

2016

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Recommended Citation

Pablo Letelier Cibie, *Enforcement of Arbitration Awards in Latin America: The Current Progress and Setbacks*, 22 LAW & BUS. REV. AM. 93 (2016)
<https://scholar.smu.edu/lbra/vol22/iss2/9>

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ENFORCEMENT OF ARBITRATION AWARDS IN LATIN AMERICA: THE CURRENT PROGRESS AND SETBACKS

Pablo Letelier Cibié

IN the past several years, there has been remarkable growth in promoting international arbitration in Latin America.¹ The enactment of modern international arbitration laws has been complemented by the flourishing of local arbitration institutions and the increasing tendency of Latin American courts to interpret the United Nations' 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") in light of pro-arbitration policies.² Particularly, recent decisions from Colombian, Chilean and Brazilian courts demonstrate a shared inclination to restrict the scope of the public policy exception set forth in Article V(2)(b) of the New York Convention only to cases where international arbitration awards contradict the most fundamental principles of the enforcement forum's legal system, excluding mere inconsistencies from mandatory norms of domestic law.³

Despite the efforts of many, not all Latin American countries show the same enthusiasm toward the growth of international arbitration. In the past few years, Argentinian courts have consistently recognized the award-debtor has the right to resist the enforcement of an international arbitration award on the basis of a broad public policy exception covering virtually all norms of Argentinian domestic law.⁴ In a recent decision, a

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1. Andrés Jana, *International Commercial Arbitration in Latin America: Myths and Realities*, 32 J. INT'L. ARB. 413, 420 (2015).
 2. *Id.* at 421.
 3. See Alberto Zuleta & Rafael Rincón, *Country Report – Colombia*, in REPORT ON THE PUBLIC POLICY EXCEPTION IN THE NEW YORK CONVENTION 9, 1-13 (Eduardo Silva Romero & Pascal Hollander eds., 2015), available at http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recognntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx; See José Antonio Moreno Rodríguez, *Country Report – Chile, Paraguay, MERCOSUR, Perú, Venezuela*, in REPORT ON THE PUBLIC POLICY EXCEPTION IN THE NEW YORK CONVENTION 8, 1-18 (Eduardo Silva Romero & Pascal Hollander eds., 2015), available at http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recognntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx; see also Leonardo V. P. de Oliveira & Isabel Miranda, *International Public Policy and Recognition and Enforcement of Foreign Arbitral Awards in Brazil*, 30 J. INT'L. ARB. 49, 55 (2013).
 4. Noiana Marigo, *Country Report – Argentina & Uruguay*, in REPORT ON THE PUBLIC POLICY EXCEPTION IN THE NEW YORK CONVENTION (Eduardo Silva Romero & Pascal Hollander eds., 2015), available at http://www.ibanet.org/LPD/Dispute_

local court suggested that the Argentinian judiciary should maintain the power to review the public policy implications of investment arbitration awards,⁵ a prerogative explicitly barred by Articles 53 and 54 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.⁶

Against such a background, this article attempts to present an updated account of how the Latin American jurisdictions differently interpret public policy as a means to limit the enforcement of international arbitration awards. Section I introduces the public policy exception under the New York Convention and underlines its challenges in the Latin American context. Section II discusses the case of Colombia, the Latin American jurisdiction that has demonstrated the most restrictive application of the public policy exception. Section III presents the cases of Chile and Brazil, where domestic courts have recognized the idea of international public policy. Both countries are moving toward a more restrictive interpretation similar to Colombia. Section IV explains how Argentinian local courts have tended to expand the idea of public policy in order to retain discretion in reviewing substantive implications of international arbitral awards.

I. THE EXCEPTION OF PUBLIC POLICY BEFORE LATIN AMERICAN COURTS

Under most arbitration regimes around the world, national courts are deemed to favor the enforcement and recognition of international arbitral awards.⁷ Most modern arbitration legislation is inspired in a pro-enforcement approach, which implies national courts recognize and compel the performance of international arbitral awards that comply with basic jurisdictional requirements.⁸ This approach is consistent with the international arbitration system framed by the New York Convention, which provides for the presumptive recognition of arbitral awards.⁹

Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx.

5. Bruchou, Fernandez Madero & Lombardi Abogados, *First Argentine Court Judgment on the Recognition of an ICSID Award*, KLUWER ARBITRATION BLOG, <http://kluwarbitrationblog.com/2016/03/15/first-argentine-court-judgment-on-the-recognition-of-an-icsid-award/?print=print>.
6. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archiv/ICSID_English.pdf [hereinafter ICSID Convention].
7. See e.g., Pierre Mayer & Audley Sheppard, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT'L. 249, 250 (2003).
8. The United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration recognizes this trend by presumptively requiring the recognition of an international arbitral award, provided that the award-debtor does not demonstrate the application of very narrow defined exceptions. See UNCITRAL Model Law, Art. 36, G.A. Res. 40/72, U.N. Doc. A/40/17 (June 21, 1985), revised in 2006, G.A. Res. 61/33, U.N. Doc. A/61/33 / (Dec. 4, 2006).
9. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3413 (Wolters Kluwer ed., Kluwer Law International 2nd ed. 2014) (2009).

