civil de Nicaragua, Comentado y Concordado*, at 495.

10. Judgment will be processed and duly recorded.
11. Service of process of the judgment will be conducted.
12. Issuance of a certified copy of the judgment, returning the attached original documents once they have been reasoned.

Draft Civil Procedure Code

In June 2013, the Parliament Justice Committee of the National Assembly of Nicaragua initiated a consultation process of the new Code of Civil Procedure. This initiative was presented by the Supreme Court of Justice which proposed several provisions that affect the functioning of alternative dispute resolution methods. Pertaining to arbitral decisions, the bill stipulates in Article 623(c) that *"[f]oreign writs of enforcement are arbitral awards made outside of Nicaragua."*

With this provision, the drafters of the bill sought to approximate it to Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which states that *"[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles."* The drafters also sought to match it to the provisions of Article 4 of the Inter-American Convention on International Commercial Arbitration which delineates that *"[a]n arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties."*

Notwithstanding the above, a serious oversight is observed. In order to identify it, it is necessary to point out that there are two distinct polarities, namely:

a) Arbitral awards issued in the territory of a State other than the State in which the recognition or arbitration is requested, and which are not considered as domestic judgments in the State where recognition and enforcement is sought.[53] This could be called third state arbitral awards; and
b) Arbitral awards issued outside of Nicaragua.[54]

53 New York Convention, Art. 1.

54 Preliminary Draft of the New Code of Civil Procedure of June 2013, Art. 623 (Nicaragua).

We wish to clarify that the provisions stipulated in Article 623(b) are applied under the New York Convention in the case of foreign judgments. On the other hand, Article 623(b) stipulates that a domestic or international arbitral award (LMA, Articles 21 and 22) shall be deemed to be issued in the place agreed to by the parties (LMA, Article 57). In other words, under the Mediation and Arbitration Law, a domestic or international arbitral award is deemed to be issued at the agreed place, which could be Managua or any other city of the country. Therefore, a domestic award issued abroad is erroneously treated as a foreign arbitral award in the bill.

Appeals for annulment are excluded pursuant to Article 536 of the Preliminary Draft of the New Code of Civil Procedure. These are foreseen in Article 61 of the Mediation and Arbitration Law. Article 5 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and Article 5 of the Inter-American Convention on International Commercial Arbitration stipulate the obligations of Nicaragua with respect to arbitral award and its recognition and enforcement.

It is necessary to point out that an appeal for annulment is a special civil summary proceeding that must be based on some legal ground. It is a summary proceeding, which means that the motion for annulment is a petition to obtain a court ruling as to whether or not the award is valid. This ruling by the court does not create, modify or extinguish a legal situation. It is a special proceeding, since it is based on specific rather than general hypotheses, and it must be based on one of the causes or grounds established by law, that is, those provided in Articles 61 and 63 of the Mediation and Arbitration Law and in Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

If the bill overlooks the appeal for annulment, then some of the principles in Article 3 of the Mediation and Arbitration Law are breached, namely process and right to a defense in favor of arbitration. Despite the seriousness of the foregoing, there is a brief reference to an appeal for annulment in Article 408(3), of the bill which states that *"*[*w*]*hen an* appeal for annulment *has been lodged against an arbitral award in accordance with Article 61 of the Mediation and Arbitration Law, and such appeal is denied by the Supreme Court of Justice, the judge shall review only those grounds that have not been subject to the appeal for annulment."*

In contrast, despite this brief reference to an appeal for annulment, Article 536 of the bill stipulates that only appeals against judicial decisions may be lodged when an appeal for annulment or an appeal for reversal is denied. The Code of Civil Procedure bill does not stipulate the amount for an appeal for annulment as a remedy against the arbitral award.

VI Leading Cases

As a result of the country's limited experience with international arbitration, to date, we are not aware of a leading case on the recognition or enforcement of a foreign arbitral award in our jurisdiction.

VII Conclusions

The Supreme Court of Justice through its jurisprudence, reflects a long tradition regarding enforcement of judgments handed down by foreign courts, some of which have already been referred to in this analysis. Regrettably, despite the consultations and research conducted, we found no decisions by the Supreme Court relating to the enforcement of arbitral awards. Nevertheless, as a result of this study, we conclude that the provisions of the Code of Civil Procedure of Nicaragua, Book I, Title XXI, Enforcement of Foreign Judgments, Articles 542–552, are applied by the Supreme Court, as well as the provisions of Articles 423, 426, 427, 428, 432 and 433 of the Bustamante Code among the State parties.

Annex

Law 540 of 2005—Chapter VII—Recognition and Enforcement

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 law and others on the matter.

The party relying on an award or applying for its enforcement shall supply the duly authenticated original of the award or a duly certified copy thereof and the original of the arbitration agreement or a duly certified copy thereof. If the award or the arbitration agreement are not in the official language of this State, the party shall supply a duly certified translation into this language of such documents.

Article 63—Grounds for refusing recognition or enforcement
Recognition or enforcement of an arbitral award may only be refused, irrespective of the country in which it was made, when the party furnishes evidence to the competent court of the country where recognition or enforcement is sought, of the following circumstances:

1. That the party to the arbitration agreement 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.
2. That the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.
3. That 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 that are not, the former may be recognized and enforced.
4. That 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
5. That 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.

Recognition or enforcement of an arbitral award may also be refused, irrespective of the country in which it was made, upon the application of the party against whom it is invoked when the court finds:

1. That according to the law of this State, the subject-matter of the dispute is not capable of settlement by arbitration.
2. That the recognition or enforcement of the award would be contrary to the public order of this State.

If an application has been made to a jurisdiction court to set aside or suspend an award, the tribunal where recognition or enforcement is sought may, if it considers it proper, and upon application of the party seeking the recognition and enforcement of the award, order the other party to provide appropriate security.

CHAPTER 14

Panama

Katherine González Arrocha and Adrián Martínez Benoit

I Introduction

For more than a decade, Panama has provided a favorable environment for the recognition and enforcement of foreign and international arbitral awards. Not only has Panama acceded to the New York and Panama Conventions and enacted a modern arbitration law governing international arbitration, but its courts have also demonstrated a consistent and favorable disposition towards the recognition of arbitral awards under the appropriate governing laws.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

Panama has acceded to the following international treaties regarding the recognition and enforcement of foreign arbitral awards:

1. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention): Panama ratified the convention through the enactment of Law No. 5 of 25 October 1983.
2. The Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention): Panama ratified this international treaty through the enactment of Law No. 11 of 23 October 1975.

Although not specifically a treaty on recognition and enforcement of foreign arbitral awards, it should be stated that Panama is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (ICSID Convention). The Convention was ratified by the enactment of Law No. 13 of 3 January 1996. In accordance with Article 54 of this treaty, awards rendered by arbitral tribunals established under this Convention are to be deemed by contracting states as final judgments of their own courts, and enforced accordingly.

 | DOI 10.1163/9789004284364_016

III Relevant Provisions in Free Trade or Bilateral Investment Agreements

During the past three decades, Panama has become a party to more than 20 bilateral investment treaties (BITs) with countries from Europe, America and Asia. They all provide for investor-state dispute settlement mechanisms and in some cases include specific provisions regarding the obligation incumbent on the Panamanian State regarding the recognition and enforcement of awards rendered by arbitral tribunals. For example, the Panama-Mexico BIT provides that the contracting parties shall adopt the necessary measures for the effective enforcement of awards including under the New York Convention.[1] This example has been followed since 2003 in a number of free trade agreements (FTAs). The agreements however, also provide recognition and enforcement of international commercial awards.

An early example is the FTA with Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. Section B of Chapter XX of this agreement provides contracting parties shall have appropriate procedures to ensure both the observance of international arbitration conventions in force and the recognition and enforcement of arbitral awards resolving international commercial disputes.[2] This approach was also taken in free trade agreements in force with Taiwan (2003),[3] Peru (2012),[4] the United States (2012),[5] and Canada (2013). For example, the FTA with Canada provides as follows:

> *Article 22.17: Alternative Dispute Resolution*
>
> 1. *Each Party shall encourage and facilitate the use of arbitration and other means of alternative dispute resolution to the extent possible in order to settle international commercial disputes between private parties in the free trade area.*
> 2. *To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of awards in such disputes.*

1 Panama-Mexico BIT, Arts. 20.6 and 20.7.

2 Panama-Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua FTA, Arts. 20.21:1 and 20.21:2.

3 Panama-Taiwan FTA, Arts. 19.21:1 and 19.21:2.

4 Panama-Peru FTA, Arts. 18.15:2 and 18.15:3.

5 Panama-US FTA, Arts. 20.20:2 and 20.20:3.

> 3. *A Party shall be deemed to comply with paragraph 2 if it is a party to and complies with the New York Convention.*[6]

IV National Law

In 1999, Panama first adopted a modern arbitration law based on the 1985 UNCITRAL Model Law.[7] The 1999 arbitration law governed both domestic and international arbitration as well as alternative dispute resolution (ADR) methods, namely mediation and conciliation. The 1999 law was notable because it introduced the cornerstone principle that an arbitral tribunal is competent to decide on its own jurisdiction (*competence-competence*) and provided that interested party could only challenge that decision before Panamanian courts when applying for the recognition of the resulting foreign arbitral award.[8] The 1999 arbitration law also governed the recognition and enforcement of arbitral awards, without prejudice to the provisions of the New York and Panama Conventions.[9]

In 2013 Panama enacted a new arbitration statute through Law 131 of 2013 (the Arbitration Law). The Arbitration Law is based on the 2006 UNCITRAL Model Law. It reflects 2004 amendments to the Constitution in which arbitration was recognized as a method of "administration of justice" and an arbitral tribunal's power to rule on its own competence was endorsed.[10] In addition, the Arbitration Law also reflects the Constitutional authorization for the State to agree to international arbitration.[11]

V Application for Recognition and Enforcement before Local Courts

The Arbitration Law governs the recognition and enforcement of foreign arbitral awards and international awards seated in Panama.

---

6 Panama-Canada FTA, Art. 20.17

7 Decree Law 5 of 1998 (as amended, by Law 15 of 2006). Before its enactment, arbitration was regulated by the Judicial Code of 1986.

8 Decree Law 5 of 1998, Art. 17.

9 Decree Law 5 of 1998, Art. 6.

10 Panama Constitution, Art. 202.

11 Panama Constitution, Art. 202(4). Before the 2004 amendments to the Constitution, the State and its entities could not resolve *any* dispute through arbitration unless its submission thereto was agreed upon by the President and the cabinet, subject to a prior and favorable opinion of the Attorney General.

A *Applicable Awards*

Pursuant to Article 70 of the Arbitration Law, foreign arbitral awards subject to recognition are those made outside of the territory of the Republic of Panama.[12] In order to promote Panama as an international arbitral seat, awards resulting from international arbitral proceedings seated in the country do not require recognition and can be enforced directly in local courts.[13] The law, however, does not expressly address whether interim or partial awards are eligible to be submitted for recognition. Yet other portions of the law do suggest it. Notably, the law expressly provides as a general rule that even the arbitral tribunal's conservatory and interim measures may be submitted for recognition and enforcement before the Panamanian courts.[14]

B *Competent Courts*

Pursuant to Article 70 of the Arbitration Law, the Fourth General Affairs Chamber of Supreme Court of Justice of Panama shall be competent to decide on the recognition and enforcement of a foreign arbitral award.[15] Technically, the Supreme Court decides on the recognition of the foreign award and authorizes its enforcement in Panama pursuant to the internal legal order. As a result, once recognized, the arbitral award shall be enforced by the corresponding civil circuit judge.[16]

C *Conditions*

Strictly speaking, pursuant to Article 70 of the Arbitration Law, foreign awards shall be recognized and enforced in Panama in accordance with the treaties and conventions to which the Republic of Panama is a party.[17] In the absence of applicable provisions, those of the Arbitration Law apply. Article 72 of the Arbitration Law sets forth grounds to refuse the enforcement of the awards that are similar to those in the New York and Panama Conventions.[18]

D *Formalities*

In accordance with Article 71 of the Arbitration Law, a party's written application seeking the recognition of the foreign arbitral award must be filed together

12 Arbitration Law, Art. 70.
13 Id.
14 Arbitration Law, Art. 43.
15 Arbitration Law, Art. 70.
16 Arbitration Law, Art. 69.
17 Arbitration Law, Art. 70.
18 Arbitration Law, Art. 72.

with either the original or a certified copy of the arbitral award. However, the Supreme Court may request the petitioning party to file a translation of awards not written in Spanish.[19]

Past practice informs these requirements. A certified copy of the award provided by the corresponding secretariat of major international arbitration institutions pursuant to their arbitration rules should suffice. With *ad hoc* arbitration awards, the tribunal's secretary can provide the appropriate certification. For their part, translations should ideally be undertaken by a translator duly authorized by the Ministry of Government and Justice of Panama.[20] Finally, though the Arbitration Law does not establish a specific time limit to file for recognition, the general 7 year period in private law applies.[21]

E *Procedure*

Once the application is filed in accordance with formalities described in Article 71 of the Arbitration Law, the Supreme Court will serve the opposing party or parties so that they may respond to the petition as they deem appropriate.[22] The responding party will have a fifteen day period to respond.[23] Thereafter, the Court will have a sixty-day period in which to decide on the recognition application.[24] These periods are shorter than those previously provided by the country's judicial code and on which the 1999 law was silent.[25]

Once recognized, the interested party may file for enforcement before the civil circuit judge.[26] A written application for enforcement must be filed with an authenticated copy of the award.[27] The enforcement judge will serve the respondent with the application and supporting documents and provide a fifteen day period to respond.[28] The respondent may only oppose the enforcement furnishing evidence of a pending application to set aside the award or an

19 Arbitration Law, Art. 71.
20 Judicial Code, Art. 877.
21 Civil Code, Art. 1701.
22 Arbitration Law, Art. 73.
23 Judicial Code, Art. 1242. *See also Fundación Hadley y Robert Papillon Rankike v. Saxon Investment Trust A.G.*, Supreme Court, Nov. 7, 2011.
24 Arbitration Law, Art. 73.
25 Judicial Code, Art. 1420.
26 Arbitration Law, Art. 69.
27 Id.
28 Id.

authenticated set aside judgment. Other than in those instances the judge shall decree the enforcement.[29] No order of the court shall be subject to recourse.[30]

VI Leading Cases

The Supreme Court has had its fair share of opportunities to deliberate on the recognition and enforcement of foreign arbitral awards. Some decisions worth highlighting are the following. An early case following the enactment of the 1999 Arbitration Law was the 2001 case *Petrocom de Panamá Inc. v. Cable and Wireless de Panamá, S.A.*[31] In *Petrocom* the Court rejected a claim that an ICC award violated public policy because the underlying contract was invalid under Panamanian law. The Court rejected that claim finding that public policy "must be studied on a case by case basis" and "its violation cannot be invoked generically.[32]

Four years later (2005) in *Greenhow Limited v Refinería Panamá, S.A.*, the Supreme Court rejected the respondent's argument that it was unable to present its case because the arbitral tribunal did not admit an expert opinion.[33] The Court made clear that it was unable to revisit the Tribunal's decision except in extreme circumstances such as when no evidence was allowed to be submitted during the proceedings. Based on the constitutionally sanctioned principle that an arbitral tribunal is competent to decide on its own jurisdiction, the Court stated:

> *Arbitrators are judges in their own right, and their decisions have coercive force towards the rest of the judiciary and administrative community, thus giving the parties greater security that their claims, recognized through arbitral awards, shall be respected.*[34]

---

29 Arbitration Law, Art. 69.

30 Id.

31 Supreme Court of Panama, Mar. 23, 2001, *Petrocom de Panamá Inc. v. Cable and Wireless de Panamá, S.A.*

32 *Petrocom.* Translated from the original in Spanish by the authors.