Among the few reasons to oppose enforcement recognized by the New York Convention, perhaps the most controverted, is the so-called public policy exception.¹⁰ According to Article V(2)(b), national courts may deny the request for recognition and enforcement of an international arbitration award if the enforcement and recognition of such award “would be contrary to the public policy of that country.”¹¹ Unsurprisingly, the elusiveness of the provision affords the award-debtor a formidable tool to oppose enforcement in almost any imaginable scenario.

As noted by Gary Born, the fact that public policy could be as unpredictable as an “unruly horse” is one of the favorite clichés of international arbitration.¹² Naturally, this unpredictability makes the delimitation of the public policy exception a highly controversial issue.¹³ In order to advance the pro-recognition aspirations of the New York Convention, some jurisdictions have attempted to limit the application of the public policy exception only to those cases in which the award violates a body of universally recognized principles referred to as “international public policy.”¹⁴ The Latin American countries demonstrate, however, that this solution has not put an end to the unpredictability associated with Article V(2)(b) of the New York Convention.

It has been suggested that Latin American legal systems are bound by a close affinity.¹⁵ All Latin American countries have ratified the New York Convention, and many are also part of the Panama Convention.¹⁶ Importantly, a great majority of the Latin American countries have recently enacted arbitration legislation inspired in the UNCITRAL Model Law. This normative framework suggests that, at least in principle, Latin American jurisdictions share a commitment to the regime of enforcement and recognition of arbitral awards set forth in the New York Convention.¹⁷

Nevertheless, practitioners and commentators have long considered Latin America as the home of idiosyncratic courts determined to control arbitration procedures as just another part of the national system of judi-

10. Mayer & Sheppard, *supra* note 7, at 250.

11. Convention on the Recognition and Enforcement of Arbitral Awards, Art. V § 2b, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>.

12. Born, *supra* note 9, at 3653.

13. See Jan Paulsson, *The New York Convention in International Practice – Problems of Assimilation*, in 9 ASA SPECIAL SERIES, THE NEW YORK CONVENTION OF 1958 112 (Marc Blessing ed., 1996).

14. See e.g., Mayer and Sheppard, *supra* note 7, at 251.

15. See Alejandro Garro, *Unification and Harmonization of Private Law in Latin America*, 40 (3) AM. J. COMP. L. 587, 587-616 (1992).

16. To date, the Inter-American Convention on Arbitration (“Panama Convention”) has been ratified by Argentina; Bolivia; Brazil; Chile; Colombia; Costa Rica; Dominican Republic; Ecuador; El Salvador; Guatemala; Honduras; Mexico; Nicaragua; Panama; Paraguay; Peru; the United States; Uruguay; and Venezuela. Organization of American States, B-35: Inter American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, available at <http://www.oas.org/juridico/english/signs/b-35.html>

17. See Jana, *supra* note 1, at 420-21.

cial administration.¹⁸ In this context, the public policy exception has been recognized as one of the major dangers to the validity of international arbitration awards in Latin America.¹⁹ It is not difficult to imagine how an idiosyncratic court could use the exception as a suitable excuse to shield Latin American states against undesirable awards.²⁰

Case law suggests, however, that the trend among Latin American courts is to restrict the application of the public policy exception in order to favor the enforcement of international arbitration awards.²¹ Indeed, recent decisions demonstrate that a majority of jurisdictions have adopted the notion of international public policy, and that those jurisdictions' local courts tend to reject broad interpretations of the public policy exception.²² As the following sections show, the fact that Latin American domestic courts reason in somewhat analogous terms suggests that a consensus could develop in the region.

II. RADICAL LIMITATION OF THE PUBLIC POLICY EXCEPTION: THE COLOMBIAN CASE

National courts in Colombia have traditionally showed a very careful approach to the public policy exception, not only in international arbitration, but while deciding the recognition of every foreign judgment.²³ The Colombian Supreme Court has repeatedly found that the idea of public policy should be defined in accordance with international standards as an extreme limit to the enforcement of foreign decisions in a globalized context.²⁴ This position is justified due to the need to promote transnational commerce and to develop an effective system of private international law.²⁵

The international dimension of public policy has been especially emphasized while deciding the enforcement of international arbitration

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18. *Id.* at 424 (“The fear is that judges in Latin America remain idiosyncratic and carry on the customs of legal culture that are incompatible with international arbitration, characterized by their overall power to intervene in decisions of arbitrators, whose work is often considered part of the national system of judicial administration.”).
 19. See Felipe Ossa, *El Orden Público en el Arbitraje Comercial Internacional: La Experiencia Chilena y Comparada*, in *ARBITRAJE COMERCIAL INTERNACIONAL: RECONOCIMIENTO Y EJECUCIÓN DE SENTENCIAS Y LAUDOS ARBITRALES EXTRANJEROS* 331, 332 (Magaly McLean & Jaime Moreno-Valle eds., 2012).
 20. See Elina Mereminskaya, *El Camino se Hace al Andar: Recurso de Nulidad en la Jurisprudencia Latinoamericana*, in *ARBITRAJE COMERCIAL INTERNACIONAL: RECONOCIMIENTO Y EJECUCIÓN DE SENTENCIAS Y LAUDOS ARBITRALES EXTRANJEROS* 309, 321 (Magaly McLean & Jaime Moreno-Valle eds., 2012).
 21. See Zuleta & Rincón, *supra* note 3, at 9; see also Moreno Rodríguez, *supra* note 3, at 8; see also V. P. de Oliveira & Isabel Miranda *supra* note 3, at 49.
 22. *Id.*
 23. See Zuleta & Rincón *supra* note 3, at 2.
 24. See Diego Fernández Arroyo, *La Evolución del Arbitraje en América Latina: De la Supuesta Hostilidad a la Evidente Aceptación*, 3 *REVISTA DE DERECHO COMERCIAL DEL CONSUMIDOR Y DE LA EMPRESA* 317, 324 (2012) (Arg.).
 25. See Juan F. Roldán Pardo, *El Estado del Arte del Concepto de Orden Público Internacional en el Ámbito del Derecho Internacional Privado ? y el Arbitraje Internacional*, 44 *REVISTA DE DERECHO PRIVADO DE LA UNIVERSIDAD DE LOS ANDES* 1, 26-27 (2010) (Colom.).

awards. Colombian courts have clearly distinguished between international and domestic mandatory laws, restricting the scope of Article V(2)(b) of the New York Convention to “the most basic and fundamental principles of Colombian juridical institutions.”²⁶ These fundamental principles only include very limited and basic principles of the law, such as good faith, impartiality of the arbitral tribunal, and due process.²⁷ To date, the Colombian Supreme Court has never refused the enforcement of a foreign arbitral award on grounds of international public policy.²⁸

This view is evident in the Colombian Supreme Court decision in *Petrotesting Colombia S.A. y Southeast Investment Corporation v. Ross Energy S.A.* (“*Petrotesting*”).²⁹ In this decision, the Colombian Supreme Court enforced an international arbitration award dealing with a dispute regarding the exploitation of an oil concession in Colombia.³⁰ In the *Petrotesting* case, the award-debtor opposed recognition arguing that the award violated Colombian public policy.³¹ According to that party’s position, the award ruled on the obligations of the parties under a contract for the purchase of Colombian oil, which should be governed by mandatory norms of public policy—specifically by Articles 2 and 10 of the Colombian Petroleum Code.³² Because the arbitral tribunal disregarded the provisions of the Colombian Petroleum Code in settling the dispute, the award-debtor claimed the arbitration award violated Colombian public policy and should not be enforced.³³

In its decision, the Colombian Supreme Court noted that Article V(2)(b) of the New York Convention was applicable only to violations of the most basic and fundamental principles of Colombian legal institutions.³⁴ Referring to a variety of international authorities, the Court noted that the public policy exception should cover only violations to international public policy, a concept that differed from the imperative norms of domestic law.³⁵ Thus, a mere discrepancy between an international arbitration award and internal public policy provisions was insufficient for opposing recognition under the New York Convention.³⁶ Contrary to what the award-debtor argued, the Court found that the contract between the parties did not regulate the purchase of oil, which indeed was governed by Colombian Petroleum Code, but instead governed the acquisition of property over the consortium that operated the oil con-

26. See Zuleta & Rincón, *supra* note 3, at 3.

27. *Id.*

28. Zuleta & Rincón, *supra* note 3, at 8.

29. Corte Suprema de Justicia [C.S.J.] (Supreme Court), 27 julio 2011, “*Petrotesting Colombia S.A. y Southeast Investment Corporation c. Ross Energy S.A.*,” Rol de la causa: 11001-0203-000-2007-01956-00 (Colom.), available at http://newyorkconvention1958.org/index.php?lvl=notice_display&id=504.

30. *Id.* at 72.

31. *Id.* at 38.

32. *Id.* at 38.

33. *Id.* at 37-38.

34. *Id.* at 46-47.

35. *Id.* at 39-40.

36. *Id.* at 47.

cession.³⁷ Therefore, the arbitral award could not have violated the provisions of Colombian Petroleum Code, applicable only to oil purchases.³⁸ Based on these reasons, the Court rejected the public policy exception and granted the recognition of the arbitral award.³⁹

This precedent was used by the Colombian Supreme Court to go a step further while deciding another public policy case, *Drummond Ltda. v. Ferrovías en Liquidación and Ferrocarriles Nacionales de Colombia S.A.* (“*Drummond*”).⁴⁰ There, the Colombian Supreme Court rejected a public policy exception invoked by the Colombian Ministry of Transportation involving a contract between a French party and the Colombian National Railroad Company.⁴¹ In this case, the Court quoted the *Petrotesting* case to affirm an award that imposed fines on the National Railroad Company in disregard of Colombian Administrative Law.⁴²

Once again, the Court concluded that deference to public policy did not imply complying with all the imperative norms of domestic law.⁴³ This time, however, the Court added that even if the arbitration award had violated the rules of Colombian Administrative Law, such violation would not have sufficed to trigger the public policy exception under the New York Convention.⁴⁴ As in the *Petrotesting* case, the Court rejected the opposition of the award-debtor and ordered the enforcement of the international arbitration award.⁴⁵

The discussed decisions show that Colombian courts have adopted a clear distinction between domestic and international public policy with the intention of restricting the application of the public policy exception as much as possible.⁴⁶ This restriction has allowed Colombian courts to recognize international arbitration awards that disregard imperative norms of domestic law—even those norms regulating areas in which the Colombian State had a clear vested interest, such as the exploitation of non-renewable natural resources, and the operation of public transportation.⁴⁷ As explained below, other Latin American jurisdictions have started to move in the same direction.