33 Corte Suprema de Justicia, Feb. 2005, Greenhow Limited v Refinería Panamá, S.A. *Isthmus Crossing Services, Inc. v Panama Canal Railway Company*, Supreme Court of Panama, Judgment of Dec. 16, 2005.

34 Translated from the original in Spanish by the authors.

As a result, the Court went on to state it was not an appeals court for arbitral tribunals adding that "*it cannot elucidate whether the arbitral tribunal appreciated in due form the adduced evidence*." The Supreme Court restated a similar position that same year in *Isthmus Crossing Services, Inc. v Panama Canal Railway Company.*[35]

VII Conclusions

The decisions taken by the Panamanian Supreme Court regarding recognition and enforcement of foreign awards evidence a modern and favorable approach to international arbitration. Since first enacting a modern arbitration law in 1999, Panama has gone to great lengths to enhance and strengthen arbitration in the country, including amending its Constitution in 2004 to overcome some judicial resistance. The enactment of the 2013 arbitration law is a welcome step toward consolidating the country's accomplishments both in law and in practice, making Panama an attractive seat for international arbitral proceedings and a modern jurisdiction for the recognition of foreign arbitral awards. Indeed, with the popularity of arbitration as an efficient dispute settlement mechanism in business circles and the support of leading national arbitration institutions, the Panamanian judiciary is nowadays more knowledgeable and supportive of the arbitral process and of resulting awards.

Annex

Law 131 of 2013—Chapter IX
Recognition and Enforcement of the International Awards

Article 70. Applicable Provisions for the Recognition and Enforcement of International Awards.

International arbitral awards shall be recognized and enforced in Panama in accordance with the following instruments:

1. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards approved in New York on June 10 of 1958;

35 Corte Suprema de Justicia, Dec. 2005, *Isthmus Crossing Services, Inc. v. Panama Canal Railway Company*.

2. The Inter-American Convention on International Commercial Arbitration approved in Panama on January 30, 1975.
3. Any other treaty of the recognition and enforcement of arbitral awards ratified by the Panamanian state.

Unless the parties have agreed otherwise, the applicable treaty shall be the most favorable to the party requesting the recognition and enforcement of the international arbitral award.

Awards made in international arbitrations seated in the Republic of Panama shall not be subject to the procedure for recognition and may be directly enforced without it.

An international arbitral award, in whichever country it is made, shall be recognized as binding and, following the filing of a written petition before the Fourth General Affairs Chamber of Supreme Court of Justice, shall be enforced in accordance with the provisions of this article and of Article 72.

Article 71. Requirement for Invoking or Petitioning the Enforcement of the Award

The party invoking an award or petitioning its enforcement shall furnish the original award or certified copy. If the award were not drafted in the Spanish language, the Fourth General Affairs Chamber of Supreme Court of Justice may request that the party file a translation of the award into this language.

Article 72. Grounds for the Refusal of Recognition or Enforcement

The recognition and enforcement of a foreign arbitral award, in whichever country it is made, may only be refused for the reasons and grounds exhaustively provided below:

1. At the request of the party against whom it is invoked, when that party proves before the competent tribunal before which the recognition and enforcement is sought:

    a) That one of the parties to the arbitral agreement was subject to some incapacity under the applicable law 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
    b) That the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

c) That the award deals with a difference 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; however if the decisions of the award dealing with matters submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and enforced; or
d) That the composition of the arbitral authority 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
e) That 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

2. If the Fourth General Affairs Chamber of Supreme Court of Justice finds:

a) That in accordance with Panamanian law, the subject matter of the difference is not capable of settlement by arbitration; or
b) That the recognition and enforcement would be contrary to the international public policy of Panama.

If an application for setting aside or suspension has been made to a court referred to in provision (1)(e) of this article, the competent court before which the recognition and enforcement is sought may, if it considers it proper, adjourn its decision, and on the application of the party seeking the recognition and enforcement, may also order the other party to provide appropriate security.

This article shall apply in the absence of a treaty, or even in the presence of one, when these provisions are, in whole or in part, more favorable to the party petitioning for the recognition and enforcement of the foreign award.

Article 73. Procedure for the Petition for Recognition
The party petitioning the recognition shall file the request before the Fourth General Affairs Chamber of Supreme Court of Justice, together with the documents listed in Article 71.

Should the petition be admissible, the Fourth General Affairs Chamber will serve the other parties to the process, and they will have a fifteen day period to respond as appropriate. The Fourth General Affairs Chamber will decide in a subsequent sixty day period.

CHAPTER 15

Paraguay

Diego Zavala

I Introduction

International commercial arbitration is a discipline in the process of development in Paraguay. Some aspects of arbitration such as the ratification of international treaties and the enactment of local laws—in line with international trends—demonstrate the great progress attained so far. However, other aspects related to the practice of arbitration, still need to be further strengthened.

As indicated in the course of this work, Paraguay has ratified key international treaties in matters related to the recognition and enforcement of foreign arbitration awards. In a decisive move in 2002, Paraguay enacted Law No. 1879 on arbitration and mediation[1] that incorporated the 1985 UNCITRAL Model Law. This law shows an encouraging legislative tendency towards arbitration and recognition of foreign awards in Paraguay. In accordance with the international trend adopted by national legislation, the only Paraguayan based arbitral institution drafted its institutional arbitration rules based on the UNCITRAL model rules for arbitration of 1976.

The practice of arbitration and in particular, case law with regards to the recognition and enforcement of foreign arbitral awards are progressively developing, but the amount of cases is still limited. However, it is important to bear in mind that these limited cases followed the same tendency adopted by national legislation, showing the positive attitude of the Paraguayan Courts towards arbitration.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

There are several treaties ratified by Paraguay upon which a party seeking recognition or enforcement of a foreign arbitral award may rely upon:

1 Law 1879/02, Arbitration and Mediation Law, 2002 (Paraguay). Hereinafter, "Arbitration Law" or "Law 1879,"

 | DOI 10.1163/9789004284364_017

- 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.[2]
- 1975 Inter-American Convention on International Commercial Arbitration ("Panama Convention").[3]
- 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards ("Montevideo Convention").[4]
- MERCOSUR's Agreement on International Commercial Arbitration.[5]

According to Article 44 of the Arbitration Law, an arbitration award issued in a foreign country shall be recognized and enforced in Paraguay in accordance with the treaties ratified by Paraguay on the recognition and execution of arbitration awards. In the case that more than one international treaty applies, "…[the courts] shall apply the most favorable treaty to the party requesting the recognition and enforcement of an agreement and an arbitral award…" unless the agreement states otherwise. Only in the absence of an international treaty or convention does the procedure for recognition and enforcement of foreign arbitral awards provided by the Arbitration Law applies.

III Relevant Provisions in Free Trade or Bilateral Investment Agreements

Paraguay is a founding member of the Common Market of the Southern Cone (MERCOSUR), a customs union that eliminated customs duties within the region on numerous items. Disputes between and among the member states (i.e. Argentina, Brazil, Uruguay) shall be settled according to the mechanism provided by the *Protocolo de Olivos*, executed in 2002 and in force since January 2004. The Olivos Protocol gives freedom of choice with respect to the competent forum (MERCOSUR or WTO), allowing the possibility of mediation by the

2 Law No. 948/96, Approving and Ratifying the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1996 (Paraguay).

3 Law No. 611/76, Approving and Ratifying the Inter-American Convention on International Commercial Arbitration, 1976 (Paraguay).

4 Law No. 889/81, Approving and Ratifying the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, 1981 (Paraguay).

5 Law No. 3303/07, Approving and Ratifying the Agreement on International Commercial Arbitration pursuant to MERCOSUR, 2007, (Paraguay).

Common Market Group, and establishes a review procedure by the Permanent Review Court, with a permanent seat in Asunción, Paraguay.[6]

IV National Law

The Paraguayan Constitution expressly recognizes arbitration as a valid method of dispute resolution. It also recognizes the competence of arbitrators to preside over these disputes.[7] Prior to the enactment of the Arbitration Law, the Paraguayan Code of Civil Procedure governed arbitrations with seat in Paraguay and also enforcement and recognition proceedings taking place in Paraguay. These norms were not in accordance with the international trends in arbitration and were not suitable for the development of international arbitration in the country.

The Arbitration Law was enacted in 2002 with the aim of making Paraguay a regional arbitration center, taking advantage of its strategic geographic location. Furthermore, the Arbitration Law was drafted in order to update the Paraguayan legal framework to match these international trends incorporating new concepts such as the contractual nature of the arbitration clause, the competence-competence principle and flexibility in arbitration proceedings. One of the most remarkable features of the Arbitration Law is that it applies equally to both national and international arbitration.

The Arbitration Law follows the UNCITRAL Model Law as approved in 1985 (without the amendments of 2006) except in the following respects:

- *Scope of geographic application*: Unlike the 1985 Model Law,[8] Law 1879 does not allow the parties to agree that the subject matter of the arbitration agreement involves more than one state, for purposes of the definition of "international arbitration."[9]

6 Paraguay also participates in the Latin American Integration Association (LAIA), and has signed partial-scope agreements with all of its members. Within LAIA, Paraguay has concluded economic agreements with Colombia, Ecuador, Mexico, Peru, and Venezuela.

7 Paraguay National Constitution (1992), Art. 137.

8 *See* 1985 UNCITRAL Model Law, Art. 1(3)(c).

9 *See* Arbitration Law, Art. 3(c). The distinction is relevant, *inter alia*, to the criteria to be applied by a court appointing an arbitrator by default. Under Art. 13 of the Arbitration Law, in the case of international arbitrations, courts are required to consider whether the arbitrator should be a national from another state.

- *Proceeding in the event of a challenge against a preliminary jurisdictional objection*: Both the 1985 Model Law and Law 1879 envisage jurisdictional objections to be addressed either in a preliminary ruling or in an award. Under the Model Law, if the preliminary ruling is challenged, the arbitral tribunal may continue with the proceeding and issue an award.[10] By contrast, under Law 1879, the proceeding may continue, but an award may not be issued.[11]
- *Form of arbitration agreement*: Unlike the 1985 Model Law, Law 1879 does not include "telex" or "other means of telecommunication" as part of the definition of a written arbitration agreement.[12] This exclusion arguably denies validity to agreements made by e-mail and other new communication systems that may promote and facilitate the use of arbitration, especially in international arbitrations, which often involve parties residing in different countries.[13]
- *Court-ordered interim measures*: Unlike the 1985 Model Law, Law 1879 allows local courts to grant interim measures prior to the constitution of the arbitral tribunal. These interim measures expire seven days after the constitution of the arbitral tribunal, which may confirm, terminate or modify the measures.[14]
- *Calculation of deadlines*: Law 1879 sets out the method for calculating deadlines, *i.e.*, counting as of the relevant notification, and inclusion of business days except where the deadline falls on a non-business day.[15] The 1985 Model Law is silent on the matter. Further, various time periods for events during the arbitration are shorter than those set forth in the Model Law.
- *Costs and fees*: Unlike the 1985 Model Law, which is silent on the matter, Law No. 1879/02 set out rules on arbitration costs and arbitrator's fees.[16]

---

10 *See* 1985 UNCITRAL Model Law, Art. 16(3).

11 Arbitration Law, Art. 19.

12 *See* Id. at Art. 10.

13 For commentary on this exclusion, see Juan Antonio Moreno Rodriguez, *Arbitraje y mediación* [translated: Arbitration and Mediation] (Asunción: Intercontinental, 2003). The 2006 UNCITRAL Model Law provides for an even wider definition of the written requirement, allowing, *inter alia*, for agreements made verbally and through electronic communications. *See* 2006 UNCITRAL Model Law, Art. 7, Option I.

14 Arbitration Law, Art. 20.

15 Id. at Art. 6.

16 Id. at Arts. 3(e), 49, 50, 51 and 52. Costs are defined as "the fees of the arbitral tribunal; the travel and other expenses of the arbitrators; the costs of expert advice or other assistance required by the arbitral tribunal; travel or other expenses of the witnesses, provided that

V Application for Recognition and Enforcement Before Local Courts

As mentioned before, in the absence of an international treaty or convention, the procedure for recognition and enforcement of foreign arbitral awards provided by the Arbitration Law applies. The procedure provided by the Arbitration Law is as follows:

A *Competent Courts*

The requesting party must submit an application for recognition to a court judge of First Instance on Civil and Commercial Affairs. The requesting party has the option to choose between the judge of the domicile of the party against whom the award is executed, or in his defect, the judge where the assets are located.

B *Conditions*

The objections that may be raised to set aside an arbitration award are limited to those provided in Article 46 of the Arbitration Law, and are set forth below:[17]

1) The party against whom the award is invoked presents evidence before the competent judge showing that:

   a) one of the parties of the arbitration agreement was affected by a disability, or that said agreement is not valid by virtue of the law to which the parties have subjected to, or if nothing has been pointed out on such respect, by virtue of the law of the State in which the award was drafted;
   b) there was no notification of the appointment of an arbitrator or the arbitration proceedings, and while these were being conducted, the respondent was not afforded the opportunity to present their case and produce evidence, functions which they were equipped to perform;

---

they are approved by the arbitral tribunal; attorneys' fees and legal assistance costs of the prevailing parties if the parties agreed on claiming such costs during the arbitral proceeding and only to the extent that the arbitral tribunal decides that the amount is reasonable; and fees and expenses of the institution that designated the arbitrators."

17 These provisions were drafted following the 1985 UNCITRAL Model Law that follows the 1958 New York Convention on Enforcement of Foreign Arbitral Awards. In this respect, the Paraguayan legislature internalized, in its totality, the grounds to object the execution of an award.

c) the award refers to a controversy not foreseen in the arbitration agreement, or it contains rulings that exceed the terms of the arbitration agreement. However, if the provisions of the award applicable to the subject matter of the arbitration can be separated from the ones that are not, then recognition and enforcement shall only be given to the former;
d) the constitution of the arbitral tribunal or the arbitration proceeding was not in accordance with the parties' agreement or in lack of said agreement, and it was not in accordance with the laws of the State where the arbitration was held;
e) the award is not binding on the parties; or it has been set aside or suspended by a judge of the State in which it was issued or according to its laws.

2) When the judge confirms that, according to Paraguayan legislation, the subject matter of the dispute is not arbitrable; or that the recognition or the enforcement of the award would be contrary to the international public order or to the laws of the Paraguayan State.

A suspension of the enforcement proceedings may be requested where the arbitration award has been set aside or suspended in accordance with the laws of the State where the arbitration award was issued. If such is the case, the judge to whom the request for recognition or enforcement of an award was given shall, if he deems proper, order a different resolution; and shall, at the petition of the party who requests the recognition or the enforcement of the award, be able to order the submission of a guarantee by the party against whom enforcement is sought.

An emblematic reasoning provided by case law in relation to public policy can be found in the case *Gunder v. Kia*. The reasoning given by the Supreme Court of Paraguay is that matters of public interest cannot be referred to arbitration outside Paraguay and be governed by foreign law.[18] The case concerned a distribution contract providing for arbitration in South Korea, and governed by Korean law. Under Paraguayan law, the contract was subject to Law 194/93, which regulates international distribution contracts and forbids waiver of any right pursuant to that Law. The Supreme Court ruled that the prohibition against waiver of the protections granted by Law 194 "evidences the public

18 Supreme Court of Justice [CSJ], May 25, 2006, *Gunder S.C.S.A. v. Kia Motor Corp.*, Ac. y Sent. Nº 285.

order nature of the norm."[19] Based on this finding, the Court concluded the following:

> *This* [*public order*] *quality impedes the parties from modifying or leaving without effect what is expressly provided therein, and in that regard, the competence has been determined in favor of the Courts of Paraguay. As was mentioned before, it is true that the law recognizes the possibility that the parties may settle or submit any question of commercial origin to arbitration, but this does not imply that the same must be conducted outside the territorial jurisdiction of Paraguay*.[20]

C *Formalities*

The party that invokes an award or requests its enforcement shall submit the original of the award duly authenticated, or a certified duly authenticated copy of same; as well as the original document of the arbitration agreement or a duly certified copy of it. If the award or the agreement is not written in Spanish, the requesting party must submit a translation prepared by a certified translator.[21] Authentication may take place at the Paraguayan Consulate nearest to the place of its issuance. This system is about to come to an end, since Paraguay recently ratified the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, signed at The Hague on October 5, 1961, abolishing the legalization of documents, and establishing the apostil regime for certification of documents.[22]

D *Procedure*

Once the application is filed, the court will serve written notice to the losing party by the award. Within 5 days after the notice is served, that party is entitled to object to the recognition of the award. Matters concerning objections to the recognition of an arbitral award are subject to the provisions set forth in

19 *Gunder*, at 3.

20 Id.

21 Also, as of 2014 all documents to be executed in Paraguay must be legalized at the Paraguayan Consulate nearest to the place of issuance of the arbitral award. By Law Nº 4987 dated Apr. 24, 2013 Paraguay ratified the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, signed at The Hague on Oct. 5, 1961.

22 Ratification was by Law Nº 4987 dated Apr. 24, 2013.

the Paraguayan Code of Civil Procedure relating to interlocutory proceedings (‘*incidentes*’).[23]

If a valid cause for denial of enforcement is not met, then the judge shall issue a decision recognizing the award within 5 days. The final resolution on the recognition or enforcement of the award cannot be submitted to any legal recourse. When the enforcement of the arbitration award is decided, it shall be handled in accordance with the legal provisions used in national judgments as foreseen in the Paraguayan Code for Civil Procedures.

Costs and Fees

The Arbitration Law provides, as a general rule, that the parties are entitled to submit the arbitration to one body of institutional or *ad hoc* arbitration rules with respect to the cost of arbitration. The general rule is that the losing party pays costs and fees. Although there are exceptions, in general, Paraguay law allows the successful claimant to recover from a defeated party, attorney’s fees, costs and expenses, as determined by the court. Law 1376/88 provides the rules for calculation of attorney’s fees in the absence of a prior agreement in this regard.[24] In those cases, the legal formula for calculation takes into account the following factors: the amount of the subject matter, the legal complexity of the dispute and its value, the quality of the labor of the intervening professional, and the economic benefit of the client. Depending on these factors, legal fees can range from 5% to 20% over the disputed amount (the percentage decreases when the disputed amount increases). Prior to filing proceedings to obtain recognition of a foreign arbitral award, the requesting party must pay a mandatory court tax that currently equals to 0.50% over the claimed amount.[25] The Court fixes the percentage of interest accruing from the date that the debt is due. Interest usually ranges between 1.5% and 3% (monthly) over the amount owned by the debtor.

Enforcement

In accordance with Law 879/81 that organizes our Judiciary, arbitrators are entitled to the same position (and obligations) as those of judges in the Paraguayan Administration of Justice. In the same line, arbitral awards are benefitted with the same legal stance as decisions emanating from court judges. In addition,

23 Code of Civil Procedure, Law 1337/85 (CPC or Código Procesal Civil), 1985 (Paraguay).

24 Law 1376/88, 1988 (Paraguay) “that establishes legal fees for attorneys and solicitors.”

25 Law 1165/85, 1985 (Paraguay). By this law, payment of court tax is mandatory prior to the filing of any case for the resolution of the courts, as well as for the judicial enforcement of court decisions and of arbitral awards.

the same courts that are competent in the recognition of international awards are also competent to preside over matters relating to enforcement of interim measures ordered by arbitral tribunals.

After the *exequatur* is pronounced, the enforcement request can be filed. If the award is up to a certain amount of money, the First Instance Civil and Commercial Affairs judge will seize the assets. Once the assets are seized, the debtor is summoned and has 3 days to file a challenge. At this point, only certain defenses can be filed, such as:

(i) False judgment;
(ii) Statute of limitations for the enforcement;
(iii) False or unenforceable title;
(iv) Payment, and
(v) Deduction, forbearance or debt remission.

Subsequently, if after being summoned the debtor refuses to pay or prove the existence of a valid cause for denial of enforcement (e.g. payment, transaction, among others) the proceeding will continue in accordance with the norms applicable to debt collections. The time frame involved in the enforcement of an arbitral award varies from case to case depending, among other factors, on the subject matter, the complexity, the competent court and the seat of the court. In general, the duration of the enforcement proceeding is between 9 and 15 months.

VI Leading Cases

The leading case in the jurisdiction is that of *Ministerio de Agricultura y Ganadería y Procuraduría General de la RPCA c/ Grupanor Cercampo S.A.*[26] In November 2009, Grupanor submitted a request for recognition and enforcement of the ICC arbitral award No. 13.685/CCO against the Ministry of Agriculture & Office of the Attorney General. The final judgment recognizing and enforcing the award was issued in December 2009. The Court fixed an interest of 2% per month over the amount due by the debtor accruing from the date the amount was due (totalizing 42 months), therefore setting the amount at USD 5,197,533.86. The Ministry of the Treasury later settled the claim.

26 Feb. 2009, *Ministerio de Agricultura y Ganadería y Procuraduría General de la RPCA c/ Grupanor Cercampo S.A.*

The case original arose when the Attorney General submitted a motion to set aside the award and arbitration clause against ICC arbitral award No. 13.685/CCO granted on May 1, 2006 in favor of Grupanor Cercampo S.A. ("Grupanor") against the Ministry of Agriculture & Office of the Attorney General pursuant to an amount of USD 2,824,942.32. The motion was filed before Paraguayan courts on the basis that disputes involving public goods were non-arbitrable matters under Paraguayan law. Grupanor in turn raised arguments of *res judicata* and lack of jurisdiction of Paraguayan courts to review the merits of the dispute. The First Instance Court found itself competent to review the claim filed by the Paraguayan state, and deferred the question of *res judicata* until its final ruling. Grupanor appealed. The Court of Appeals revoked the first instance decision, holding that: (a) the ICC has jurisdiction to resolve disputes arising out of the contract containing an arbitration agreement, and (b) the *res judicata* defense was proper, as the ICC award was final and Paraguay had not requested annulment of the award within the allotted time period.

The following are the most relevant decisions contained in the judgment provided by the Courts of Appeals in the case:

1. The incompetence motion filed by Grupanor was admissible since according to the arbitration clause, the ICC is the only competent body to preside over the merits of the contract subscribed between the Ministry of Agriculture and Grupanor.
2. Article 248 of the National Constitution expressly permits the submission of disputes to arbitration in any contract regulated by private law. In this case, even if the contract involved public services, it was a contract regulated by private law.
3. The exception of *res judicata* is also admissible since the arbitral award is final and enforceable, with the authority of *res judicata* as the award was not challenged within the time-period of 15 days provided by the Arbitration Law.
4. It is against the theory of equitable *estoppel* to permit the Paraguayan State to challenge the competence of the arbitral tribunal after commencing an arbitral proceeding without challenging its competence to know the merits of the dispute.
5. The mistake of the First Instance court was manifest as it rejected the challenge to the jurisdiction and postponed a decision to a later stage of the proceedings. This judgment is contradictory to key principles of Paraguayan procedural and arbitration laws as Paraguayan courts are not entitled to review the merits of an arbitral dispute.

Subsequently, the Office of the Attorney General filed a motion of unconstitutionality against the decisions granted by the Court of Appeals. The challenge was dismissed by the Constitutional Chamber of the Supreme Court of Justice on the following grounds: (a) the unconstitutionality motion was not supported by valid legal arguments in accordance with Article 557 of the Procedural Civil Code and Article 12 of Law No. 609/95; (b) Contrary to claimant's allegations, due process was sought as claimant was entitled to present its case at each stage of the procedure as it actively participated in the arbitration at the ICC.

VII Conclusions

It would be fair to say that Paraguay has an up-to-date legal framework adequate for the institutional development of international arbitration. Most of the legal structure is in place to secure the practice of international and local agents. As learned from the experience of other countries, it is the continuous practice and court testing on various aspects of arbitration that will help consolidate arbitration in Paraguay.

In particular, the legal framework for the recognition and enforcement of arbitral awards is in place. Although case law is scarce, the initial tests by Paraguayan courts ultimately respected the recognition and enforcement of an international arbitral award consistent with international trends and the domestic legal framework.

In consequence, Paraguay is slowly but steadily moving forward on the development of arbitration as a social and valuable instrument for dispute resolution. The legal community in Paraguay is continuously innovating. This is evidenced by the Judiciary decisions; the creation of arbitral institutions; the continuous legal training by law schools; the opinion of legal experts. These as well as many other developments demonstrate important positive advances towards arbitration in Paraguay. Furthermore, it is important to take into account that the Paraguayan economy is increasingly growing and at the same time, opening its trade to foreign markets, receiving capital and entrepreneurs willing to invest in diverse areas. This necessarily implies an increasing two-way flow of business and contracts involving multiple jurisdictions, cultures and ways of practicing law, which will certainly result in the expansion and progress of arbitration.

Annex

Chapter VIII—Recognition and Enforcement of Arbitral Awards

Article 44—Rules governing the recognition and enforcement of foreign arbitral awards.
Foreign arbitral awards shall be recognized and enforced in the country, in accordance with the treaties ratified by the Republic of Paraguay on the recognition and enforcement of arbitral awards.

Should more than one treaty be applicable, unless otherwise agreed by the parties, the more favorable to the party petitioning for the recognition and enforcement of an arbitral agreement or award shall apply.

Should any international treaty or convention not apply, the foreign arbitral awards shall be recognized and enforced in the Republic in accordance with the rules in this law and the specific provisions on this chapter.

Article 45—Recognition and enforcement of arbitral awards.
An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon the application in writing to the competent judicial organ, shall be enforced subject to the provisions of this chapter. At the discretion of the party seeking recognition and enforcement of award, the judge of First Instance on Civil and Commercial Affairs of the domicile of the party against whom the award is being enforced, or in the alternative, of where the assets are located shall be competent.

The party that invokes an award or requests its enforcement shall present the duly authenticated original of the award or a duly certified copy thereof, and the original of the arbitration agreement referred to in Article 10 or a duly certified copy thereof. If the award or the agreement are in written in the Spanish language, the party that invokes it shall supply an official translation onto this language by an official translator.

Article 46—Grounds to refuse recognition or enforcement.
Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only when:

a) at the request of the party against whom it is invoked, proves before the competent judge that:

    1. a party to the arbitration agreement referred to in article 10 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.

2. it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.
3. 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, the former may be recognized and enforced.
4. 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.
5. 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.

b) If the court finds that according to Paraguayan laws, the subject-matter of the dispute is not capable of settlement by arbitration; or the recognition or enforcement of the award would be contrary to the international public order or that of the Paraguayan State.

Article 47—Adjournment of the resolution and demand for security.
If an application for setting aside or suspension of an award has been made to a court of a State under the law of which the award was made, the judge where recognition or enforcement is sought may adjourn, if it considers it proper, its decision and on the application of the party claiming recognition or enforcement of the award, may also order the other party to provide appropriate security.

Article 48—Procedure.
Once the request for the recognition and enforcement of an award or arbitral judgment has been made, the judge shall serve the party found liable in the award through substituted service.

The liable party may only oppose enforcement based on the grounds provided in Article 46, providing all the supporting evidence. Documentary evidence shall be filed with the response, and should he not have it, he must describe its contents, the place, archive, government institution or person in whose possession it may be found.

If none of the aforementioned grounds are proven, the judge shall issue a resolution ordering the enforcement within a 5-day period, and providing a default notice to the respondent and the attachment of his assets.

In case of opposition, the relevant rules regarding interlocutory proceedings provide in the Civil Procedure Code shall apply.

The resolution on recognition and enforcement of the award shall not be subject to any appeal. If the enforcement of the award is ordered, it will be subject to the legal rules governing the enforcement of national judgments in the Civil Procedure Code.