37. *Id.* at 68.

38. *Id.* at 47-49.

39. *Id.*

40. Corte Suprema de Justicia [C.S.J.] (Supreme Court), 19 diciembre 2011, “*Drummond Ltda. c. Ferrovías en Liquidación and Ferrocarriles Nacionales de Colombia S.A.*,” 1100102030002008-01760-00 (Colom.) available at http://newyorkconvention1958.org/index.php?lvlN°tice_display&id=506.

41. See Zuleta & Rincón, *supra* note 3, at 9.

42. See Zuleta & Rincón, *supra* note 3, at 9.

43. “*Drummond Ltda. c. Ferrovías en Liquidación and Ferrocarriles Nacionales de Colombia S.A.*,” *supra* note 40, at 33.

44. *Id.* at 32.

45. See Zuleta & Rincón, *supra* note 3, at 9.

46. See Zuleta & Rincón, *supra* note 3, at 3.

47. See generally Zuleta & Rincón, *supra* note 3, at 3.

III. INCREASING LIMITATION OF THE PUBLIC POLICY EXCEPTION: THE CHILEAN AND BRAZILIAN CASES

Similar to other Latin American jurisdictions, international arbitration has increasingly developed in Chile and Brazil over the last ten years.⁴⁸ In 2004, Chile enacted an international arbitration law closely following the UNCITRAL Model Law, and ever since, a wealth of legal scholarship has stressed the need of turning Chile into an attractive arbitration venue.⁴⁹ On the other hand, the sustained growth of the Brazilian economy and its important place in international trade have led Brazilian courts to provide continuous support for international arbitration.⁵⁰ The case law in both jurisdictions reveal a similar tendency toward the restriction of the public policy exception.

A. THE CHILEAN CASE

Since the enactment of international arbitration law, Chilean scholars have argued time and time again that the public policy exception should be restricted to very exceptional cases.⁵¹ Following this lead, local courts have gradually accepted that public policy in international arbitration is something different from national or internal mandatory norms.⁵² This evolution can be traced to a series of decisions in which Chilean courts tended to evaluate the validity of international awards, considering only the most fundamental rules and principles of domestic law.⁵³

In *Publicis Groupe Holdings B.V. v. Árbitro Manuel José Vial*,⁵⁴ for

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48. See Moreno Rodríguez *supra* note 3, at 8; see also V. P. de Oliveira & Isabel Miranda *supra* note 3, at 49.
49. See e.g., María Fernanda Vásquez, *Recepción del Arbitraje Comercial Internacional en Chile desde una óptica jurisprudencial: una revisión ineludible*, 38 REVISTA CHILENA DE DERECHO 349, 349-370 (2011) (Chile).
50. See V. P. de Oliveira & Isabel Miranda, *supra* note 3, at 57.
51. S. Márquez, “*El Orden Público y su Función como Límite a la Eficacia, Reconocimiento y Ejecución de los Laudos Arbitrales Internacionales en Chile*” [*The Public Order and Its Function*], REVISTA DEL MAGÍSTER Y DOCTORADO EN DERECHO, FACULTAD DE DERECHO DE LA UNIVERSIDAD DE CHILE, N° 3, 205. (2009-2010); Juan Carlos Marín González & Rolando García Mirón, *El Concepto de Orden Público Como Causal de Nulidad de un Laudo Tratándose de un Arbitraje Comercial Internacional*, 24 REVISTA DE DERECHO DE VALDIVIA 117, 127-128 (2011) (Chile).
52. See Moreno Rodríguez, *supra* note 3, at 8.
53. See e.g., Corte de Apelaciones [C. Apel.] [Court of Appeals], 10 abril 2014, “*Constructora EMEX Limitada con Organización Europea para la Investigación Astronómica en el Hemisferio Sur ESO*,” Rol de la causa: 9211-2012 (Chile), available at http://corte.poderjudicial.cl/SITCORTEPORWEB/DownloadFile.do?TIP_Documento=3&TIP_Archivo=1&COD_Opcion=1&COD_Corte=90&CRR_IdTramite=10143966&CRR_IdDocumento=8786084 Corte Suprema de Justicia [C.S.J.] [Supreme Court], 15 september 2008, “*Gold Nutrition Industria y comercio v. Laboratorios Garden House S.A.*,” Rol de la causa: 6615-2007 (Chile), available at http://suprema.poderjudicial.cl/SITSUPPORWEB/DownloadFile.do?TIP_Documento=3&TIP_Archivo=3&COD_Opcion=1&COD_Corte=1&CRR_IdTramite=484667&CRR_IdDocumento=279200.
54. Corte de Apelaciones [C. Apel.] (court of appeals), 4 abril 2009, “*Publicis Groupe Holdings B.V. c. Árbitro Manuel José Vial*,” Rol de la causa: 9134-2007 (Chile), available at <http://corte.poderjudicial.cl/SITCORTEPORWEB/DownloadFile.do?>