CHAPTER 16

Peru

Carlos Paitán and Danny Quiroga

I Introduction

Peru has a sustained tradition in arbitration. Commercial arbitration has been present in Peruvian law since the beginning of the Republic in 1821 through the adoption of ordinances enacted in colonial times. In the past, however, arbitration has also been burdened with formalistic requirements that, over time, were incorporated into the governing statutes by repeated interferences of the courts.[1]

Starting in 1987, Peru began adopting modern arbitration laws in accordance with international standards. The current arbitration law is the Arbitration Act, enacted through Legislative Decree No. 1071 and in force since September 1, 2008 (*Ley General de Arbitraje*).[2] The Arbitration Act governs both national and international arbitration jointly, rather than having separate chapters. The Act does have however, special provisions for the recognition and enforcement of foreign arbitral awards that expressly incorporate the international conventions to which Peru is a party.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

Since the dawn of the Republic in the early 19th century, Peru has developed a tradition of adopting international legal standards. The National Constitution (enacted in 1993, (amended)) provides that "Treaties concluded by the State and in force are part of national law."[3] In addition, the Constitution also expressly recognizes that injured parties may resort to international tribunals

1 Ulises Alberti Montoya, *Historia del Arbitraje* in *Revista Peruana de Derecho de la Empresa*, No. 39, 9–37 (1991).

2 The Arbitration Act, Sept. 1, 2008 (Peru).

3 Peru Constitution (as amended), Art. 55. *See* http://www.congreso.gob.pe/_ingles/CONSTITUTION_29_08_08.pdf (last visited Nov. 15, 2013).

 | DOI 10.1163/9789004284364_018

and that the State and State enterprises may resolve their disputes through international arbitration.[4]

For purposes of the recognition of foreign arbitral awards, Peru has adopted a number of international instruments. Peru is a party to both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards—The New York Convention (1958) and The Inter-American Convention on International Commercial Arbitration—Panama Convention (1975).[5] Additionally, Peru is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).[6]

III Relevant Provisions in Free Trade Agreements or Bilateral Investment Treaties

Following a period of economic difficulty in the mid-1990s, Peru decided to make its market more attractive by becoming a party to numerous international agreements for the promotion and protection of its foreign investment. More than half of these agreements were entered in a relatively short period of time, specifically between 1995 to 1999. These first-generation agreements were often described as Agreements on Reciprocal Promotion and Protection of Investments (or APPRIs).[7] More recently, Peru has entered into Free Trade Agreements (FTAs) with major trading partners, including Chile (2009), the United States (2009), and China (2009).[8] These agreements and treaties provide for dispute settlement between foreign investors and the State through *ad-hoc* or institutional arbitration (including under the ICSID Convention).

In most instances, these agreements and treaties do not provide guidance regarding the recognition and enforcement of the resulting arbitral awards. The more modern Free Trade Agreements however do provide, in some cases, provisions that may complement those in the ICSID, New York and Panama Conventions. For example, the Peru-US FTA provides that "each Party shall

4 Peru Constitution, Arts. 63, 205.

5 New York Convention, in force in Peru since Oct. 5, 1988. Panama Convention, in force in Peru since May 22, 1989.

6 ICSID Convention, in force in Peru since September 8, 1993. The ICSID Convention was ratified by Resolución Legislativa Nº. 26210, published in the official gazette "El Peruano" Jul. 10, 1993.

7 Available at http://www.proinversion.gob.pe (last visited Oct. 14, 2013).

8 Available at http://www.acuerdoscomerciales.gob.pe/ (last visited on Oct. 14, 2013).

provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards . . ."[9] For its part, the Peru-Singapore FTA authorizes a Party to the agreement to provide diplomatic protection to its national when the other Party has "failed to abide by and comply with the award [rendered against it]"[10] The Peru-Chile FTA goes a step further by providing that a Party to the agreement (i.e. Peru or Chile) may petition the establishment of a State-State arbitral tribunal under the FTA seeking either a preliminary determination of the other's failure to comply with an arbitral award or a determination that the other's failure to comply with an arbitral award violates the FTA.[11]

IV National Law

Title VIII of the Arbitration Act (Articles 74–78) specifically governs the recognition and enforcement of foreign arbitral awards. Article 74 sets forth a principle of maximum efficacy in the interpretation of applicable international and national provisions on arbitration.[12] This provision finds support in Article VII of the New York Convention which allows interested parties to avail themselves of international or domestic law provisions that ultimately result in the recognition and enforcement of the foreign arbitral award.[13] Based on this principle, interested parties and the courts may resort to either the Panama Convention, the New York Convention or to the Arbitration Act itself.

V Application for Recognition and Enforcement Before Local Courts

The Constitution of Peru has recognized arbitration as a separate jurisdiction.[14] As a result, there is legal certainty regarding the capacity of persons to submit

9 Peru–United States of America, Free Trade Agreement, Art. 21.21:2. *See also* similar provisions in FTAs with Canada and Costa Rica. Specifically, Peru–Canada Free Trade Agreement, Art. 2118; Peru–Costa Rica Free Trade Agreement, Art. 15.15.

10 Peru–Singapore Free Trade Agreement, Art. 10.17:6.

11 Peru–Chile Free Trade Agreement, Art. 11.26:8.

12 Alberti Montoya, Ulises, *"El Arbitraje Comercial"* (Commercial Arbitration), *Cultural Cuzco S.A., Lima,* 187 (1988).

13 Arbitration Act, Art. 78.

14 Peru Constitution, Art. 139(1).

their disputes to arbitration. Indeed, the Constitution expressly provides that even State and State organs and entities may submit their contractual disputes to international arbitration.[15] The legal framework for the enforcement of arbitral awards against the State however is not that clear. In a 2010 decision, the Constitutional Tribunal stated that while in principle State assets are subject to enforcement proceedings, the competent tribunals must draw a limit with those assets set aside for the discharge of public functions or for public use.[16]

A *Applicable Awards*

According to Article 74 of the Arbitration Act, "foreign awards" requiring recognition are those issued outside Peruvian territory.[17] A reading of the Act suggests that partial or interim awards can also be submitted for recognition.[18] The Arbitration Act has also helpfully restated the obligation of its courts to enforce ICSID awards and to recognize these as local awards, not requiring formal recognition.[19]

B *Competent Courts*

In accordance with Article 8 of the Arbitration Act, recognition of a foreign arbitral award should be sought before the Commercial Chamber (or in its absence, the Civil Chamber) of the Superior Court of Justice of the respondent's domicile.[20] This includes awards in which the State or a State-owned enterprise is a party.[21] There is one Superior Court for each of 31 judicial districts in Peru. If the competent Superior Court refuses to recognize all or part of the award, the applicant may appeal to the Supreme Court.[22] Once an award has been recognized in full or in part, it may be presented for enforcement before the first instance specialized commercial courts (*Juzgados Especializados*) (or in its absence, the specialized civil courts) in the defendant's domicile.[23]

15 Peru Constitution, Art. 63.

16 Constitutional Tribunal, Judgment of June 30, 2010 (Case EXP. Nº. 02147-2009-PA/TC).

17 Arbitration Act, Art. 74.

18 Arbitration Act, Arts. 6(f), 54.

19 Arbitration Act, Fourteenth Supplementary Provision.

20 Arbitration Law, Art. 8(5).

21 Arbitration Act, Art. 2.2.

22 Arbitration Act, Art. 76(4).

23 Arbitration Act, Arts. 8(6), 68, 77.

C *Conditions*

Article 74 of the Arbitration Act provides that recognition and enforcement shall be governed by the New York Convention, the Panama Convention or any other relevant treaty, whichever is more favorable to the applicant.[24] The applicant, however, may also resort to the Arbitration Act to the extent that it is more favorable than the applicable conventions.[25] With this in mind, it is important to note that Article 75 of the Act provides grounds for refusal of recognition similar to those in the New York Convention, but importantly, conditions a number of them on the respondent's previous conduct in the arbitral proceedings. Finally, it is crucial to note that there is a ten year limitation period for the recognition of foreign arbitral awards.[26]

D *Formalities*

In accordance with Article 76 of the Arbitration Act, an application for recognition must be filed together with the duly authenticated original or certified copy of the award by the appropriate Peruvian diplomatic or consular official at the seat of arbitration.[27] In contrast to the New York Convention, the Arbitration Act does not require the applicant to file the arbitration agreement. Perú has acceded to the 1961 Convention Abolishing the Requirement of Legalization for Foreign Public Documents (Hague Convention) in 2010. As a result, awards made in a member country can simply be accompanied by an Apostille Certificate by the appropriate Peruvian diplomatic or consular official. Finally, given that all documents presented to the court must be in Spanish, awards may also need to be translated and certified. Though the Act does not require an official translation, prior practice does suggest that it is a convenient precaution.

E *Procedure*

Once the Superior Court verifies that the formal requirements have been met in the application, it will duly serve or notify the respondent party. Upon service, the respondent has a 20-day period to oppose the recognition. When that period has elapsed, the Superior Court will hold a hearing within 20 days

24 Arbitration Act, Art. 74.

25 Arbitration Act, Arts. 75(1), 78(2),

26 Arbitration Act, Art. 75(1); Civil Code, Art. 2001 (Peru).

27 Arbitration Act, Art. 76(9).

during which it has the option to: (i) postpone its ruling should the relevant award be the subject of other proceedings; (ii) set it aside; or (iii) suspend it at the seat of arbitration.[28] If suspension is the case, the Court may order, at the applicant's request, that the respondent provide an appropriate financial guarantee.[29]

Following the hearing, the court has 20 days to issue a final "resolution." A resolution refusing to recognize part or all of an award may be appealed.[30] In other words, it is the applicant and not the respondent that has the right to an appeal.[31] Pursuant to Article 77 of the Arbitration Act, once the award has been recognized in part or in full, the award may be submitted for enforcement.[32] Prior practice also suggests that the best strategy for the applicant party is to request an Order from the Superior Court indicating that the recognition resolution is binding ("firme y consentido").

The process for enforcement is identical to that of local arbitration awards.[33] The Arbitration Act helpfully provides that the competent courts are prohibited from considering motions or other legal claims that may hinder or disrupt the prescribed enforcement process.[34] In accordance with Article 68 of the Arbitration Act, the competent court shall, on the *prima facie* merit of the arbitral award, proceed to issue a writ of execution ("mandamiento de pago") demanding the respondent to voluntarily perform within a 5-day period, or face an execution by force. The respondent party may only oppose the execution if it presents documents showing it has already performed.[35]

If the responding party is able to do so, the Court will order the applicant to be served and provide that party with a 5-day period to respond. Once this period has elapsed, the court will issue its ruling within the subsequent 5 days. Judgments recognizing the award cannot be appealed. Judgments refusing to recognize all or part of an award may be appealed before the Supreme Court.[36]

28 Arbitration Act, Arts. 76(2), (3); 75(8).
29 Arbitration Act, Art. 75(8).
30 Arbitration Act, Art. 76(4).
31 Arbitration Act, Art. 76.
32 Arbitration Act, Art. 77.
33 Arbitration Act, Art. 68.
34 Arbitration Act, Art. 68(4).
35 Arbitration Act, Arts. 68(2), (3).
36 Arbitration Act, Arts. 68 (3), (4).

VI Leading Cases

There are two court cases worth mentioning on the recognition of foreign arbitral awards. It is important to note, however, that they were decided under the previous arbitral regime. These cases are *Dist Corporation v. Cosmos Internacional* and *Energoprojekt SA v. Pacifico Peruano Suiza Insurance Company.*

A *Dist Corporation v. Cosmos Internacional S.A.*[37]

This October 1998 decision by the Lima Superior Court recognized an October 1997 award by the Korea Commercial Arbitration Board in which Dist Corporation was awarded damages for contractual non-performance. The enforcement was opposed by Cosmos Internacional arguing that it was Dist Corporation that had failed to perform and that it had not been given proper notice of the arbitration. The Court dismissed the respondent's first argument as "irrelevant" noting that it did not fall within the New York Convention's prescribed grounds to refuse enforcement.[38]

B *Energoprojekt Niskograndja SA v. Pacífico Peruano Suiza Compañía de Seguros y Reaseguros*[39]

A 2005 decision by the Lima Superior Court also recognized a December 2001 award made in London in which Energoprojekt Niskograndja was awarded damages on an insurer's non-performance. The respondent opposed enforcement before the Lima Superior Court invoking Peruvian public policy. The Court dismissed the respondent's appeal based on their failure to prove a violation of the internal legal order.[40]

37 Corte Superior de Justicia de Lima, Oct. 1998, *Dist Corporation v. Cosmos Internacional S.A.*

38 The respondent's second argument was dismissed for lack of evidence.

39 Lima Superior Court, Mar. 2005, *Energoprojekt Niskograndja SA v. Pacífico Peruano Suiza. See also* Lima Superior Court, Sept. 2003, *Geb Shipping Company Limited v. Transportes Marítimos del Pacífico S.A.*

40 This decision was appealed to, and dismissed by the Supreme Court on January 7, 2006 based on a formality. The arbitral legislation in force at the time did not allow a decision recognizing a foreign arbitral award to be appealed.

VII Conclusions

The Arbitration Act enacted in 2008 is the latest example of Peru's enthusiastic adoption of arbitration in accordance with international standards. Indeed, the previous statute (dating back to 1996) was also based on the UNCITRAL Model Law. The 2008 Arbitration Act is amongst the most progressive in the region. Specifically, with regards to the recognition and enforcement of foreign arbitral awards, the Arbitration Act provides a self-contained system that governs both the procedural and substantive aspects of enforcement and recognition. This self-contained system fully embraces the principle of maximum efficacy in line with the New York Convention and appropriately favors the recognition of arbitral awards; limits the intervention of the courts; and reduces a losing party's opportunities to obstruct the process. Although we are yet to see a key precedent under the Arbitration Act, past experience provides a considerable measure of confidence.

Annex

Arbitration Act

Article 1—Scope of Application
The provisions of this Legislative Decree shall apply to arbitrations whose place is within Peruvian territory, whether the arbitration is of a national or international nature; without prejudice to the provisions of treaties or international agreements to which Peru is a party or laws containing special provisions on arbitration, in which case the provisions of this Legislative Decree will apply in a supplementary manner.

Article 74—Applicable Rules

1. Foreign awards are those made in a place that is outside Peruvian territory. They will be recognized and enforced in Peru in accordance with the following instruments, taking into account the time limits provided in Peruvian law:

    a. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York on June 10, 1958, or
    b. The Inter-American Convention on International Commercial Arbitration, adopted in Panama on January 30, 1975, or

c. Any other treaty on recognition and enforcement of arbitral awards to which Peru is a party.

2. Unless the parties have agreed otherwise, the applicable treaty will be the most favorable to the party applying for recognition and enforcement of a foreign award.