instance, the award-debtor requested the annulment of an international arbitration award, arguing that the arbitrator failed to consider expert reports offered during the proceedings.⁵⁵ In the opinion of the requesting party, the demeanor of the arbitrator violated basic rules of due process and thus Chilean public policy. The Court concluded that the expert report was actually considered by the arbitrator, so no violation of due process could have existed.⁵⁶ But, in dictum, the Court clarified that Chilean procedural public policy should be interpreted restrictively and limited only to the fundamental basic rules of the State.⁵⁷

Recently, Chilean courts have taken an important step forward by expressly recognizing the distinction between international and domestic public policy.⁵⁸ As noted by commentators, this notion is quite innovative for Chilean law and represents an adherence to the standards recognized by international arbitration institutions.⁵⁹ The Santiago Court of Appeals confirmed this trend in an important decision that has been celebrated by local commentators as a demonstration of Chilean courts' commitment to international arbitration.⁶⁰

In *Vergara Varas v. Costa Ramírez* ("Vergara Varas"),⁶¹ the losing party in an international arbitration between the shareholders of a Chilean wine company requested the annulment of the award before Chilean courts.⁶² The requesting party argued that the award infringed the principle of due process as it granted a provisional measure without giving the respondent an opportunity to oppose it.⁶³ Additionally, the requesting party argued that the award violated the Chilean rules on the taking of evidence because the arbitrator only received evidence regarding the issues raised by the claimant.⁶⁴ These infractions of Chilean basic procedural norms would render the award incompatible with Chilean public

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55. *Id.*

56. *Id.*

57. "Publicis Groupe Holdings B.V. c. Árbitro Manuel José Vial." At 395.

58. See Moreno Rodríguez *supra* note 3, at 8.

59. ("[L]os tribunales Chilenos han aceptado la idea de orden público internacional. Tal definición resulta innovadora para el derecho chileno, pero se efectúa con un estricto apego a los estándares universalmente reconocidos. Dicha definición se basa en aquella elaborada en el año 2000 por la Asociación del Derecho Internacional a través de su Comité de Arbitraje Comercial Internacional".) Mereminskaya, *supra* note 20, at 332.

60. María Fernanda Vásquez, *Ley chilena de arbitraje comercial internacional: Análisis de las doctrinas jurisprudenciales, a diez años de su vigencia*, 21 IUS ET PRAXIS 523, 535 (2015) (Chile).

61. Corte de Apelaciones [C. Apel.] (court of appeals), 9 septiembre 2013, "Vergara Varas c. Costa Ramírez," Rol de la causa: 1971-2012 (Chile) http://corte.poderjudicial.cl/SITCORTEPORWEB/DownloadFile.do?TIP_Documento=3&TIP_Archivo=1&COD_Opcion=1&COD_Corte=90&CRR_IdTramite=9049698&CRR_IdDocumento=7828233 (last visited July 22, 2016).

62. *Id.*

63. *Id.*

64. *Id.* at section 8.

policy.⁶⁵

The Santiago Court of Appeals ruled that Chilean international arbitration law authorized arbitral tribunals to conduct international arbitration proceedings without applying the procedural rules governing domestic arbitration.⁶⁶ Importantly, the Court underlined that the only limit to the validity of an international arbitration award was its compliance with international public policy, a concept that differed from Chilean public policy.⁶⁷ In the Court's view, a public policy defense should be granted only when the most fundamental legal principles of Chilean law are infringed, as when the arbitrator violates procedural equality between the parties, due process, or is involved in fraud or another form of corruption.⁶⁸ The Court concluded that the omission of Chilean rules of civil procedure was not a violation of Chilean public policy, and therefore rejected the request for annulment presented by the award-debtor.⁶⁹

As this case shows, Chilean courts have followed the Colombian lead in adopting a restricted version of the public policy exception to promote international arbitration.⁷⁰ Unlike Colombian courts, however, Chilean courts have not had the opportunity to decide cases in which the infringement of substantive norms of public law is at stake. The direction that Chilean courts will take in this kind of case is still an open question.

B. THE BRAZILIAN CASE

While the Brazilian courts strongly support international arbitration, they have not yet produced relevant decisions dealing with the scope of the public policy exception. According to commentators, Brazilian case law on public policy remains in an "embryonic stage."⁷¹

Even so, the absence of relevant decisions has not prevented local scholars from developing a sound doctrine on the role that the public policy exception should play under Brazilian arbitration law. The drafters of the Brazilian arbitration law have made very clear that the provision recognizing the public policy exception should be interpreted in harmony with the best international standards. This position was strongly stated in a recent publication:

If Brazil wishes to be an attractive forum for arbitration, courts should not approach the issue [of the public policy exception] through a purely internal perspective. In doing so, Brazil would be navigating against the tide of the position already adopted by many

65. *Id.*

66. *Id.*

67. *Id.* at section 16.