Article 75—Grounds for Refusal

1. This Article shall apply in the absence of a treaty, or even if it exists, if these norms are, in whole or in part, more favorable to the party applying for recognition of foreign award, taking into account the time limits provided in Peruvian law.
2. Recognition of a foreign award may only be refused, at the request of the party against whom it is invoked, if that party proves:

    a. That one of the parties to the arbitral agreement 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 therein, under the law of the country where the award was made; or
    b. That the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to exercise its rights; or
    c. That the award deals with a difference not contemplated in the arbitral agreement or contains decisions beyond its terms; or
    d. That 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
    e. That the award has not yet become binding on the parties, or has been set aside or suspended by a competent judicial authority of the country in which, or under the law of which, that award was made.
3. Recognition of a foreign award may also be refused if the competent judicial authority in the country where recognition and enforcement finds:

(a) That under Peruvian law, the subject matter of the difference is not capable of settlement by arbitration.
(b) That the award is contrary to international public policy.

4. The ground provided in subsection a. of paragraph 2 of this article shall not entail the refusal of the recognition of the award, if the party that invokes it has appeared in the arbitration proceedings and has not invoked the lack of competence of the arbitral tribunal because of the lack of validity of the arbitral agreement, or if the arbitral agreement is valid under Peruvian law.
5. The ground provided in subsection b. of paragraph 2 of this article shall not entail the refusal of the recognition of the award, if the party that invokes it has appeared in the arbitration proceedings and has not timely claimed before the arbitral tribunal the failure to notify the appointment of an arbitrator or of the arbitral proceedings or the violation of its right of defense.
6. The ground provided in subsection c. of paragraph 2 of this article shall not entail the refusal of the recognition of the award, if it [the award] refers to matters submitted to arbitration that can be separated from those not submitted to arbitration.
7. The ground provided in subsection d. of paragraph 2 of this article shall not entail the refusal of the recognition of the award, if the party that invokes it has appeared in the arbitration proceedings and has not invoked the lack of competence of the tribunal by virtue of that its composition is not in accordance with the agreement of the parties, or in its absence, with the law of the country where the arbitration took place; or has not timely reported before the arbitral tribunal that the arbitral proceedings were not in accordance with the agreement of the parties or, in its absence, with the law of the country where the arbitration took place.
8. If an application to a competent judicial authority of a country in which, or according to whose law, an award was made, for the setting aside or suspension of the foreign award, in accordance with subsection 6 of paragraph 2 of this article; the competent Superior Court hearing the recognition of the award, if it considers it proper, may adjourn the decision on such recognition and, on the application of the party claiming the recognition of the award, may also order the other party to give suitable security.

Article 76—Recognition

1. The party seeking recognition of a foreign arbitral award shall present the original or a copy of the award, duly observing that provided in article 9. The application will be processed in a non-adversarial manner, without the intervention of Office of the Public Prosecutor.
2. Having admitted the application, the competent Superior Court shall serve the other party so that within a twenty (20) day period it expresses what it deems appropriate.
3. Once the term of service has elapsed, a date for hearing the case shall be set within the following twenty (20) days. At the hearing, the competent Superior Court may adopt, if that is the case, the decision provided for in paragraph 8 of Article 75. Otherwise, it will decide within the following twenty (20) days.
4. Against the decision of the Superior Court, an appeal is only proper when the award is not recognized in full or in part.

Article 77—Enforcement
Once the award is recognized in full or in part, its enforcement will be heard by the competent judicial authority in accordance with article 68.

Article 78—Application of the More Favorable Provision
When the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York, on June 10, 1958, is applicable the following shall be taken into account:

1. In accordance with paragraph 1) of article VII of the Convention, when one or more of the provisions of this Legislative Decree shall be applicable when they are more favorable to the party applying for the recognition and enforcement of the award.
2. In accordance with paragraph 1) of article VII of the Convention, the interested party may invoke the rights that may assist it, in light of the laws and treaties to which Peru is a party, to obtain the recognition of the validity of the arbitral agreement.
3. When paragraph 2) of Article II of the Convention is applicable, this provision shall apply, mindful that the circumstances it describes are not exhaustive.

CHAPTER 17

Uruguay

Leonardo Melos

I Introduction

Since the nineteenth century, Uruguay has progressively developed a strong tradition on the recognition and enforcement of foreign arbitral awards. Uruguay's traditional respect for the international community and the decisions rendered by the varying international courts is one of the bases of the country's existence itself. It is fair to say that due to its geopolitical situation, Uruguay has demonstrated that it was well aware of its international calling, most notably through its ability to cull the respect of Brazil and Argentina for its sovereign rights. In this scenario, it is not a surprise to find that Uruguay promoted the Montevideo's Procedural Law Treaty ("MPLT") of January 11, 1889. It is important to note that this treaty, promulgated at the end of the nineteenth century contains specific regulations on recognition of foreign arbitral awards.

On top of the strong international tradition, positive signs are Uruguay's position regarding the nullity of choice of law clauses added to a well-organized and reliable judicial system that applies arbitral solutions to solve national and international commercial and civil disputes.[1] Having said that, during the recent decades with the globalization of the world economy, and the participation of Uruguay on the commercial international fora, investment protection treaties, Mercosur commercial disputes, and Free Trade Agreements entered by the Uruguayan government, these have all provoked a revitalization of the international conventions system approved long ago. In addition, the enactment of the Civil Procedural Law ("CPL") on November 14, 1989 (which includes an entire chapter on the enforcement of foreign judgments and arbitral awards), has created an updated local legal system, aligned to the principles ratified by Uruguay on the several international conventions in place since 1889.

1 Civil Code, MPLT and MPLT 1940, does not allow the parties to choose the applicable law. Uruguay did not ratify Mexico's Convention on International Contracts (1994). *See*, Cecilia Fresnedo Cecilia de Aguirre, *Curso de Derecho Internacional Privado*, 162 (Tomo II, Vol. II Mdeo, FCU, 2009). *See also*, Diego P. Fernandez Arroyo, *Derecho Internacional Privado de los Estados del Mercosur*, 1019 (Buenos Aires, Zavalía, 2003).

 | DOI 10.1163/9789004284364_019

This is to say that Uruguayan jurisdiction has a remarkable and consolidated legal system (of both national and international sources) addressed to facilitate the recognition and enforcement of foreign arbitral awards. Nevertheless, the ultimate test of any arbitration proceeding is its ability to render an award which, if necessary, will be recognized and enforced in any relevant jurisdiction.[2] In the following pages, we will render a general overview of the enforcement of foreign arbitral awards in the Uruguayan jurisdiction, whether the enforcement is based in an international convention ratified by our country or based on the local regulations.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

Although Uruguay has not assumed an unconditional commitment to the recognition of foreign arbitral awards, it is true that due to the several conventions in place, we can conclude that Uruguay is a friendly jurisdiction for the recognition and enforcement of foreign commercial (and non-commercial) arbitral awards. In this regard, Article 3 of the MPLT states that *"(j)udgments or arbitral awards ruled on civil and commercial . . . will have effect between the signatory countries in accordance with the provisions of this treaty . . ."* The MPLT also established a reciprocity rule through its Article 5 which states that *"(j)udgments and arbitral rulings issued on civil and commercial cases in one of the signatory countries, will have in the jurisdiction of the remaining signatory countries, identical legal value than the one recognized in the country in which such award was rendered."* [3]

In 1940 Uruguay ratified the second Montevideo Procedural Law Treaty ("1940 MPLT"), with identical wordings in Articles 3 and 5. Uruguay[4] also ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) by Law-Decree No. 15.229 (December 11, 1981). Under the New York Convention, Uruguayan courts are bound to recognize and enforce foreign awards made in other contracting

2 Born Gary, *International Commercial Arbitration in the United States*, 460 (Kluwer Law and Taxation Publishers, Boston, 1994).

3 Signatory countries: Argentina, Bolivia, Brasil, Chile, Paraguay, Perú y Uruguay. Ratifying countries: Argentina, Bolivia, Paraguay, Perú, Uruguay. Accession countries: Colombia.

4 Signatory countries: Argentina, Bolivia, Brasil (with reservations), Colombia, Paraguay, Perú, Uruguay. Ratifying countries: Argentina, Paraguay, and Uruguay.

states.[5] According to the New York Convention, *"(e)ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."*

The New York Convention is the most relevant international convention ratified by Uruguay on this subject. Moreover, the country did not make any reservation at the time of ratification thereby limiting its application to the foreign arbitral awards issued in the territory of the signatory countries. As per Article 1(3), *"(w)hen signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State."*

Recognition of foreign awards is also established by Law-Decree 14.534 of June 24, 1976 (Panamá Inter-American Convention on Commercial Arbitration ["CIDIP I"], 1975), and Law-Decree 14.953 dated November 12, 1979, (Montevideo Inter-American Convention on enforcement of foreign judgments and arbitral awards ["CIDIP II"], 1979). Both conventions were timely ratified by Uruguay. Despite the limited range of CIDIP I vis-à-vis the New York Convention, it has established a relevant improvement in Uruguay. In accordance with Article 4 of the CIDIP I, all foreign arbitral awards have the same legal enforceability as foreign judgments rendered by a foreign Court not subject to further recourse (*res iudicata*). Notwithstanding the exequatur proceeding to be analyzed in the upcoming sections, this same principle is followed by the internal procedural regulations established in the CPL.

Recognition of foreign arbitral awards was also included in the Mercosur Agenda. The Mercosur Protocol on Procedural Cooperation was approved in Uruguay by Act. No. 16.971 on June 15, 1998. Uruguay passed Act No. 17.751 on March 26, 2004 approving the multilateral agreement on commercial arbitration entered between the founding members of Mercosur, Bolivia and Chile. Later on, a more specific regulation was established by the Mercosur Protocol on Commercial Arbitration and ratified by Act. No. 17.834 on September 23, 2004.

5 UNCITRAL, Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). Available at, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited on Mar. 21, 2014).

III Application for Recognition and Enforcement before Local Courts

A *Conditions and Formalities*

In addition to the particularities of the conventions mentioned above, it is important to point out the three conditions to be met for the purposes of recognition of arbitral awards: (i) formalities to be met by the arbitral award; (ii) procedural conditions; and (iii) substantive conditions or material aspects of the arbitral award. Article 4 of the New York Convention outlines international formalities to be met by arbitral awards:

> 1. *To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:*
>
> (*a*) *The duly authenticated original award or a duly certified copy thereof;*
> (*b*) *The original agreement referred to in article II or a duly certified copy thereof.*
>
> 2. *If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.*

In general, formalities are related to authentication of the arbitral award issued by the foreign tribunal, i.e. translation and legalization of the arbitral award that is customarily presented with the original document in which the arbitral agreement was executed. CIDIP I also contemplates authentication for recognition through a consular agent or diplomatic authority, in effect avoiding the legalization process. This course of action would be applicable in the case of Article 5 of MPLT and MPLT 1940 as well as through Article 539.1 of the CPL. Uruguay ratified the Hague Convention Abolishing the Requirement for Legalization for Public Documents (the Apostille Convention) through Act. No. 18.836 on November 15, 2011. Through this, it could be argued that a foreign arbitral award in compliance with the Apostille Convention would meet the required formality.

There are conventions that have established lesser formalities such as Mercosur Protocol on Procedural Cooperation (Act. No. 16.791). In accordance

with Articles 19, 20 and 21, it would not be necessary to legalize the arbitral award, only to evidence the authenticity and public translation of the award to be recognized. Procedural requirements are related to three aspects: (i) due process of law, (ii) arbitral tribunal international jurisdiction, and (iii) *res iudicata* of the foreign arbitral award.The first aspect is traditionally evidenced through timely notification to the defendant of the arbitral claim and a reasonable legal term to appear before the arbitral tribunal to exercise its legal rights. In that respect, Article 5 of the New York Convention establishes that:

> (*b*) *The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;*

The Mercosur Protocol establishes similar criteria that the defendant must be duly notified, and that the arbitral tribunal has guaranteed due process of law. MLPT and MLPT 1940 Article 5 prescribe that, to consider the due process of law duly served, it is necessary that *"the party has been duly summoned and legally represented or declared in contempt"*. Assessment on which procedural law shall be complied with by claimant and the arbitral tribunal would depend on the convention or local regulations in place.

For instance, Article 539.1 of CPL establishes that the defendant must be summoned in accordance with the regulations of the country that issued the arbitral award. However, Article 2 of CIDIP II is more restrictive. In order to recognize the foreign award, the procedure to notify defendant must be considered valid and legal in the place the foreign award is going to be enforced. Although it might be considered a different requirement, we tend to believe that the legal capacity of the party to appear before court or through a legal representative is directly related to the due process of law (New York Convention, Article 5(1)(a) and CIDIP I Article 5(1)(a)). The lack of capacity to appear before a Court, or to appoint a legal representative, somehow limits the possibility of a party to exercise its rights before the arbitral tribunal.

Regarding the requirement of jurisdiction of the arbitral tribunal, CIDIP II establishes that the arbitral tribunal must have jurisdiction in accordance with the laws and regulations of the country in which the arbitral award will have legal effect. This condition is usually met, given that if the parties can agree on an arbitral solution to its commercial differences they can also appoint the arbitral tribunal to deliberate on a concrete dispute. Therefore, as long as the arbitral agreement is valid and in full force, it could be difficult to challenge the jurisdiction of the arbitral tribunal. It is fair to say that such understanding

could be rejected where the arbitral dispute is considered excluded from arbitration by the country in which the arbitral award is to be enforced, or in the case of an exclusive jurisdiction by local Courts, as established in CPL Article 539.4.

The New York Convention recognizes a similar exception under Article 5(2)(a) which states:

> *The subject matter of the difference is not capable of settlement by arbitration under the law of that country*

An important matter is whether the arbitral tribunal has the ability to determine its own jurisdiction. As per Article 18 of the Mercosur Protocol on Commercial Arbitration, the arbitral tribunal is empowered to determine whether the dispute is under its jurisdiction or should be subject to analysis before a judicial court.

Another aspect related to the jurisdiction of the arbitral tribunal is compliance with the appointment procedure in accordance with the arbitral agreement in place and/or in compliance with the local applicable laws of the country in which the arbitration took place. Under Article 5(1)(d) of the New York Convention and the CIDIP I, recognition and enforcement of an award may be refused if proof is provided that "[t]he composition of the arbitral authority 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 . . ." An arbitral tribunal that is not appointed in the manner the parties have agreed, would have no legal or conventional jurisdiction over the dispute.

An additional standard requirement regarding jurisdiction is found in Article 5(1)(c) of the New York Convention where recognition and enforcement may be refused if:

> [*t*]*he award deals with a difference 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*

A similar provision is contemplated in CIDIP I, Article 5.1.c. This is an important aspect to be analyzed given that if the dispute is not contemplated by the arbitral agreement, it should be deliberated by the Court, and the jurisdiction

of that Court would be determined by conflict of law principles. Considering that Uruguay is a country that has traditionally rejected the choice of law and jurisdiction clauses this is an important standard requirement to be met. It could be argued that this is a material or substantive requirement for foreign arbitral awards. In any event, and despite its categorization, for purposes of recognition before Uruguayan courts this is a relevant aspect. Finally, the inexistence of further recourse (*res iudicata*) against the foreign arbitral award and/or that the foreign arbitral award is, at the time of enforcing the award, binding to the parties (even when is subject to a nullity recourse) is a not fully elucidated issue.

In accordance with the New York Convention and CIDIP I, the foreign award would be recognized unless the foreign award does not bind the parties yet, and or if it has been already suspended or annulled by a competent authority in the country where the foreign award has been issued (Articles 4, 5(1)(d) and 5(1)(e) of the New York Convention and CIDIP I). In accordance with those conventions, a foreign award might be enforceable although a suspension or nullity recourse is pending. In any event, it is within the powers of the judicial authority in which the foreign award is to be enforced to: (i) suspend the enforceability until a decision on suspension or nullity is rendered, or (ii) upon the application of the claimant, order the respondent to furnish a performance bond to guarantee the enforcement of the arbitral award (Article 6 of the New York Convention and CIDIP I). However, CIDIP II and CPL have established that the foreign arbitral award must be considered *res iudicata* in the country in which the foreign award has been rendered. The said requirement is also established in the MLPT and MLPT 1940.

Regarding the substantive standard condition to admit the recognition of a foreign arbitral award, the analysis would entail an assessment of whether the arbitral award is contrary to the public policy of the country where the arbitral award is to be enforced. This standard condition is a significant requirement of all conventions ratified by Uruguay. However, the public policy exception under the CPL, Mercosur Protocol is related only to the international public policy of the country and not to the internal public policy. This is a relevant aspect, as the bar for a foreign arbitral award not be recognized requires not only contradicting an internal law, but also affecting fundamental public policies of the Uruguayan Republic in the international scenario.

Other conventions, such as the MLPT, MLPT 1940, and CIDIP II, have identical provisions but no reference to international public policy, instead the reference is only to the "public policy". On the other hand, the New York Convention established that the public policy to consider for purposes of enforcing the foreign arbitral award are those in effect in the country in which

the foreign arbitral award is to have legal effect, that is to say, the internal public policy. Therefore, the broadness of the public policy exception would depend on the applicable convention.

Scholarly opinions in Uruguay characterize the internal public policy as those laws that cannot be contradicted by private agreements, and the international public policy as the set of consolidated rules and principles in which the whole legal system is based.[6] Uruguay's position was reflected in a statement made by the Uruguayan representative during the negotiations of CIDIP II. The representative stated that international public policy *"is an exceptional authorization to the parties, to deny recognition in a grounded base and without discretion to a foreign arbitral award, and only when the foreign award causes offense in a concrete, express and serious manner to the essential rules and principles of the international public policy in which the legal system of the state is based."*[7] Such traditional understanding from the public authorities and judicial bodies regarding the international public policy exception characterize Uruguay's ample criterion and willingness to recognize arbitral awards from different legal systems.

B *Competent Courts*

Uruguay's Supreme Court of Justice is the competent authority to analyze whether the standard requirements established above are duly met.

C *Applicable Awards*

It is obvious that an arbitral award would be considered foreign, if the award was rendered outside the Uruguayan jurisdiction (CPL, Article 537.1). However, under the New York Convention, an award is also considered foreign when the procedural law applied is not the same as the local arbitral award.[8] The Mercosur Protocol on Commercial Arbitration broadens the concept of foreign arbitral award and considers aspects such as legal or economic point of contacts of the contract with more than one jurisdiction; domicile of the parties; existence of branches, etc. This is to say that in Uruguay, other aspects might be analyzed to determine whether the arbitral award is considered local

6 Reuben Santos Belandro, *Arbitraje Comercial Internacional*, 119–122 (Mexico, Ed. Oxford University Press, 2000).

7 Manuel Viera, *Derecho Internacional Privado*, 12 (Montevideo, Ed. FCU, 1992).

8 Reuben Santos Belandro, *Seis Lecciones sobre Arbitraje Privado* (*Interno e Internacional*), 188 (Montevideo: Associacion de Escribanos del Uruguay, 2002).

or foreign. An additional aspect to consider whether the arbitral award is subject to enforcement is the nature and content of the arbitral decision of the dispute.

First, the claimant should determine whether the arbitral award will be filed before the Court as an evidence of a certain fact, and/or to make the local authorities recognize the imperative/binding effect of the award, in which case the arbitral award is filed with the a competent court (Article 539.1) with certain limited formalities such as evidence of: (i) res *iudicata*, (ii) certified copy of the arbitral award, and (iii) notice to the defendant in order to exercise their legal defense. In case the claimant's intention is to obtain a recognition of the binding legal effect or evidentiary value of the foreign arbitral award out of Court, the arbitral award recognition requirements would be assessed by the *notaire publique* and/or the public officer which would be acting in the respective legal act (contract, public registration of the arbitral award, etc.). However, when the intention of the claimant is to enforce the decision of the arbitral tribunal to obtain fulfillment of defendant's obligations under the award, the claimant could be authorized to initiate the respective enforcement proceeding.

Nevertheless, and prior to commencement of the enforcing proceeding, the claimant should distinguish whether the arbitral award: (i) has a pre-existing legal situation, (ii) creates a new legal situation, and/or (iii) imposes a certain pecuniary obligation over the defendant and/or imposes the obligation to undertake a certain action (or not to undertake that action) by the defendant. If the arbitral award only imposes legal effect under numbers (i) and (ii), there will be no legal reason to promote an enforcement proceeding, instead only recognition would be applicable. When the arbitral award creates a legal effect described under number (iii) above, an enforcement proceeding could be promoted by the claimant. Although in most cases the arbitral award imposes mixed legal effect, it is a useful tool for the claimant to determine which category the arbitral award falls into in order to avoid unnecessary proceedings and formalities to realize the recognition of a foreign arbitral award.

D *Procedure*

CPL establishes that the proceeding to enforce the foreign arbitral awards is the same that is applicable for the foreign judgments (CPL Article 543). In accordance with the CPL, only arbitral awards and foreign judgments that impose a certain pecuniary obligation over the defendant and/or impose the obligation to undertake a certain action (or not to undertake that action) by the defendant could be subject to enforcement. (CPL Article 541). After the

filing of the enforcement action, the respondent is duly notified and is granted a 20 calendar days term to challenge the petition for enforcement under one of the limited grounds established in the CPL that mirror those in the New York Convention and CIDIP I and II. After the respondent's written reply is filed, the Supreme Court of Justice notifies the National Prosecutor in order to gather his written opinion on the admittance or rejection of the enforcement of the foreign arbitral award petition. The Supreme Court of Justice would then decide whether the foreign arbitral award has met the legal requirements established in the international conventions or local regulations, and without further recourse, subsequently admitting or rejecting its enforceability. If the enforceability is granted, the arbitral award along with the court records are sent to the local Court that would have jurisdiction if the case were to be considered a local case for the purposes of enforcement of the award.

After exequatur is granted by a judgment of the Supreme Court, the local Court is bound to enforce the arbitral award in the exact same manner as if it were a local judgment through the expedited proceeding called "proceso de ejecución." Where the claimant's intention is to simply recognize the legal effect of the foreign arbitral award, the arbitral award is filed before the respective local Court with jurisdiction over the legal dispute, that after hearing the district attorney's opinion will decide if the requirements established under the local laws or international conventions are met.

A similar process is followed when the arbitral award is issued in compliance with an international convention such as the New York Convention, CIDIP I, CIDIP II, MLPT, etc. The exception is the MLPT 1940, which requires that the foreign award has to be enforced directly by the local judge who would have jurisdiction if the case were a local matter upon submission of a prior opinion of the district attorney.

IV Leading Cases

1 *Foreign Awards*

In Decision No. 74/11, the Civil Court of Appeal 1st Circuit heard a case in which an arbitral tribunal recognized and considered as foreign an award rendered in Uruguay in which the parties were two foreign companies, participating in a purchase of oil agreement to be performed in Bolivia.[9] The Court decided to apply the New York Convention and CIDIP I and not the CPL. The Civil Court of Appeal 1st Circuit also ruled that its legal powers are restricted to only ana-

9 Tribunal de Apelaciones en lo Civil de Primer Turno, Decision 74 of Feb. 2011, *Univen Refineria de Petróleo Ltda. v. Empresa Petrolera Andina S.A.*

lyzing whether the Arbitral Award could be recognized and enforced, and not to analyze the merits of the arbitral decision.

2 *Notice to Defendant*

In Decision No. 41/04, the Uruguayan Supreme Court of Justice recognized and decided to enforce an arbitral award against a local company that has been summoned in its special domicile by a Russian company, under which the defendant failed to communicate its new legal domicile.[10] In this case, it was relevant for the Supreme Court that the defendant exercised its right before the arbitral tribunal, and failed to mention its new legal domicile to the claimant and the arbitral tribunal. The Supreme Court of Justice found that due process of law was satisfied during the arbitration, and at the time of enforcement the defendant should be aware of the legal consequences of not communicating its new legal domicile.

3 *Nullity Recourse, Applicable Law to the Arbitral Proceeding, International Public Policy*

As per Decision No. 161/03 rendered by the Civil Court of Appeal 2nd Circuit, an arbitral tribunal established that it is not legally valid to contest or challenge the validity of the foreign arbitral award under the grounds that the arbitral award was rendered once the term had expired, when both parties had exercised their legal defenses, accepted the arbitral procedure and produced their final allegations.[11] The Court reasoned that the good faith principle was violated as defendant unlawfully tried to act against its tacit acceptance of the extension of the term. For purposes of deciding the case, the Civil Court understood that if the defendant produced its final allegation when the time had already expired, this could be interpreted as a tacit acceptance of the term extension.

The nullity recourse right cannot be waived *ab initio*, and thus any agreement containing this provision would be considered null and void. The Civil Court understood that in the absence of an express decision on the applicable law to the arbitration, the location of the arbitration is a relevant guidance to conclude that the parties would select the law of the arbitration`s venue. However, given that the parties decided to submit the dispute to an institutionalized arbitration organization, those rules should apply.

---

10 Suprema Corte de Justicia, Decision 41 of Feb. 2004, *Vao Techmashexport v. Antigrad Latinoamericana S.A.*

11 Tribunal de Apelaciones en lo Civil de Segundo Turno, Decision 161 of June 2003, *Enersis Internacional, Chilectra S.A., Empresa Nacional de Electricidad S.A. v. Pecom Energía S.A. y PCI Power Edesur Holding Limited.*

The only interest that a Uruguayan Court could have in rejecting the recognition and enforcement of foreign arbitral award would be that the arbitral award infringes Uruguay's international public policy. In this connection, the Civil Court ruled that such exception is understood as a violation of due process of law principles which directly affects the basis of our legal system.

4 *Commitment with Recognition, Evidence of* Res Iudicata

In Decision No. 136/06, the Uruguayan Supreme Court of Justice authorized the enforcement of an arbitral award under the grounds that the existence of *res iudicata* can be proved through a legal opinion delivered by an attorney of the jurisdiction where the dispute took place.[12] Here, the Supreme Court of Justice understood that there is a principle and commitment in favor of enforcement of foreign decisions, based on the international judicial cooperation.

5 *Requirement of the Arbitral Agreement*

Under Decision No. 85/08, the Supreme Court of Justice rejected the enforceability of an arbitral award and ruled that no enforcement could be authorized if the arbitral agreement does not meet the necessary requirements.[13] In particular, the Court reasoned that the agreement should be signed by both parties or be accepted in writing by the defendant through an additional document or amendment. This ruling reinforces the position of the Supreme Court of Justice that standard term contracts that are not duly signed by both parties, do not meet the conventional requirement established by New York Convention.

V Conclusions

Uruguay has entered into a significant number of multilateral and bilateral international treaties which apply to almost all regions of the world. In the absence of an international treaty, local regulations tend to favor the recognition and enforceability of foreign awards. Requirements established by the local procedural rules are aligned to the requirements established in international conventions ratified by Uruguay. Moreover, as per the local regulations,

12 Suprema Corte de Justicia, Decision 136 of Aug. 2011, *A.B.N. Amro Bank N.V.* (*Sucursal Nueva York, Estados Unidos*) *v. Wishaw Trading S.A.*

13 Suprema Corte de Justicia, Decision 85 of May 2008, *Soufflet Internacional Pte. Ltd. y Prolac v. Brookner S.A.*

foreign arbitral awards are considered to have the same value as that of a foreign court judgment.

Local courts decisions apply the requirements established in both local and international regulations without amplifying or adding new requirements to the foreign arbitral awards. Local rulings recognize the existence of a principle, based on international judicial cooperation, which tends to be restrictive in the interpretation of the exceptions to reject the enforcement of a foreign arbitral award. In this respect, local courts have a limited interpretation of international public policy reasons to reject the enforcement of an arbitral award.

Annex

Civil Procedural Law of Uruguay

538—Effects of Judgments

538.1. Foreign judgment shall have binding and probatory effect and be enforceable in the Republic in accordance with the provisions of this Chapter.

538.2. Foreign judgments shall be recognized and enforced in the Republic, as appropriate, without it being necessary to review the merits of case.

538.3. Recognition is the act of series of procedural acts carried out to establish if the foreign judgment meets the necessary conditions in accordance with the provisions of this Chapter.

538.4. Enforcement is the act of series of procedural acts carried out to obtain performance of compensatory foreign judgments.

539—Validity of Judgments

539.1. Foreign judgments shall be valid in the Republic provided they meet the following conditions:

1) that they be in compliance with the foreign formalities required to be deemed authentic in the Country of origin;
2) that the judgment or award and the necessary exhibits attached thereto be duly translated into the official language of the Country where recognition and enforcement are to take place;

3) that they are duly translated, if appropriate,
4) that the corresponding tribunal has extraterritorial jurisdiction to hear the case, in accordance with its laws, except if the subject-matter is under the exclusive jurisdiction of national tribunals.
5) that the respondent has been given notice or legally summoned in accordance with the laws of the country of origin of the judgment.
6) that the parties have had a right to have their case heard.
7) that it is res judicata in the country of origin.
8) that it is not manifestly contrary to the principles of international public order of the Republic.