68. *Id.* at section 18.

69. *Id.* at section 17.

70. In *Vergara Varas*, the Santiago Court of Appeals recognized this objective in unmistakable terms. *See Id.* at section 6b.

71. "Despite the favourable scenario, decisions regarding public policy are still at an embryonic stage and international public policy or truly international public policy has not been addressed directly in the context of arbitration." Oliveira & Miranda, *supra* note 3, at 58.

jurisdictions, which in turn would set back the modern approach to arbitration that Brazil has already developed. In this sense, the BAA [Brazilian Arbitration Act] should be interpreted in the same way as public policy would be when the decision of a foreign court is being enforced in Brazil, that is, in accordance with private international law (sometimes called international public policy or truly international public policy) as opposed to the public policy used to decide domestic affairs.⁷²

Brazilian courts' recent decisions have implicitly recognized a notion of international public policy similar to that advanced by Colombian and Chilean courts. Traces of this implied recognition can be found in the case *Keytrade AG v. Ferticitrus Indústria e Comércio de Fertilizantes* ("Keytrade").⁷³

In this case, the award-creditor sought the recognition of an international arbitration award granting compound interests against the respondent in a case of breach of contract.⁷⁴ The award-debtor opposed the recognition of the award based on two grounds.⁷⁵ First, the award-debtor argued that it had not been duly notified of the arbitral proceedings in the terms provided by Brazilian procedural law.⁷⁶ Second, the award-debtor argued that Brazilian law forbade usury in all forms, and thus an award granting compound interests was against Brazilian public policy.⁷⁷

The Court rejected both arguments. Regarding the validity of notifications, the Court found that they were made in compliance with the arbitration law chosen by the parties, which allowed email notifications.⁷⁸ The fact that Brazilian procedural law was not applied could not entail a violation of public policy, as Brazilian international arbitration law provided that procedural aspects of arbitration shall be governed by the law chosen by the parties.⁷⁹

While rejecting the second argument, however, the Court developed the most important part of the decision. According to the Court, in order to demonstrate a public policy violation under Brazilian international arbitration law, the party opposing enforcement could not rely solely on a departure from Brazilian domestic law in regards to the award.⁸⁰ Instead, to succeed, the party should demonstrate that the award threatens the fundamental values of the Brazilian legal system.⁸¹

72. *Id.* at 57.

73. S.T.J. Corte Especial, Ap. No. 4024/EX (2010/0073632-7), Relator: Nancy Andriahi, 7.8.2013 (Braz.) http://newyorkconvention1958.org/index.php?lvl=notice_display&id=1604 (last visited July 22, 2016).

74. *Id.* at 5.

75. *Id.* at 7.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 6-7.

80. *Id.*

81. *Id.* at 7.

In this case, the public policy allegation relied on the fact that the award granted compound interests, which allegedly contradicted Brazil's general prohibition of usury.⁸² The Court considered that such general contradiction with Brazilian substantive law was not enough to trigger the public policy exception, as Brazilian law recognized compound interests in certain types of contracts.⁸³ Therefore, it was not possible to argue that the award threatened the fundamental values of the Brazilian legal system.⁸⁴

Though Brazilian tribunals have not expressly adopted the concept of international public policy, the *Keytrade* case demonstrates that Brazilian courts tend to reason in similar terms as their Colombian and Chilean counterparts. It would not be surprising if international public policy were explicitly introduced in a decision to come. Case law and academic commentary suggest that Brazil is following a path similar to that taken by Colombia and Chile.

IV. EXPANSIVE INTERPRETATION OF THE PUBLIC POLICY EXCEPTION: THE ARGENTINIAN CASE

Argentinian courts have taken quite a different position regarding the scope of the public policy exception. As indicated by the International Bar Association, Argentinian courts have consistently considered the notion of public policy from a purely domestic point of view, failing to discern clear limits to its application.⁸⁵ Unsurprisingly, the academic commentary in Argentina has supported the use of public policy as a means for judicial control of foreign awards. For instance, the National Court of Appeals for Commercial Matters has relied on an academic definition to characterize public policy as an authorization to the local judge to determine whether foreign law is adequate to regulate the subject matter of a given dispute.⁸⁶

On its face, the Argentinian courts' interpretation of the public policy exception does not seem very different from other common interpretations advanced by Latin American national courts. Indeed, Argentinian courts have defined public policy as the basic and fundamental principle that underpins the domestic legal system—expressly recognizing the concept of international public policy.⁸⁷ Yet, while in other countries this idea allows courts to limit the scope of the public policy exception, in Argentina it has been used to emphasize the role of local courts in protecting national interests. In this regard, Professor Grigera Naón has suggested that international public policy includes “the basic and fundamental principles that underlie the Argentine legal system and

82. *Id.*

83. *Id.*

84. *Id.* at 10.

85. Noiana Marigo, *supra* note 4, at 2.

86. *Id.* at 2.