539.2. The necessary documents to petition the enforcement of the foreign judgment are:

1) Authentic copy of the judgment.
2) Authentic copies of the necessary evidence to prove that numeral 5 and 6 of the preceding provision [539.1] have been complied with.
3) Authentic and certified copy that the judgment is *res judicata.*

[. . . .]

541—Enforcement

541.1. Only compensatory foreign judgments shall be subject to enforcement.

541.2. Enforcement shall be petitioned from the Supreme Court of Justice.

[. . .]

543—Foreign arbitral awards

The relevant provisions of this Chapter shall apply to awards made by Foreign Arbitral Tribunals.

CHAPTER 18

Venezuela

Diana C. Droulers, Emilio García-Bolívar and Adriana Vaamonde M.

I Introduction

Recognition and enforcement of commercial arbitral awards is a well-developed matter in the Venezuelan local legislation and addressed in the international law recognized by the country. Although there has not been a case to date dealing with recognition and enforcement of international commercial arbitral awards, the terms of the law and the tendency of the judicial precedents of the Supreme Tribunal of Justice allow a fair prediction of the possible outcomes, were that to occur.

II Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

Venezuela is a party to a number of international agreements. They are as follows:

- Agreement on the Execution of Foreign Acts (Caracas Convention of 1911): The Agreement on the Execution of Foreign Acts (*Acuerdo sobre ejecución de actos extranjeros*), was signed by Venezuela together with Colombia, Bolivia, Ecuador, and Perú on July 18, 1911. Venezuela ratified the Agreement on December 19, 1912 and it is still in force in the country.[1]
- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention of 1958), was ratified by the legislature on December 29, 1994. Venezuela made the express declaration

1 Organization of American States, Status of Signatures and Ratification, Acuerdo Sobre Ejecucion de Actos Extranjeros, (Venezuela, 1911). Available in Spanish at, http://www.oas.org/juridico/spanish/firmas/f-28.html and text available in Spanish at http://190.24.134.121/webcsj/Documentos/Civil/Exequ%C3%A1tur%20V.%20Final/Instrumentos%20Internacionales/Tratado%20sobre%20Derecho%20Procesal.pdf (last visited on Feb. 18, 2014).

 | DOI 10.1163/9789004284364_020

when acceding to this Convention that it will only apply to the recognition and enforcement of awards made in the territory of another contracting State. Venezuela also made the declaration that the Convention will apply only to disputes arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.[2]

- The American Convention on International Commercial Arbitration (the Panama Convention) was signed on January 30, 1975; accepted on March 22, 1985; and deposited with the General Secretariat of the Organization of American States on May 16, 1985.[3] In accordance with Article 10 of the Panama Convention, it entered into force thirty days after on June 16, 1985.
- The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention of 1979) was ratified on January 30, 1985, and deposited with the General Secretariat of the Organization of American States on February 28, 1985.[4] In accordance with Article 11 of the Montevideo Convention, it entered into force thirty days after on March 28, 1985.

III National Law

The Venezuelan Constitution expressly provides that alternative means of adjudication are part of judicial activities and thus the judicial system, but not of the judicial branch. This declaration is pronounced while reference is clearly made that the law shall promote arbitration, *inter alia*.[5] The Constitution, however forbids foreign and international arbitration in matters concerning public interest contracts. Specifically, it provides that in "contracts of public interest, if not inappropriate according to their nature, it shall be deemed to

2 UNCITRAL, Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). Available at, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited on Feb. 17, 2014).

3 Organization of American States, Signatories and Ratifications, Inter-American Convention on International Commercial Arbitration (Panama, 1975). Available at, http://www.oas.org/juridico/english/sigs/b-35.html (last visited on Feb. 18, 2014).

4 Organization of American States, Signatories and Ratifications, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Uruguay, 1979). Available at http://www.oas.org/juridico/english/sigs/zb-41.html (last visited on Feb. 18, 2014).

5 Constitution of the Bolivarian Republic of Venezuela (hereinafter, Constitution), Arts. 253 and 258 (1999).

be included even if not expressed, a clause under which doubts and disputes that may arise regarding such contracts and which do not reach to be resolved amicably by the contracting parties, shall be decided by the competent courts of the Republic, in accordance with its laws, and shall not give rise to foreign claims for any reason or cause."[6]

The 1986 Civil Procedural Code (CPC) provides that disputes may be submitted to arbitration before one or more arbitrators of odd number, prior to, or during trial, provided that the matter does not involve issues of legal capacity; divorce or separation of spouses; or other matters in which settlement is not possible.[7] However, under the terms of CPC, the acceptance and constitution of the arbitral tribunal must be conducted before a judge.[8] In general, arbitration under the CPC requires an active involvement and intervention of the courts.

In 1998, Venezuela adopted its Commercial Arbitration Law (VCAL) *Ley de Arbitraje Comercial*. This law is an adaptation of the UNICTRAL Model Law and the Colombian Arbitration Rules, with some modifications and special provisions added by the Venezuelan Congress (presently known as the National Assembly). Prior to the adoption of the VCAL, arbitration in Venezuela was governed by the rules of the Venezuelan CPC. Noted differences between the VCAL and the CPC is the distinction between the arbitration clause (*Cláusula Compromisoria*) and the agreement to formalize the arbitration or submission to arbitration (*Compromiso Arbitral*); and the role of the Court of First Instance to decide the validity of the agreement to submit to arbitration—now superseded.

Under the VCAL, all disputes are subject to arbitration except for disputes in which the parties are not allowed by law to reach a settlement, including family matters; issues concerning public policy; proceedings involving minors (unless there is a previous court approval); and matters regarding functions of the State.[9] The VCAL has a special provision regarding the formal requirements for the validity of an agreement to arbitrate signed by a company where the Republic, State or Municipalities have participation rights equal to or greater than 50% of the capital (known in Venezuela as "Public Companies"). In these cases, the agreement to arbitrate must specify the type of arbitration that it relates to (legal arbitrations as opposed to equitable arbitrations) and the number of arbitrators, which cannot be less than three. Furthermore, the

6 Constitution, Art. 151.

7 Civil Procedure Code (hereinafter, CPC) of 1986, Art. 608 (Venezuela).

8 Id.

9 Commercial Arbitration Law (*Ley de Arbitraje Comercial*) of 1998, Art. 3 (Venezuela).

agreement must be approved by a competent corporate body of the Public Company and have the approval of the corresponding Minister. This means that in order for a Public Company to properly agree to submit a controversy to arbitration, the arbitration clause must specifically state that (i) there will be a minimum of three arbitrators and; (ii) each time a contract is entered into with an arbitration clause, the agreement must have the formal approval of the Minister. The purpose of Article 4 of the VCAL is to condition the capacity of a publicly owned corporation to a prior formality.[10]

Other legislations also provide for arbitration, such as the 2002 Organic Law on Labor Procedure under which arbitration is possible if the parties so request to a sitting judge who will then choose three arbitrators from a list previously assembled by the Supreme Tribunal of Justice through its Chamber of Social Cassation.[11] Likewise, in the oil and gas industries, arbitration is allowed through Article 34 of the Hydrocarbons Organic Law (2006), and Article 24 of the Gaseous Hydrocarbons Organic Law (1999), pertaining to joint venture agreements and the possible disputes between the parties. The Law for the Development of Petrochemical Activities (2009) also allows arbitration as a dispute settlement mechanism for the joint venture agreements incorporated for the exploitation of petrochemical activities.

Disputes exempted from being submitted to arbitration as established in Article 3 of the Commercial Arbitration Law include:

- Those that are contrary to public order or concerning crimes with the exception of quantum claims, unless already determined in a final judgment;
- Those directly related to matters regarding the powers or functions of the State or public law persons and entities;
- Those related to the status or legal capacity of individuals;
- Those related to assets or rights of individuals without legal capacity where there is no previous court authorization; and
- Those over which there have already been final judgments, except with respect to the consequences related to assets that arise out of the enforcement proceedings provided they only concern the parties to the proceedings and those issues have not been decided in a final judgment.

Likewise there are certain requirements for disputes involving State entities submitted to arbitration. Accordingly, where in an arbitration agreement at

10 Commercial Arbitration Law, Art. 4.

11 Organic Law on Labor Procedure of 2002, Art. 138 (Venezuela).

least one of the parties is a commercial legal entity in which the Republic, the States, the Municipalities or autonomous institutions have a stake equal to or greater than fifty percent (50%) of the capital stock; or a partnership in which the aforementioned persons have a stake equal to or greater than fifty percent (50%) of the capital, then approval of all members of the Board of Directors of the legal entity is required along with written permission of the Minister guardianship. The arbitration agreement must specify the type and the number of arbitrators, which in no event should be less than three.[12]

The Venezuelan Commercial Arbitration Law differs from the UNCITRAL Model Law in that:

- There is no distinction between national and international arbitration. Unlike the UNCITRAL Model Law, Venezuela does not have a distinction between national and international arbitration. The VCAL applies to both national and international arbitrations that take place in Venezuela. The identification of the international character of arbitration is not necessary. The Venezuelan doctrinal interpretation of the New York Convention points out that, for Venezuelan purposes, an award is considered foreign if it has been rendered outside of Venezuela and the award is considered national if the arbitration process took place in Venezuela.
- The VCAL determines that the grounds to challenge arbitrators are those granted by the CPC. The VCAL also establishes a different procedure from that provided by the UNCITRAL Model Law.
- *Grounds for challenging an arbitrator:* Arbitrators may be challenged and disqualified in accordance with the provisions in this regard set out as grounds for challenge and disqualification from the Article 82 in the Code of Civil Procedure. The arbitrators appointed by agreement between both parties cannot be challenged other than for grounds unrelated to their designation.[13]
- *Procedure for challenging an arbitrator:* When grounds for challenge exist or arise, the challenged arbitrator must inform the other arbitrators and the parties of same, and shall, in the meantime refrain from accepting the appointment or continue to hear the case. A party wishing to challenge any of the arbitrators on the basis of grounds unknown at the time of formation of the arbitration tribunal must state this within five (5)

12 Commercial Arbitration Law, Art. 4.

13 Commercial Arbitration Law, Art. 35.

business days from the date on which he or she became aware of the ground in a submission filed with the arbitration tribunal.[14]

- *Deadline for challenging an arbitrator*: Within five (5) business days following the notice of the establishment of the arbitral tribunal, a party with a motive to challenge any of the arbitrators for grounds unknown by the time of the establishment of the arbitral tribunal, must express such motive within five (5) business days upon detection of the grounds by way of a brief submitted to the arbitral tribunal.[15]
- *Procedure for appointing a new arbitrator*: Upon acceptance of the grounds for challenge of an arbitrator, the remaining arbitrators shall declare him or her excluded from the arbitration proceedings and inform the appointing party so the party may replace the arbitrator. Should no appointment be made within five (5) business days of the notice of acceptance of the grounds, the competent First Instance Judge shall appoint a substitute at the request of the remaining arbitrators. The rulings of the competent Judge shall be final.[16]
- The VCAL does not make a distinction between interim measures of protection and preliminary orders. The sole provision referring to interim measures in the VCAL is one that recognizes the power of the arbitral tribunal to dictate them. Moreover, there is no specific proceeding for enforcing interim measures ordered by the arbitral tribunal.
- The VCAL establishes that the time frame for the parties to challenge the award is five working days after the parties have been notified of it or its amendments.
- The VCAL distinguishes between two types of arbitration, institutional and independent or *Ad hoc*. For the latter, the VCAL provides procedures that will be applicable to everything that was not determined by the parties in the arbitral agreement.
- The VCAL does not contemplate an expert appointment proceeding by the arbitral tribunal or the parties as found in Article 26 of the UNCITRAL Model Law.
- Except as otherwise agreed to by the parties, the arbitrators shall maintain the confidentiality of the motions of the parties, the evidence and of everything related to the arbitral proceedings in accordance with Article 42 of the VCAL. The UNCITRAL Model Law makes no reference to such an obligation.

14 Id. at Art. 36.

15 Id. at Art. 37(1).

16 Id. at Art. 37(2).

IV Application for Recognition and Enforcement before Local Courts

In Venezuela the enforcement of a domestic arbitral award is a straightforward matter. An arbitral award, regardless of the country of where it is made, shall be recognized by the ordinary jurisdiction as binding and not subject to appeal. Upon application in writing to the competent court of first instance, it shall be enforced without need of an exequatur, pursuant to the rules established by the CPC regarding the mandatory enforcement of judgments. The party relying on an award or applying for its enforcement shall supply a duly certified copy of the award, along with a translation into Spanish, if necessary.[17]

A *Applicable Awards*

In Venezuela there are two sources of law applicable to the recognition and enforcement of foreign awards. These are international sources which basically include international conventions, and the internal municipal law. As to internal municipal law, Venezuela has the Commercial Arbitration Act of 1998 (VCAL).[18] The VCAL is applicable when: (i) at the time of enforcement of the award, there is no international convention that ties Venezuela with the country where the award was made; or, (ii) it becomes necessary to use the VCAL to fill a void in an international convention.[19] Further, Articles 48 and 49 of the VCAL contain the rules of procedure for the enforcement of an international award.

According to the declaration made by Venezuela when acceding to the New York Convention, recognition and enforcement of awards will only apply to awards made in the territory of another contracting State. Venezuela also made the declaration that the Convention will apply only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.[20] Therefore, the New York Convention will not apply to technical arbitral awards.

17 Id. at Art. 48.

18 Commercial Arbitration Law of Venezuela published in the Official Gazette No. 36.430 of Apr. 7, 1998.

19 Commercial Arbitration Law, Art. 1.

20 UNCITRAL, Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). Available at, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited on Feb. 17, 2014).

B *Competent Courts*

The Venezuelan trial courts bear the responsibility with jurisdiction *ratione materiae* o *ratione locus* to administer over the recognition of foreign arbitral awards.[21] A petition to recognize and enforce an arbitral award must be made in writing to the competent court of first instance. Mandatory enforcement by this court is made without need for an exequatur, pursuant to the rules of the CPC regarding the mandatory enforcement of judgments.[22]

C *Conditions*

The VCAL mirrors the New York Convention with respect to refusal of the recognition and enforcement of arbitral awards. Under Article V of the New York Convention, recognition and enforcement of an arbitral award, irrespective of the country in which it was rendered, may be refused only:

a) if the party against whom it is invoked furnishes proof that at the time of the arbitration agreement the other party was not qualified;
b) if the party against whom it is invoked was not given notice of the appointment of an arbitrator, or of the arbitration proceedings that require notification, or was otherwise unable to present their case;
c) if the composition of the arbitral tribunal or the arbitration proceedings were not in accordance with the requirements of the law of the country where the arbitration took place;
d) if the award deals with a dispute not contemplated by the arbitration agreement, or contains decisions on matters beyond the scope of the issues submitted to arbitration;
e) if the party against whom the award is invoked furnishes proof that the award has not yet become binding on the parties, or has been previously declared void or suspended by a competent authority, pursuant to the terms of the submission to arbitrate;
f) if the Court hearing the application for the recognition or enforcement of the arbitral award, establishes that the subject matter of the dispute is not arbitrable under the law, or the award is in conflict with public policy;[23]
g) if the arbitration agreement is invalid under the laws that the parties submitted it to.

---

21 Commercial Arbitration Law, Art. 48.

22 Id. at Art. 43. 13 CPC, Art. 524.

23 Id. at Art. 44.

A challenge of the award can be filed during the five working days after the parties have been notified of the award or its amendments. The challenge *per se* does not stay the enforcement procedure. However, the court may stay enforcement of the award if the party requesting it submits a warranty.[24] The New York Convention expressly provides that the party against whom recognition of the award is invoked has the burden of proof.[25] The VCAL does not mention anything regarding this matter.

D *Formalities*

The Commercial Arbitration Law provides that the party requesting recognition and enforcement of an award shall submit a formal request to the competent Court of First Instance in writing. Additionally, the party relying on an award or applying for its enforcement shall supply a duly certified copy of the award, along with a translation into Spanish, if necessary.[26] Under the New York Convention, the translation shall be certified by an official, a sworn translator, or by a diplomatic or consular agent.[27]

E *Procedure*

a. *Requirements to be fulfilled by the applicant* (*procedure, time limits*): The VCAL only requires an application for the recognition and enforcement of foreign awards.[28] There is no requirement under the VCAL that the party against whom the enforcement is being sought, be domiciled in the venue of the court, nor does the party requesting the recognition of the foreign award have to show that there are assets located in the jurisdiction of the court. This broad approach of the law seems to allow forum shopping on the part of the party seeking an enforcement of an award.

b. Neither the VCAL nor the CPC have a specific provision which sets a time limit for filing an application for the recognition of a foreign award.

---

24 Commercial Arbitration Law, Art. 43.

25 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), e*ntered into force* 5 Sept. 1995 (hereinafter, New York Convention), Art. V.

26 Commercial Arbitration Law, Art. 48.

27 New York Convention, Art. IV.

28 Id.

c. *Remedies against decisions granting or declining enforcement*: The Venezuelan Supreme Court has held in the case of national awards (as opposed to international awards), that the decision of the first instance court granting or denying recognition cannot be appealed, and thus is final (Venezuelan Supreme Tribunal 2002–2006).[29] In 2011, the Venezuelan Supreme Tribunal held that the extraordinary remedy of cassation cannot be used for this purpose.[30] These holdings also apply to international arbitrations, however, some Venezuelan commentators take the view that a decision that rejects recognition of an award can be appealed (Superior Court) and cassation can be requested before the Supreme Court. The argument in favor of allowing the appeal is that, otherwise, the recognition of an award would be left solely in the hands of the first instance court. This latter criterion has not been recognized by the Courts in Venezuela.

d. If one accepts that a judgment granting or denying the recognition of an award is subject to appeal, then that appeal should be initiated before the Superior Court of the corresponding jurisdiction. In turn, a challenge can be filed against the decision of the Superior Court before the relevant Cassation Chamber of the Supreme Court. These steps in the appeal process correspond to the interpretation of the VCAL which states that the recognition and enforcement of an award is completed through the procedure used for the enforcement of a judgment according to the rules of the Code of Civil Procedure.[31] The rules for enforcement of a judgment under the Code of Civil Procedure allow the claim of cassation against the decision of the Superior Court.[32]

---

29 *See*, Venezuelan Supreme Court, Feb. 8, 2002, *Hanover P.G.N. Compressor, C.A. v. COSA and CONVECA*; Venezuelan Supreme Court, Aug. 14, 2004, *Promotora E.P. 1697, C.A.* v. *Asociación Civil El Carrao*; Venezuelan Supreme Court, Nov. 09, 2004, *Operaciones FF* v. *Valores Venafin*; and Venezuelan Supreme Court, June, 2006, *Tensaven* and *Anclajes Venezolanos* v. *Giovanni Boldrin*.

30 *See*, Venezuelan Supreme Court of Justice, Constitutional Chamber, Nov. 2011, Sentence Nº 1773, *Van Raalte de Venezuela, C.A.*

31 Commercial Arbitration Law, Art. 48.

32 Id. at Art. 312.

The Commercial Arbitration Law provides that enforcement of a foreign award shall be conducted as per the provisions of the CPC on mandatory enforcement of judgments.[33] Accordingly, the competent court shall issue an order of enforcement under which the debtor is given a period of no less than three days and no more than ten days to comply voluntarily. Once that period of time has elapsed, mandatory enforcement shall take place.[34]

V Leading Cases

To date, there has not been a court case dealing with the recognition and enforcement of a final and total foreign commercial arbitral award in Venezuela. There have been, however, some significant deliberations delivered by the judiciary concerning relevant issues of commercial arbitration. For example, as Venezuela is a party to both the Panama and New York Conventions the issue of compatibility has been resolved in that the standard to be used is the one most favorable to the party applying for the recognition and enforcement of an arbitral award.

This is illustrated in the October 9, 1997 *Embotelladora Caracas* case where the Venezuelan Supreme Court incorporated the criterion of favorability. Accordingly, the most favorable provision between the New York and the Panama Conventions shall apply in order to achieve the common objectives of both conventions. That is, that the arbitral agreements: (i) are recognized as per their terms; (ii) the awards are enforceable in countries outside the seat of the arbitral tribunal; and (iii) they stand without the need for review on the merits of the dispute.[35] The incorporation of this principle, however, was not made by law.

In the 2001 *Grupo Inmensa* case, the Venezuelan Supreme Tribunal of Justice's Constitutional Chamber held that *Amparo* was not the effective remedy to challenge an arbitration award, as the action for annulment referred to in Article 43 of the VCAL was available. The Tribunal also held that the plaintiffs had not exhausted the ordinary means and thus the exceptional constitutional remedy of *Amparo* was not a possibility. *Grupo Inmensa* further held

33 Commercial Arbitration Law, Art. 48.

34 CPC, Art. 524.

35 Supreme Court of Justice, Political Administrative Chamber, Oct. 1997, *Embotelladora Caracas & others* v. *Pepsi Cola Panaméricana* (Venezuela).

that the Code of Civil Procedure was supplementary to the VCAL with respect to compulsory enforcement of arbitral awards.[36]

On November 19, 2004, the Constitutional Chamber of the Supreme Tribunal of Justice, in the *Consorcio Barr* case, granted a constitutional injunction to prevent the enforcement of a partial award. In that case, another litigation was also pending in Venezuela involving the same arbitral matter and between the very same parties. The Constitutional Chamber held that under the provisions of the Law on International Private Law, foreign judgments, among which partial and final arbitral awards are included, (and considering the vacuum of the Commercial Arbitration Law in this regard), shall have effect in Venezuela provided there is no litigation pending in Venezuela on the same issues between the same parties which had been initiated prior to the time of the foreign judgment issuance.[37]

In a previous decision on the same *Consorcio Barr* case, the Political Administrative Chamber of the Supreme Tribunal of Justice of Venezuela refused to enforce a partial arbitral award because, in contradiction to the terms of Article 49 of the Commercial Arbitration Law, the case involved a dispute not contemplated by the arbitration agreement and/or contained determinations on matters beyond the scope of the agreement itself. Apparently, the arbitral tribunal ordered one of the parties to withdraw an application filed with a Venezuelan court to try new action before the Venezuelan courts in relation to the relevant contract of the case. Thus, that Chamber held that Venezuelan courts have jurisdiction to hear and decide matters related to the dispute, by which that partial award was not enforceable.[38]

In 2006, the Constitutional Chamber of the Venezuelan Supreme Tribunal of Justice held in the *Todosabor* case that the constitutional coverage of *Amparo* was extended to arbitral awards rendered by arbitral tribunals. This decision held that the competent courts in those cases was the appellate tribunals so long as the law did not provide otherwise as to who had jurisdiction over matter, amount and territory, and to hear requests of constitutional injunctions

36 Supreme Tribunal of Justice, Constitutional Chamber, May 23, 2001, *Grupo Inmensa, C.A.*, Decision Nº 827. Available in Spanish at, http://www.tsj.gov.ve/decisiones/scon/mayo/827-230501-00-3203%20.HTM (last visited on Feb. 20, 2014).

37 Supreme Tribunal of Justice, Constitutional Chamber, Nov. 19, 2004, Decision 2365, *Consorcio Barr, SA* (Venezuela). Available in Spanish at, http://www.tsj.gov.ve/decisiones/scon/noviembre/2635-191104-04-0163%20.HTM (last visited on Feb. 21, 2014).

38 Supreme Tribunal of Justice, Political Administrative Chamber, Mar. 25, 2003, Decision No. 476, *Consorcio Barr, SA* (Venezuela).

against such.[39] In that same year, the Political and Administrative Chamber of the Supreme Tribunal of Justice of Venezuela held in the *Tanning case* that the termination of the contract under which the arbitral agreement was contained made inapplicable that commitment.[40]

In an October 17, 2008 decision, the Constitutional Chamber in the *Hildegard Rondón de Sansó* case decided on the interpretation of whether an article of the Foreign Investment Law contained an arbitral consent by the State for investors to submit disputes before investment arbitral tribunals (of which it stated there was no consent). The court held that as Article 258 of the Constitution imposes the development, promotion and healthy operation of alternative dispute mechanisms in Venezuela, any legal norm or judicial interpretation that contradicts that imposition shall be deemed a constitutional breach.[41]

On November 3, 2010, the Constitutional Chamber of the Supreme Tribunal of Justice in the *Astivenca* case, held that arbitration is a fundamental right comprised within the precept of effective judicial protection. The court also held that the principle of *kompetence-kompetence* was inherent to arbitration and hence part of the same right. The Constitutional Chamber further held that since the parties had entered into an arbitration agreement, the courts must immediately surrender their jurisdiction over any disputes covered by such an agreement if, *prima facie*, the arbitration agreement is valid. Hence, Venezuelan courts are bound to hear the case and refer the parties to arbitration. The Constitutional Chamber also established that implied waiver of arbitration shall be admitted depending on the conduct of the parties in the proceedings; an analysis of which is to be carried out on a case-by-case basis.[42]

---

39 Supreme Tribunal of Justice, Constitutional Chamber. Feb. 14, 2006. Decision No. 174, Corporació Todosabor, C.A. (Venezuela). Available in Spanish at, http://www.tsj.gov.ve/decisiones/scon/febrero/174-140206-04-3033.htm (last visited on Feb. 17, 2014).

40 Supreme Tribunal of Justice, Political Administrative Chamber, Dec. 12, 2006, Decision No. 0293, *Tanning Research Laboratories, Inc.* (Venezuela). Available in Spanish at, http://www.tsj.gov.ve/decisiones/spa/diciembre/12-85233-2006-1605-007.html (last visited on Feb. 17, 2014).

41 Supreme Tribunal of Justice, Constitutional Chamber, Oct. 17, 2008, Decision No. 1541, *Hildegard Rondón de Sansó et al.* (Venezuela), Available in Spanish at, http://www.tsj.gov.ve/decisiones/scon/Octubre/1541-171008-08-0763.htm (last visited on Feb. 17, 2014).

42 Supreme Tribunal of Justice, Constitutional Chamber, Nov. 3, 2010, Decision N° 1067, *Astivenca Astilleros de Venezuela, C.A.* (Venezuela). Available in Spanish at, http://www.tsj.gov.ve/decisiones/scon/Noviembre/1067-31110-2010-09-0573.html (last visited on Feb. 17, 2014).

The Court also deliberated that interim measures of protection in arbitral proceedings can be requested before ordinary courts.[43]

In the *Van Raalte* case, the Constitutional Chamber of the Supreme Tribunal of Justice held that cassation, as a special challenge to an appellate tribunal decision (submitted before the Supreme Tribunal), is not possible against a judgment to annul or uphold an arbitral award. This does not preclude the admissibility of other means of judicial review, that under the Constitution or other special laws are available against any judicial decision subject to the control of the competent bodies that make up the judiciary, as in case of the constitutional injunction of *Amparo* or request for constitutional review.[44]

VI Conclusions

Venezuela falls in line with international standards for the recognition and enforcement of international commercial awards. This is demonstrated through the enactment of the VCAL that has exhibited a positive balance after fifteen years of existence. Additionally, arbitration has grown significantly in offer and demand as in knowledge in Venezuela. The precedents of the judiciary point to a trend in favor of arbitration and enforcement of the arbitral awards.

Annex

Venezuela Commercial Arbitration Law of 1998
Chapter VIII: Recognition and Enforcement of Awards

Article 48.
The arbitral award, irrespective of the country in which it was made, shall be recognized by the ordinary court as binding and not appealable. And after submitting a written request to the competent court of first instance, it shall be executed forcibly by that court without requiring exequatur according to the norms established by the Code of Civil Procedure for the enforcement of judgments.

43 Id.

44 Supreme Tribunal of Justice, Constitutional Chamber, Nov. 30, 2011, Decision Nº. 1773, *Van Raalte de Venezuela, C.A.* (Venezuela). Available in Spanish at http://www.tsj.gov.ve/decisiones/scon/Noviembre/1773-301111-2011-11-0381.html (last visited on Feb. 17, 2014).

The party relying on an award or applying for its enforcement shall submit with the application, a copy of the award certified by the arbitral tribunal, and translated into Castilian [Spanish] language if necessary.

Article 49.
Recognition or enforcement of an arbitral award, irrespective of the country which made the award may be refused only:

a) when the party against whom it is invoked proves that a party was under some incapacity at the time of conclusion of the arbitration agreement;
b) when the party against whom the award is invoked was not given any proper notice of the appointment of an arbitrator or of the arbitration proceedings, or has been unable for any reason to assert their rights;
c) when the composition of the arbitral tribunal or the arbitral procedure was not in conformity with the law of the country where the arbitration took place;
d) when the award deals with a dispute not contemplated in the arbitration agreement, or contains decisions on matters beyond the agreement itself;
e) when the party against whom the award is invoked proves that it is not binding on the parties, or has been set aside or suspended earlier by a competent authority as agreed by the parties to the arbitration process;
f) when the court where recognition or enforcement of the award arises confirms that under the law, the object of the dispute is not arbitrable or that the matter upon is contrary to public policy;
g) that the arbitration agreement is not valid under the law to which the parties have subjected it.

Index

Conclusions