87. *Enforcement of arbitral awards in Argentina: Overview*, PRACTICAL LAW, <http://us.practicallaw.com/3-619-5542?source=relatedcontent> (last visited Oct. 1, 2015).

therefore incarnate interests or principles that are vital for the Argentine society” and “the mandatory norms (‘normas de policía’) of which application is necessary as they protect equally important interests.”⁸⁸

The definition offered by Professor Grigera Naón includes two distinctive features that should be emphasized. First, it couples the widely accepted idea that public policy protects the “most important principles” of a domestic legal system, with the less conventional notion that it also protects the “interests” of Argentinian society.⁸⁹ While the formula “most important principles” has a clear legal connotation, the notion of “interests” transpires a less juridical nature, and could arguably include the economic or political goals pursued by a given government.

Second, international public policy is commonly related to the notion of “normas de policía,” a legal term used to identify mandatory norms of domestic law that cannot be renounced or modified by private parties because they regulate acts in which the state has a vested interest.⁹⁰ This term opens the door to interpret public policy as a means to promote the goals of the Argentinian state. Naturally, this is problematic because one of the traditional obstacles to the development of international arbitration in Latin America has been the intervention of idiosyncratic courts to protect state interests.⁹¹

These positions are confirmed by Argentinian international arbitration practice. During the last two decades, Argentinian courts have revealed a tendency toward the disproportionate extension of the notion of public policy.⁹² Some decisions have even proposed that Argentinian courts should undertake a constitutional review of international arbitration awards.⁹³ Such conclusions contrast considerably with the trend shown by domestic courts in Colombia, Chile, and Brazil.

The decision in *José Cartellone Construcciones Civiles SA v. Hidroeléctrica Norpatagónica SA o Hidronor SA* (“Cartellone”)⁹⁴ adequately illustrates this contrast. As in the Brazilian *Keytrade* case, in this case the Court considered whether or not an award granting compound interests shall be deemed contrary to public policy. Unlike the Brazilian court, however, the Argentine court opted for annulling the award.⁹⁵

88. Horacio Grigera Naón, *Arbitraje Comercial Internacional* [International Commercial Arbitration], in *Course on International Law XIX* 223-242 (Department of International Law of the Secretariat for Legal Affairs ed., 1992), <http://www.oas.org/es/sla/ddi/docs/223-242.GrigeraNa%C3%B3n92.pdf>.

89. *Id.*

90. *Id.*

91. *See* Ossa, *supra* note 9, at 338.

92. *See* Roque Caivano, *Argentina Necesita Mejorar su Legislación Sobre Arbitraje*, 155 *La Ley* 994, 994-999 (1994) (Arg.); *see also* Noiana Marigo, *supra* note 4, at 2.

93. *See* Cámara Nacional de Apelaciones de la Capital Federal [CNCom.] [National Court of Commercial Appeals of the Federal Capital], 8/8/2007, “Mobil Argentina S.A. c. Gasnor S.A.,” *La Ley* [L.L.] (Arg.).

94. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/8/2007, “José Cartellone Construcciones Civiles SA c. Hidroeléctrica Norpatagónica o Hidronor SA” (*Cartellone*), *La Ley* [L.L.] (2004-E-266) (Arg.).

95. *Id.*

In the *Cartellone* case, a dispute arose between the parties of a public works contract concerning the higher costs incurred by the claimant in order to comply with its contractual obligations.⁹⁶ The parties submitted the dispute to arbitration, and the arbitral tribunal granted damages against the respondent, an Argentinian governmental agency.⁹⁷ Importantly, the award included compound interests over the awarded damages.⁹⁸

The award-debtor requested the annulment before Argentine courts, arguing, *inter alia*, that the inclusion of compound interests in the award was unfair and unreasonable.⁹⁹ The Court rejected this claim stating that by agreeing to arbitrate the dispute the parties had waived their right to appeal the award, and thus local courts lacked the power to review the fairness or reasonability of the award.¹⁰⁰ The award-debtor appealed this decision before the Argentine Supreme Court, which agreed to hear the case.¹⁰¹

The Argentinian Federal Supreme Court concluded that the parties could always request the annulment of an award containing unconstitutional, illegal or unreasonable decisions, and therefore they could not have waived their right to appeal an arbitral award that was in contradiction with public policy.¹⁰² The court determined that by granting compound interests, the arbitral award imposed an excessive burden on the award-debtor incompatible with Argentinian public policy, and thus its decision was unreasonable and disproportionate.¹⁰³ Therefore, the Court concluded the award should be annulled.

The doctrine set forth in the *Cartellone* case has been strongly criticized as a serious threat to the effectiveness of arbitration in Argentina.¹⁰⁴ Though some commentators have argued that after the *Cartellone* case Argentine courts seem to be moving away from interventionism,¹⁰⁵ recent decisions show that local courts continue to interpret the public pol-

96. *Id.*

97. *Id.*

98. *Id.* at 2.

99. *Id.* at 1.

100. *Id.* at 7.

101. *Id.*

102. *Id.*

103. *Id.* at 8.

104. Juzgado Nacional de Primera Instancia [1^a Inst.] (lower court of ordinary jurisdiction), 27/9/2004, “Entidad Binacional Yacyretá c. Eriday y otros”, La Ley [L.L.] (13-06-05) (Arg.). Here, a local court relied on the precedent set in *Cartellone* to intervene in the process of selection of arbitrators. In its decision, the lower court concluded that Argentine courts had the powers to scrutinize the terms of reference of ongoing international arbitrations. For a commentary, see Juana Dioguardi, *El Poder (proceso) Judicial y el Control Sobre el Arbitraje Internacional*, REVISTA IBEROAMERICANA DE ARBITRAJE Y MEDIACIÓN, http://www.servilex.com.pe/arbitraje/colaboraciones/caso_yacyreta.html (last visited July 22, 2016).

105. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 6/3/2014, “Claren Corporation e/ E.N – arts. 517/518 CPCC exequátur s/ varios”, La Ley [L.L.] (06-04-2015) (Arg.).

icy exception in rather broad terms.¹⁰⁶ Moreover, the inclusion of a provision in the new Argentine Civil and Commercial Code prohibiting the parties to waive the right to challenge an award “contrary to the Argentine legal system” suggests that the *Cartellone* doctrine has been formally incorporated into Argentine law.¹⁰⁷

Of course, Argentinian courts could overrule the *Cartellone* doctrine and interpret the applicable legal provisions in a restrictive fashion, which would be more in line with the trend followed by other Latin American jurisdictions. Recent developments, however, suggest that national courts are leaning in the opposite direction. The case *Compañía de Concesiones de Infraestructura S.A. le pide la quiebra República de Perú* (“*CCI*”)¹⁰⁸ provides a good example of this tendency.

In the *CCI* case, the Republic of Peru requested of Argentinian local courts the enforcement of an ICSID award ordering an Argentinian investor to pay more than two million dollars for the costs of arbitration.¹⁰⁹ The Argentinian court denied recognition of the award, holding that the award-creditor had not complied with the exequatur procedure set forth in Argentine law.¹¹⁰ The Republic of Peru appealed this decision on the basis of Articles 53 and 54 of the ICSID Convention, which provide that ICSID awards shall be recognized as final judgments issued by a national court of the Contracting states.¹¹¹

Though the Argentine Court of Appeals granted the appeal and finally ordered the enforcement of the award, its decision included an alarming remark in dicta.¹¹² As is well known, while international commercial arbitration awards are arguably subjected to some degree of substantive review by national courts under Article V(2)(b) of the New York Convention, the revision of international investment arbitration awards is clearly excluded by Articles 53 and 54 of the ICSID Convention. In its decision, however, the Argentinian court affirmed that national courts maintained the power to review “in prudence” possible violations of domestic public policy principles, even when required to enforce ICSID awards.¹¹³

The Court’s dictum is quite telling of the position of Argentinian courts regarding the extension of the public policy exception. Naturally, the prudential public policy revision proposed in the *CCI* case is against the text of the ICSID Convention. The Court’s decision indicates, at least

106. See Código Civil y Comercial de la Nación [CÓD. CIV. Y COM.] [CIVIL AND COMMERCIAL CODE] art. 1656 (Arg.).

107. Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal [CNCom.] [National Court of Commercial Appeals of the Federal Capital], 18/8/2015, “Compañía de Concesiones de Infraestructura S.A. le pide la quiebra República de Perú”, La Ley [L.L.] (30-12-2015) (Arg.).

108. *Id.* at 2.

109. *Id.* at 1.

110. *Id.*

111. *Id.* at 4.

112. *Id.* at 1.

113. *Id.*

theoretically, that Argentinian courts could be willing to disregard the ICSID Convention in order to secure the enforcement of domestic policies. In the context of international commercial arbitration, where the public policy exception grants national courts additional arguments to review the substance of an international award, the door opened by the *CCI* case raises serious concerns regarding the reliability of Argentina as a suitable enforcement forum.

V. CONCLUSION

The reviewed decisions reveal some similarities in the way Latin American courts decide cases involving the public policy exception. These courts tend to distinguish between international and domestic public policy, interpreting the exception of Article V(2)(b) of the New York Convention as protecting only the former. Additionally, they seem to coincide in reserving international public policy only to the most fundamental principles of a given legal system, and excluding most mandatory provisions of domestic law. Finally, courts relate the need to restrict public policy with the pro-enforcement project framed by the New York Convention, and with the need of promoting international arbitration as the preferred mechanism to resolve international disputes.

In contrast with these developments, Argentinian courts have adopted an expansive interpretation of public policy, including norms of domestic law that are not specially protected by other courts in the region. This broad notion of public policy has allowed Argentinian courts to deny the enforcement of international arbitral awards on the grounds that they threaten the Argentinian State's interest. Recent decisions suggest that this tendency could be growing even stronger.

It was an Argentinian Professor who, more than ten years ago, noted with foresight that the action of a "political pendulum" would render the development of international arbitration in Latin America a process of successive progresses and setbacks.¹¹⁴ As the reviewed cases demonstrate, the disparities regarding the application of the public policy exception provide a unique focal point to analyze the movement of this pendulum across jurisdictions. Hopefully, the awareness of such disparities will help local courts to stimulate progress and avoid future setbacks.

114. Horacio Grigera Naón, *Arbitration and Latin America: Progress and Setbacks*, 21(2) *ARB. INT'L* 127, 172-176 (2005).

Updates

